Working Group on Bribery in International Business Transactions

MID-TERM STUDY OF PHASE 2 REPORTS

APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This study is a retrospective review of the Phase 2 reports on Parties’ application of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation. It describes and analyses levels of compliance with the Convention and the Revised Recommendation and the effectiveness of the systems put in place to combat foreign bribery in the 21 countries reviewed between September 2001 and the end of 2005. The study highlights progress and identifies major challenges in combating bribery and implementing the Convention.

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For further information, please contact Mrs. Christine Uriarte, Principal Administrator, Anti-Corruption Division (Tel.: +33 1 45 24 97 91; Fax: +33 1 44 30 63 07; E-mail: christine.uriarte@oecd.org).
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I. INTRODUCTION

1. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) calls for a systematic monitoring process to oversee and promote the fullest implementation of the Convention. Monitoring, carried out by the OECD Working Group on Bribery in International Business Transactions (Working Group) through a rigorous peer review mechanism, not only ensures implementation of the Convention and the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, but also creates a unique dynamic for Parties to learn from the challenges and solutions encountered within the Working Group.

2. Since the entry into force of the Convention in 1999, the monitoring of Parties’ compliance and implementation of the Convention and the formulation of specific recommendations for actions to improve Parties’ anti-foreign bribery work has proceeded in two stages. The first phase of this process sought to review Parties’ laws to combat bribery – their implementing legislation – to determine whether they met the standards set in the Convention. The second phase of monitoring, begun in 2001, assesses the structures in place to enforce these laws and the degree to which they are effective. Phase 2 also broadened the focus of monitoring to encompass more fully the non-criminal law aspects of fighting foreign bribery, including accounting and auditing requirements and non-tax deductibility of bribes. This monitoring process seeks to gain an overall impression of the functional equivalence of Parties’ efforts, taking into account that Parties may use various approaches to fulfil their obligations. In 2005, as the Working Group neared the halfway point of this second phase of evaluation of the 36 Parties to the Convention, it was decided that it would be opportune to review the findings of the Phase 2 reports in a Mid-Term Study.

3. This study is a retrospective of the Phase 2 reports of Parties’ application of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation, conducted from September 2001 to the end of 2005. During this period, Phase 2 reports were completed for 21 Parties. Based on these 21 Phase 2 reports, this study highlights notable progress in implementing the Convention, and identifies innovations and good practices in combating bribery. It also seeks to recognise areas that consistently pose challenges across Parties as well as significant difficulties and shortcomings observed in individual Parties. The study highlights developments and trends in a number of areas and proposes a descriptive analysis in terms of levels of compliance with the Convention and the Revised Recommendation, the types of action that have been taken, and the effectiveness of the systems put in place to combat foreign bribery.

4. The objective of this study is three-fold: First, it seeks to further enhance the equal application of standards to all examined Parties, keeping in mind that pursuant to the principle of “functional equivalence” in the Convention, equality does not require uniformity or changes in fundamental principles of a Party’s legal system. The second goal of the study is to identify patterns of compliance and deficiencies in Parties’ implementation of the Convention, as well as notable approaches that might not at this stage represent trends. Thirdly, the study is intended to provide a basis for the Working Group to determine which issues require further analysis and to decide on the direction of future monitoring tasks regarding the Convention.

1 The 21 Phase 2 reports adopted and finalised by the Working Group by 31 December 2005, and oral and written follow-up reports also finalised by that date, are the sole sources for this Mid-Term Study. Oral and written follow-up reports on the implementation of Phase 2 recommendations are scheduled for all States Parties; to date, some have been submitted. Written follow-up reports are posted at [www.oecd.org/bribery](http://www.oecd.org/bribery) upon their release. Additional information on countries’ progress can be found in a regularly updated document entitled “Steps Taken and Planned Future Actions by Participating Countries to Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.” This document is available at [www.oecd.org/bribery](http://www.oecd.org/bribery).
II. PROGRESS IN IMPLEMENTING THE CONVENTION AND THE REVISED RECOMMENDATION

A. INVESTIGATION, PROSECUTION AND SANCTIONS

1. Offence of Bribing a Foreign Public Official (Article 1 of Convention)

a. Various approaches to implementing the offence

5. The principle of “functional equivalence” provided in Commentary 2 on the Convention ensures that Parties are able to establish the offence of bribing a foreign public official “without requiring uniformity or changes in fundamental principles of a Party’s legal system”. Given that it is not possible for Parties with different legal systems to establish identical offences of foreign bribery, the principle of “functional equivalence” has the advantage of enabling the Convention to have a truly global reach.

6. A variety of approaches has been used by the Parties to the Convention so far examined under the Phase 2 procedures to establish the offence of bribing a foreign public official. These approaches can be divided into two main categories: 1. the type of statute chosen to establish the foreign bribery offence; and 2. the formulation of the offence. Some Parties were limited by their legal systems to a particular avenue for implementing Article 1; others had choices of different avenues. This part of the study canvasses the different methods, and suggests areas for future study.

i. Choice of statute

7. The majority of the Parties established the foreign bribery offence in their penal code (Australia, Bulgaria, Finland, France, Hungary, Iceland, Italy, Luxembourg, Mexico, Norway and Switzerland). For each of these Parties, the penal code also establishes the offence of bribing a domestic public official.

8. Five Parties enacted specific legislation for the purpose of establishing the foreign bribery offence (Canada, Germany, Greece, Korea and the United States). One of these Parties (Germany) indicated, in providing its oral follow-up report in June 2004 on progress in implementing the Working Group’s recommendations, that it plans to integrate the implementing legislation into the Criminal Code (in connection with the ratification of the Council of Europe Criminal Law Convention). Four of these Parties established the domestic bribery offence in their penal code. However, in the United States, the offence of bribing a foreign public official is provided in Title 15 of the United States Code.

9. Two of the Parties (Japan and the United Kingdom) established the foreign bribery offence in a statute other than the penal code that is not a stand-alone statute. In Japan, the foreign bribery offence is

2 The principle is further developed in Commentary 3, which states that Parties are not required to use the precise terms in Article 1 of the Convention in defining the offence under their domestic laws, and may use “various approaches” to fulfil the standards under Article 1 “provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were described” in the language of Article 1.

3 The Phase 2 recommendations to Germany by the Working Group do not make a recommendation in this respect.
contained in the Unfair Competition Prevention Law (UCPL), which, with the exception of the foreign bribery offence, primarily addresses unfair competition in relation to intellectual property. According to article 1 of the UCPL, its purpose is “to contribute to the sound development of the national economy”. The Japanese authorities have maintained that the foreign bribery offence was established in the UCPL in contrast to the domestic bribery offence, which is established in the Penal Code, because the two offences have different objectives: the domestic offence is aimed at maintaining public trust in a fair and honest public service, and the foreign offence is aimed at ensuring fair competition in international business transactions.

10. At the time of the Phase 1 examination, the United Kingdom, which does not have a single criminal or penal code, relied on the Prevention of Corruption Act 1906 (1906 Act), which criminalises the bribery of an “agent” in relation to his/her principal’s affairs or business, and the common law offence of bribing a person in public office. The 1906 Act seemed to cover the bribery of domestic public officials in that the definition of an “agent” in respect to the public service is “any person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians”. The common law offence applies to the bribery of a person in “public office”. It is the position of the United Kingdom that the 1906 Act criminalises the bribery of foreign public officials. In Phase 1, the Working Group concluded that it was not in a position to determine that the United Kingdom’s laws were in compliance with the standards under the Convention. Thus the Working Group urged the United Kingdom to enact appropriate legislation as a matter of priority. The United Kingdom responded by clarifying in the Anti-Terrorism Crime and Security Act 2001 (2001 Act), which came into force on 14 February 2002, that existing common law and statutory offences on bribery and corruption, including the 1906 Act, apply to the bribing of persons and bodies in a country or territory outside or having no connection with the United Kingdom. The United Kingdom authorities explain that this vehicle was chosen for clarifying the statutory basis for the offence of bribing a foreign public official, due to its expediency, and because corruption is linked with terrorism in that it helps foster the conditions in which terrorism thrives.

Conclusions

11. The Phase 2 reports have not addressed the issue of choice of statute to any degree, except with regards to Japan. The variety of statutes chosen by Parties to implement Article 1 of the Convention demonstrates the robust application of the principle of “functional equivalence”. This is clearly a sign that the Parties have been able to adapt Article 1 to the particularities of different legal systems. Nevertheless, with respect to Japan, the Working Group intends to follow up on whether placement of the offence in an unfair competition statute might affect enforcement. In addition, another issue that the Working Group might decide to study is whether in different national systems, certain criminal statutes take enforcement priority over others, and how this might affect enforcement of the foreign bribery offence. In the absence of a comparative analysis of this issue, it might seem that placement of the foreign bribery offence in a Party’s penal code, where this avenue exists, especially where the domestic bribery offence is also contained therein, could maximise the likelihood of enforcement actions.

4 A 1989 Court of Appeal decision had been submitted by the United Kingdom in support of the application of the 1906 Act to the bribery of foreign public officials, However, the Working Group did not consider this decision sufficiently clear on the question of applicability of the 1906 Act to such bribery because the accused was not convicted of bribing a foreign public official, but with conspiring, contrary to the Criminal Law Act 1977, with an agent of the Government of Ireland and other persons to promote the activities of the agent, which were to corruptly agree to obtain money in exchange for providing Irish passports, contrary to section 1 of the 1906 Act.
12. Since most Parties are able to choose between implementing Article 1 in a penal code or in a different statute, either one specifically aimed at foreign bribery or one that also covers other matters, such as a “statute prohibiting the bribery of agents generally” (as foreseen by Commentary 3 on the Convention), the Working Group might decide that an analysis of this issue would be useful. The Working Group might consider raising this issue as a matter of routine in future Phase 2 examinations, in particular where Parties have established the offence in legislation other than their penal code.

ii. Formulation of offence

13. Parties that have so far been examined under the Phase 2 procedures have employed either one of the following two statutory techniques for the purpose of formulating the offence of bribing a foreign public official: 1. extending the already existing offence of bribing a domestic public official to the bribery of a foreign public official, or 2. establishing a separate offence of bribing a foreign public official. The majority of Parties chose to establish a separate foreign bribery offence (Australia, Canada, France, Germany, Greece, Hungary, Japan, Korea, Mexico, Switzerland and the United States). The rest employed a variety of techniques to expand the domestic bribery offence to cover foreign bribery also (Bulgaria, Finland, Iceland, Luxembourg, Italy, Norway and the United Kingdom). As with respect to the variety of statutory vehicles for implementing Article 1, the variety of statutory techniques demonstrates the flexibility provided by the principle of “functional equivalence” under the Convention.

14. Given that the foreign bribery offence is relatively new to the criminal legal systems of most Parties, the ability to rely on case law concerning domestic bribery provides important interpretive guidance. However, neither the technique of extending the domestic bribery offence to foreign bribery nor establishing a separate offence appears to provide an advantage in this regard. Four Parties that employ the former technique have provided case law from domestic bribery offences in support of their interpretations of certain elements of the offence (Iceland, Italy, Luxembourg and the United Kingdom), as well as five Parties that employ the latter technique (France, Germany, Hungary, Korea and Switzerland). This is due to the presence of similar or identical language in the domestic and foreign bribery offences of those Parties that chose to establish a separate foreign bribery offence. In the case of the United States, a substantial body of law on the offence of bribing a foreign public official has been produced since the Foreign Corrupt Practices Act (FCPA) was enacted in 1977.

Conclusions

15. The Phase 2 examinations have not so far considered the advantages and disadvantages of either establishing a stand-alone foreign bribery offence or extending the domestic bribery offence to cover the bribery of a foreign public official also. The Phase 2 Report on Italy remarks that the relevant provision is “somewhat complicated because of its chain of cross-references to various domestic (active and passive) bribery offences in the Criminal Code”, but does not look further at whether the complicated nature of the offence could be an obstacle to effective enforcement in Italy. In the absence of a comparative analysis, it might seem that a separate offence of foreign bribery would give more prominence to the offence than by incorporating it into the same provisions as the domestic bribery offence. However, it is not known whether the advantages of increasing its visibility would be outweighed by other possible factors. Since so far it appears that either technique provides the same opportunity to rely on case law from the domestic bribery offence, it may be useful to look at whether either technique results in more enforcement actions.

b. Amendments to offence made in response to Working Group Recommendations

16. A positive signal regarding implementation of Article 1 of the Convention by Parties is the number of amendments made to comply with recommendations of the Working Group in Phase 1 or in
some cases Phase 1bis. Among the Parties examined so far under Phase 2, eight have made such
amendments (Bulgaria, Greece, Hungary, Japan, Mexico, Norway, the Slovak Republic and the United
Kingdom). These amendments can be divided into the following three categories: 1. amendments regarding
the coverage of foreign public officials, 2. clarification of specific elements of the offence, and 3. the
repeal of defences or exceptions.

17. The majority of amendments to the offence of bribing a foreign public official concerned the
coverage of foreign public officials (Bulgaria, Greece, Hungary, Japan, Norway and the United
Kingdom). Two Parties amended the definition of “foreign public official” for the purpose of making it autonomous
(Greece and Hungary).

18. The common thread through the rest of the amendments regarding the coverage of foreign public
officials, except for the United Kingdom, is an expansion of the coverage of the definition. Bulgaria
extended the part of the definition of “foreign public official” concerning officials of public international
organisations, in order to extend the definition to also cover a person exercising “duties of an office in an
international parliamentary assembly or international court”. In the case of Japan, the definition of
“foreign public official” was extended to meet the standard under Commentary 14 on the Convention
regarding the degree of indirect control by a foreign government of an enterprise that deems it a “public
enterprise” (i.e. where a foreign government has de facto control over an enterprise but does not hold in
excess of 50% of the shares with the right to vote). Norway expanded the scope of its definition from
“foreign public servants and servants of public international organisations” to “anyone in connection with a
post, office or commission in a foreign country”. As mentioned previously, the United Kingdom clarified
in the 2001 Act that existing common law and statutory offences on bribery and corruption, including the
1906 Act, apply to the bribing of persons and bodies in a country or territory outside or having no
connection with the United Kingdom.

19. The second largest category of amendments clarified specific elements of the offence of bribing a
foreign public official (Bulgaria, Hungary, Norway and the Slovak Republic). Bulgaria made three
amendments in this regard. The first extends the offence to offering and promising, whereas previously it
only covered giving. The second broadens the description of the advantage to be offered, etc. to the
foreign public official to cover a “gift or any other kind of advantage” due to concerns that non-pecuniary
and intangible benefits were not covered. The third amendment clarifies that the foreign bribery offence
applies to a person who mediates the offering, promising or giving of a bribe. In the case of Hungary, the
foreign bribery offence was amended so that it no longer requires proof that the bribe was intended to
influence the functioning of an official “to the detriment of the public interest”. Instead the offence now
only requires proof that the bribe was given or promised “in connection with the functioning of a foreign
official person”. With respect to Norway, the language “granting or promising a favour” has been amended
to “gives or offers an improper advantage”. The Norwegian authorities stated that pursuant to the
preparatory works on the amendment and the “presumption principle”, the term “offers” is intended to

5 This part of the definition previously referred to a person exercising “duties of an office or mission
assigned by an international organisation”.

6 This element has been amended twice. The first time offering and promising were subject to one year of
imprisonment. The second amendment subjected offering and promising to the same penalty as giving—
six years of imprisonment and a fine up to 5 000 Leva.

7 The previous language to describe the benefit was “a gift or any other material benefit”.

8 Article 305a of the Bulgarian Penal Code establishes a penalty of up to three years of imprisonment and a
fine of up to 5 000 Leva for a person who mediates “any action under the preceding articles if the
perpetrated act does not represent a graver crime”.

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cover the situation where the briber agrees to a solicitation. The Slovak Republic amended its foreign bribery offences to expressly cover bribery that benefits third parties.

20. The third category of amendments was made to repeal certain exceptions or defences to the offence, in order to improve compliance with Article 1 of the Convention (Bulgaria and Japan). Bulgaria repealed two exemptions from punishment—one for voluntarily informing the authorities (effective regret) and the other for a person who was provoked into giving or receiving a bribe “for the purpose of unmasking” the person who gives or receives the bribe (entrapment).

21. Japan repealed an exception under the UCPL to the foreign bribery offence that applied where the “main office” of the briber was located in the same country for which the foreign public official engaged in public service (known as the “main office exception”) and replaced it with the language “in an international commercial transaction”. The Phase 2 examination of Japan revealed that the “main office exception” may still apply to the Japanese foreign bribery offence through the interpretation by the Japanese government of the term “in an international commercial transaction”. Guidelines on the foreign bribery offence published by the Ministry of Economy, Trade and Industry (METI) provide an example of “international business” that appears to provide an exception similar to the “main office exception”. In addition, a guidebook on the UCPL published annually by METI suggests that the “main office exception” is now encompassed by the interpretation of “international business”. The Working Group recommended a review of the interpretation of “international business transactions” in the METI Guidelines and other relevant guidance issued by the Japanese authorities to ensure that they conform to the Convention and do not mislead companies.

Conclusions

22. The amendments so far observed in the Phase 2 process are largely intended to clarify the scope of Parties’ foreign bribery offences. This is part of a positive trend globally to ensure that penal sanctions are only applied for acts clearly prohibited in the law. Clarity in the foreign bribery offence also helps to dispel confusion about what acts are prohibited. In order to ensure that such amendments are effective in practice, the Working Group should ensure that a systematic review of amendments to the foreign bribery offence be included in each Phase 2 examination, in particular where there has not been a Phase Ibis examination of the amendments, or there has been a Phase Ibis review but it was not sufficiently comprehensive. This review could address the level of awareness of the enforcement authorities and the private sector of any amendment. In addition, the Working Group might consider routinely addressing the interpretation of amendments, in particular the repeal of exceptions and defences and the possibility that they might still be applied in practice, in its meetings at the on-site visits with law enforcement authorities and government bodies.

c. Guidelines on the interpretation of the offence

23. Five Parties (Australia, Canada, Japan, Korea and the United States) had issued, by the time of their Phase 2 examinations, guidelines or guidance on the interpretation of the offence of bribing a foreign public official under their laws. In Australia, the Attorney-General’s Department had issued a pamphlet (“Bribery of Foreign Public Officials is a Crime”) providing an overview of the foreign bribery offence and its legal consequences, and had also established a webpage providing detailed information about the

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9 Hungary had previously repealed the defence of giving or promising a favour upon the initiative of an official person because of fear of unlawful disadvantage. The repeal of this defence was reviewed in the context of a Phase Ibis examination.

10 METI Guidelines to Prevent Bribery of Foreign Public Officials (26 May 2004).
Convention and the offence. In Canada, the Department of Justice issued a guide on the Canadian Corruption of Foreign Public Officials Act (CFPOA) within three months of its coming into force. The guide provides historical information about the Convention and the government bill for implementing the Convention, as well as information about the interpretation of each element of the offence, the defences provided under the CFPOA, jurisdiction, penalties, enforcement and the related issue of money laundering. The guide is intended as a resource for companies and individuals on how to comply with the CFPOA. In Japan, METI issued its Guidelines on 26 May 2004, a 32-page document that contains an in-depth interpretation of each of the elements of the offence and the defence of facilitation payments. It also addresses preventive measures in the form of internal company controls. This document is mainly targeted at assisting companies in complying with the foreign bribery offence under the unfair Competition Prevention Law. In February 1999, the Korean Ministry of Justice published the Explanatory Manual on the Convention and the Foreign Bribery Prevention Act (FBPA), which was provided to prosecutors, the police and the Korean business sector. The Explanatory Manual includes answers to frequently asked questions, and provides interpretive guidelines on the elements of the offence of bribing a foreign public official, relevant defences and jurisdictional issues. Norway stated, in providing its oral follow-up report in June 2005, that a folder has been prepared by the Ministry of Foreign Affairs and the Ministry of Development (for the Norwegian administration and Norwegian companies) specifying that small facilitation payments are prohibited under Norwegian law.

24. In the United States, the U.S. Department of Justice and the U.S. Department of Commerce published a “Lay-Person’s Guide to the FCPA Statute” in June 2001, which explains the FCPA anti-bribery provisions. The document is available on several U.S. Government websites and was further circulated as an appendix in the Department of State’s brochure “Fighting Global Corruption: Business Risk Management” In addition, the Department of Justice established the FCPA Opinion Procedure, by which a company about to engage in a transaction that might potentially give rise to issues under the FCPA may ask the Department of Justice for a statement on its present enforcement intentions under the FCPA regarding any proposed business conduct. The Opinion Procedure releases are published on the Department of Justice (DOJ) Fraud Section website. In addition, further guidance may be obtained by referring to published plea and consent agreements.

25. Guidelines on the interpretation of the offence serve two important functions; they act as an awareness-raising tool about the risks of bribing foreign public officials, and assist companies and individuals in complying with the foreign bribery offence by providing information on how to interpret the elements of the offence. Such information plays a significant role in combating the bribery of foreign public officials, especially given that until recently foreign bribery was an accepted way of doing business for many companies. Companies need as much information as possible to know how to comply with the new rules on international business relations. Where the foreign bribery offence is contained in legislation not as well known to the law enforcement authorities as the penal code, guidelines also serve the purpose of raising awareness of the foreign bribery offence amongst their ranks. However, it is important to keep in mind that not all Parties are able to issue interpretive guidelines, due to the strict limits on some governments on providing guidance in interpreting statutes. In addition, even where guidelines can be issued, their authoritative value depends on the Party’s legal system.

26. The Phase 2 reports on Canada, Japan and Korea point out that the guidelines issued by those Parties serve these important functions. They also raise some of the problems that can be created by guidelines that are not entirely consistent with the Convention or the implementing legislation. The

11 METI also publishes on an annual basis the METI Guidebook on the UCPL, which contains similar but less comprehensive information about the foreign bribery offence, as well as other offences under the UCPL.
Canadian International Development Agency (CIDA) had issued a guideline in an anti-corruption publication, with misleading information about the availability of the defence for facilitating payments. Neither the Department of Foreign Affairs and International Trade, nor the Department of Justice had been consulted on the content of this guideline. The Canadian authorities undertook to correct the misleading advice, which has since been done. In the case of Japan, neither the Ministry of Justice nor prosecutors had been consulted on the interpretation of the offence, and, for instance, did not agree with the information provided about facilitation payments. The Working Group recommended that Japan review the METI Guidelines to ensure compliance with the Convention in consultation with the prosecutorial authorities and the Ministry of Justice.

27. The Explanatory Manual published by the Korean Ministry of Justice is considered the main resource for providing opinions concerning the interpretation of the FBPA. In Korea, the Ministry of Justice may provide opinions to the public regarding the interpretation of the criminal law, including the FBPA. The Phase 2 Report comments that the Explanatory Manual is accessible, and by and large should provide appropriate and accurate information about the Convention and the FBPA. However, in Korea, any erroneous or misleading advice provided by the Ministry of Justice may be the basis of the defence of mistake of law where it is relied on. The Working Group therefore recommended that the Korean authorities carefully review the Explanatory Manual to ensure that it is consistent with the Convention and the FBPA.

d. Bribes through intermediaries

28. Article 1 of the Convention requires the coverage of cases where a person intentionally offers, promises or gives an undue advantage directly or through an intermediary. The non-coverage of cases where the bribe is made through an intermediary would represent a very large loophole in the offence of bribing a foreign public official, given that it is common practice to bribe foreign public officials through local agents. Although all 21 Parties examined so far under the Phase 2 process state that their foreign bribery offences are intended to cover bribing through an intermediary, nine (Bulgaria, Finland, Germany, Hungary, Iceland, Italy, Korea, Norway and the United Kingdom) do not expressly cover bribing through an intermediary.

29. Of the nine Parties that do not expressly cover the act of bribing through an intermediary, six submitted some supporting authority for their contention that it is indeed covered (Germany, Hungary, Italy, Korea, Norway and the United Kingdom). Germany provided case law, thus satisfying the Working Group that follow-up was not necessary. Hungary provided a Supreme Court decision from 1997 in which a person was convicted of paying money to an intermediary in order that the intermediary would exercise influence over a public official. Since this case involved trafficking in influence and not the bribery of a public official, the Working Group recommended follow-up of the issue. Italy provided supporting case law concerning the domestic bribery offence, and at the time of the Phase 2 examination an investigation was ongoing concerning two company officers allegedly involved in paying bribes to foreign public officials through a foreign consultant. The Working Group was satisfied with this information. Norway was able to provide a supporting statement in the preparatory works to the implementing legislation, but in the absence of supporting case law, the Working Group recommended follow-up. On the part of the Norwegian authorities, there is absolutely no doubt that bribes through intermediaries are covered. The United Kingdom satisfied the Working Group with academic legal literature that bribery through intermediaries is covered.

12 Anti-Corruption Programming: A Primer.
30. Korea was able to support its position that bribes through intermediaries are covered by the FBPA with a conviction in a foreign bribery case where the bribe was paid through the wife of the foreign public official. Nevertheless, the Working Group recommended follow-up because, since attempts to bribe a foreign public official are not covered under the FBPA, the Group was concerned that an offer, promise or gift that does not result in the provision of a benefit by a foreign public official or is not accepted by or does not come to the attention of a foreign public official, might not be covered. Indeed, the Korean authorities confirmed that the following three situations are not covered: 1. the briber expresses an intent to bribe but his/her intent is not conveyed to the foreign public official; 2. a letter or e-mail containing an offer or promise has been sent to the official, but the official has not yet received it; and 3. a bribe has been sent by mail but for some reason it has not been delivered to the public official. Due to this area of non-coverage, the Working Group recommended follow-up.

31. Of the remaining three Parties that did not expressly cover bribing through intermediaries in their implementing legislation (Bulgaria, Finland and Iceland), officials from Finland and Iceland felt that the absence of express language would not be an impediment to prosecuting such cases. Nevertheless, a Finnish prosecutor stated that an explicit reference would make her job easier. With respect to Bulgaria, the Working Group was assured that bribes through intermediaries are covered due to the provision in the Penal Code on the liability of accomplices. However, because the Bulgarian authorities were only able to provide supporting case law on domestic bribery where the intermediary was held responsible for his/her role as an accomplice in the passive bribery of an official, the Working Group recommended follow-up.

Conclusions

32. Where Parties have not expressly covered the act of bribing a foreign public official through an intermediary in their implementing legislation, the Working Group has been fairly consistent in its resulting recommendations. Except for the United Kingdom, the Group has recommended follow-up of the issue in the absence of supporting case law on the coverage of bribes through intermediaries in relation to the domestic bribery offence. Moreover, in the case of Korea, follow-up was recommended despite the existence of supporting case law due to the non-coverage of attempts to bribe through an intermediary. It is not clear whether the problem identified in the examination of Korea might also apply to other Parties, since the link between the law of attempts and bribing through intermediaries has not been looked at routinely.

e. Definition of “foreign public official”

33. Article 1 of the Convention requires that Parties’ laws contain an autonomous definition of “foreign public official” consistent with the standards in Article 1.4.a. Commentaries 12 to 19 provide clarification of certain terms included in the definition of “foreign public official” under Article 1, including “public function”, “public agency”, “public enterprise”, “public international organisation” and “foreign country”. The Working Group identified the definition of “foreign public official” as an area requiring further attention in 12 of the Phase 2 examinations (Belgium, Finland, Germany, Hungary, Iceland, Korea, Mexico, Norway, the Slovak Republic, Sweden, the United Kingdom and the United States). The problems identified by the Working Group can be categorised into the following three groups: 1. a non-autonomous definition that does not meet the standards of the Convention, 2. the coverage of the definition is not as broad as under the Convention, and 3. the application of the definition is unclear in some respect.

34. The Working Group identified five Parties as having a non-autonomous definition of “foreign public official” (Belgium, Finland, Iceland, Mexico and the United Kingdom). Two of these Parties (Finland and Mexico) provided definitions that referred to the law in the foreign public official’s country. In Finland, this issue arises because the Finnish foreign bribery offence provides two overlapping
definitions—“an official of another Member State of the European Union” and “foreign public official”. For the purpose of the former definition, it is necessary to refer to the legislation of the foreign country in which the official performs public functions in order to determine if the person in question is “subject to criminal liability as a public official or civil servant”. The Finnish government had prepared a draft amendment to the foreign bribery offence in order to remove the overlap. The Working Group recommended that the government submit the amendment to Parliament as soon as possible. Mexico defined a foreign public official as any person who holds or occupies a public office under the law of the official’s country. At the time of the Phase 2 examination, an amendment to establish an autonomous definition had been proposed and was already adopted by the Senate. The Mexican authorities were confident that the amendment would be adopted by the Chamber of Deputies in the coming months, and as anticipated the Amendment to the Federal Criminal Code on the Bribery of Foreign Public Officials for the purpose of ensuring that the definition of foreign public officials is in line with the autonomous definition required by the Convention was submitted by the Executive in December 2003 and approved by Congress in July 2005.

35. In Belgium, determining whether a person is a foreign public official depends on a dual non-autonomous test. First, “whether a person exercises a public function in another State shall be determined in accordance with the law of the State in which the person exercises that function”. Second, where the State is outside the European Union, it is also necessary to refer to Belgian law to verify “whether the function in question is also considered to be a public function under Belgian law”. Although prosecutors at the on-site visit had not encountered problems to date in applying these tests, they conceded that in cases involving the bribery of public officials of certain countries, problems could arise in obtaining the necessary co-operation to establish the requisite criteria. The Working Group recommended that Belgium enact an autonomous definition of foreign public official.

36. The other two Parties (Iceland and the United Kingdom) did not define “foreign public official” in their implementing legislation. In respect of Iceland, the explanatory notes to the implementing legislation state that the offence “covers the same officials as the Convention against Bribery”. The Working Group recommended follow-up of the application of the offence in this regard, because secondary laws, although they are frequently referred to in court judgements, are not binding on the courts in Iceland. Iceland reported in its oral follow-up report of January 2005 that amendments to the implementing legislation make the concept of a “foreign public official” more explicit. Regarding the United Kingdom, the Anti-Terrorism Crime and Security Act 2001 extends the relevant United Kingdom laws to the bribing of persons and bodies in a country or territory outside or having no connection with the United Kingdom, but does not provide a definition of “foreign public official”. When the 2001 Act was debated in the House of Lords, the Attorney-General assured that the offence would cover all the categories of foreign public officials under the Convention. The Working Group recommended that the United Kingdom enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official. The Working Group will conduct an evaluation of the new law when it comes into force.

37. Four Parties had a definition of “foreign public official” in their implementing legislation that appeared to be not as broad as the definition in Article 1 of the Convention (Germany, Hungary, Korea and the United States). With respect to three Parties (Hungary, Korea and the United States) problems were identified concerning the application of the definition to persons exercising a public function for a “public enterprise”. Moreover two Parties (Germany and Hungary) provided definitions that lacked other features required under the Convention.

38. The Korean foreign bribery offence provides definitions of a public enterprise that did not appear to satisfy the requirements for coverage of indirect control under Commentary 14 on the Convention. The Korean definition includes an executive or employee of an “enterprise over which a foreign government holds over 50% of its subscribed capital or exercises de facto or effective controlling power over its overall
management, including the decision of major business and the appointment or dismissal of its executives” where he/she exercises a public function for a foreign government. The Working Group was concerned that the Korean definition did not necessarily cover “dominant influence” or indirect control, as specified by Commentary 14. In the absence of case law supporting Korea’s contention that these forms of control are covered, the Working Group recommended follow-up.

39. The United States FCPA does not expressly refer to persons exercising a public function for a public enterprise. Instead, a foreign public official is defined in the FCPA as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality, or for or on behalf of any such public international organisation”. In the absence of case law on the interpretation of the term “instrumentality”, and Opinion Releases on cases where there is indirect foreign government control of an enterprise or a foreign government exercises de facto control over an enterprise but does not for example hold in excess of 50% of the voting shares, the Working Group in 2002 recommended follow-up to determine if an amendment is needed. However, in the follow-up written report given by the United States in March 2005, the Department of Justice stated that it has successfully brought criminal prosecutions in circumstances in which bribes were paid to employees of state-controlled enterprises, such as state-controlled hospitals.

40. In Hungary, the problem did not concern the definition per se, but rather the overlap between the offence of bribing “foreign official persons” and the offence of bribing an employee or member of a “foreign economic organisation”, which includes state-owned and state-controlled companies. The former offence is broader, covering bribes in order that the official will “violate his official duty, exceed his competence or otherwise abuse his official position” and bribes paid “in connection with a foreign official’s functions”. The latter offence only applies where the purpose of the bribe is to obtain a violation of the duty of the employee or member of the foreign economic organisation. The Working Group recommended that Hungary clarify the relationship between the two offences.

41. The Working Group identified other areas where Parties’ definitions of a foreign public official did not appear as broad as the definition under Article 1 of the Convention (Germany, Hungary and the United States). The German implementing legislation does not define “foreign state”, thus raising the question whether the foreign bribery offence would apply to bribery of public officials of local subdivisions of a foreign government, or of an organised foreign area or entity, such as an autonomous territory or a separate customs territory. The Working Group was apparently satisfied that under the German interpretation rule, the Convention would be used as a primary tool for interpreting the foreign bribery offence, thus covering any elements not expressly mentioned in the implementing legislation “unless such an interpretation contradicts the letter of the statute”. However, when a similar question was raised with respect to the direct applicability of the definition of “foreign public official” in Article 1 of the Convention in the Phase 1 reports of two Parties (Greece and Spain), due to the absence of a definition in the implementing law, the Working Group recommended that the issue of the direct applicability of the Convention be examined on a horizontal basis at a later stage.

42. The Working Group was concerned about Hungary’s definition of foreign public official because it focuses on functional criteria, and does not provide a list of “offices” (e.g. a person holding a legislative, administrative or judicial office of a foreign country). Although Hungary considered the notion of “office” to be encompassed by “duties”, in the absence of supporting case law the Working Group recommended

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13 Where the Working Group recommends that an issue be addressed on a horizontal basis, this means that since the issue may arise among other Parties, the Working Group recommends an analysis of how the issue is treated by all Parties.
that Hungary clarify this matter in explanatory materials. With respect to the United States, the Working Group recommended follow-up to determine if amendments are needed due to the absence of express mention of persons holding a judicial office in a foreign country. Department of Justice officials expressed the firm view that the definition of a foreign public official in the FCPA covers judges. However, the United States reported that there was no available case law at that time confirming their position.

43. The Working Group identified five Parties where the application of the definition is unclear in some respects (Belgium, Hungary, Korea, Norway and Sweden). In Belgium, doubts were raised during the legislative process and then again by a number of academics who participated in the on-site visit concerning whether the foreign bribery offence covers persons who, while exercising a public function, work for public authorities under a private law contract. The Working Group thus recommended that Belgium define a foreign public official in full compliance with the Convention. In the case of Hungary, the report states that a person who is commissioned by a state administrative organ to perform certain duties is a public official only if under a contract of employment. Since the Explanatory Memorandum did not address this point, the Working Group recommended that Hungary consider clarifying the application of the definition of foreign public official in this respect. In Korea, there is uncertainty about the application of the foreign bribery offence to the bribery of North Korean public officials. Pursuant to domestic law and the Constitution, North Korea is not considered a state; thus North Korean public officials are not covered by the definition of a foreign public official in the FBPA. In addition, the Korean authorities are of the view that North Korean public officials are not considered domestic public officials. Nevertheless, the Korean authorities believe that the Foreign Exchange Control Act, which expressly prohibits payments to North Korea, can address the bribery of North Korean officials. The Working Group recommended follow-up of this issue.

44. Pursuant to amendments made in 2003 to the Norwegian foreign bribery offence, a “foreign public official” is “anyone in connection with a post, office or commission in a foreign country”. The Working Group considered this terminology quite different from the language in Article 1 of the Convention, and noted that the terms “post”, “office” and “commission” were not defined in the legislation. However, the Preparatory Works to the amendment provide a list of persons covered by the new definition, which seems to cover all the categories of foreign public officials in the Convention, and the Norwegian authorities are of the view that the definition of “foreign public official” fully meets the requirements under the Convention. In any case, the Working Group recommended follow-up. With respect to Sweden, the Phase 2 report raises doubts on whether the bribery offence in the Swedish Penal Code prohibits the bribery of all officials or agents of a public international organisation, given that a provision excludes officials of a “supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden” is not a member. Although the Swedish authorities explained that the provision on “employees” is broad enough to cover the excluded officials, the Working Group recommended that Sweden ensure that all such officials be covered.

45. The problem identified in the Phase 2 Report on the Slovak Republic concerning the definition of “foreign public official” was rather different from the preceding. The Slovak Penal Code establishes two foreign bribery offences—a general foreign bribery offence and a specific offence that essentially targets the bribery of officials of public international organisations recognised by the Slovak Republic. The lead examiners were concerned that the more specific definition would prevail over the more general, thus leading to a loophole in implementing the Convention. Although the position of the Slovak authorities was that the specific provision is subsumed by the general, in the absence of supporting case law, the Working Group recommended follow-up.

14 The former offence implements the OECD Convention and the latter the European Union instruments.
46. It is clear from the amount of focus in the Phase 2 reports on Parties’ definitions of “foreign public official” that the Working Group views the definition as critical to the effectiveness of the foreign bribery offence. The Working Group’s recommendations regarding problem areas in Parties’ definitions have been fairly uniform. Where a Party has not provided an autonomous definition of “foreign public official”, it has either recommended the quick passage of an amendment, where one has been prepared (Finland and Mexico), or follow-up (Iceland and the United Kingdom). However, it must be cautioned that where follow-up has been recommended, the Parties submitted either explanatory notes (Iceland) or parliamentary debates (the United Kingdom) indicating that all the categories of foreign public officials under the Convention would be covered. It thus remains open to the Working Group to recommend an amendment to establish an autonomous definition where supporting authority is not provided.

47. Where the Working Group has considered that a Party’s definition of “foreign public official” does not satisfactorily cover a person exercising a public function for a “public enterprise”, the Working Group has also been fairly consistent in its recommendations. In particular, where, contrary to Commentary 14 the definition does not expressly cover indirect control by a foreign government or the case where a foreign government exercises de facto control over an enterprise but does not for example hold in excess of 50% of the voting shares, the Working Group recommended follow-up (Korea) or follow-up to determine if an amendment is needed (the United States).

Conclusions

48. Regarding cases where a Party’s definition of “foreign public official” is not as broad as required by Article 1 of the Convention (except where this relates to the definition of “public enterprise”), and where the application of the definition is unclear in some respect, the Working Group’s recommendations have been consistent throughout the Phase 2 monitoring process to date. The Working Group did not recommend any action where the Party was able to provide supporting authority for its position. In any case, in light of the recommendation of the Working Group in Phase 1 to undertake a horizontal analysis of the direct applicability of the Convention, the Working Group might decide to review, once there has been sufficient practice, how effective this technique has been in relation to the definition “foreign public official” in the Convention. Otherwise, in Phase 2, either follow-up or clarification was recommended, depending upon the authoritativeness of the supporting materials.

49. As the Phase 2 reports do not disclose any routine assessment of how such Parties would in practice interpret the definition of “public enterprise”, the Working Group might therefore decide to systematically address this aspect of the interpretation of “foreign public official” in each Phase 2 examination, regardless of whether the implementing legislation provides a definition.

f. Bribes for the benefit of third parties

50. Article 1 of the Convention also requires coverage of cases where a bribe is offered, promised or given to a foreign public official “for that official or for a third party”. Given that it would be relatively simple to avoid liability by forwarding the benefit to a third party, such as a political party, spouse or friend of the foreign public official, non-coverage of the case where the benefit is provided directly to a third party with the consent of the foreign public official, would represent a significant loophole in the offence. At the time of their Phase 2 examinations, nine Parties did not expressly cover the situation where a bribe is provided directly to a third party (Bulgaria, Iceland, Italy, Japan, Korea, Mexico, Norway, the United Kingdom and the United States). Since their Phase 2 examinations, two Parties (Iceland and Mexico) indicated in their oral follow-up reports (in January 2005 and October 2005 respectively) that amendments had been made to address bribes that benefit third party beneficiaries.
51. Of the nine Parties that did not expressly cover the case where a bribe is provided directly to a third party, four Parties (Italy, Japan, Norway and the United Kingdom) provided authority to support their position that the situation is indeed covered. Italy provided a decision of the Court of Cassation in which the Court held that the offence of bribing a domestic public official is complete when the public official, after receiving the benefit, forwards all or part of it to his/her political party. With respect to Norway, the Preparatory Works to the implementing legislation state that “punishment may be imposed even if the advantage is intended to benefit a person other than the passive party” and that “the bribe may for example be deposited in an account held by a limited company or by a relative of the passive party”. The Norwegian authorities are absolutely certain that bribes for the benefit of third parties are covered under Norwegian law. Nevertheless, in the absence of supporting case law, the Working Group recommended follow-up. The United Kingdom provided academic legal literature that states that the case is covered where the briber and the public official enter into an agreement to transmit the bribe directly to a third party in exchange for an act or omission by the official.

52. Although Japan cited cases in which the active domestic bribery offence under the Penal Code covered the situation where the benefit was transferred directly to a third party, these cases only cover situations where it can be deemed that “in substance” the advantage was given to the official. The Japanese prosecutors admitted that it is doubtful that the foreign bribery offence covers the case where the benefit goes directly to a charity, political party or legal person with which the public official does not have a relationship since the public official cannot be considered to have received a benefit, and that it is generally difficult to apply the offence where the third party is a legal person. Moreover, under the Japanese Penal Code, the active domestic bribery offence expressly covers the case where the benefit goes directly to a third party; thus putting into question whether the domestic bribery cases are satisfactory authority for interpreting this aspect of the foreign bribery offence.

53. Three Parties that did not provide supporting authority, have domestic bribery offences that expressly cover the case where the benefit goes directly to a third party (Bulgaria, Iceland and Mexico). Bulgaria stated that because the passive domestic bribery offence expressly applies where the domestic official gives consent for the gift or material benefit to be directed to another person, it can be deduced that the legislature intended the same coverage for the bribery of foreign public officials. In the absence of supporting case law the Working Group recommended follow-up. In the case of Iceland, the Working Group went further and stated that the lack of analogous language in the foreign bribery offence where the passive domestic bribery offence sanctions the requesting or receiving of an advantage for the official “or others” could support the argument that the foreign bribery offence does not cover such transactions. The Working Group recommended that Iceland align the language in the two offences. Iceland explained, in providing its oral follow-up report, that in December 2003 Parliament adopted amendments aligning the language in section 109 of the Penal Code on the bribery of a foreign public official with section 128 on passive domestic bribery, so that it is clear that the bribery of a foreign public official that benefits a third party is covered. At the time of the Phase 2 examination, Mexico was in a situation similar to Iceland’s, but had presented a Bill to Congress to add similar language (i.e. “on his/her benefit or in benefit of a third party”) to the foreign bribery offence. Mexico stated in providing its oral follow-up report that the Amendment to the Federal Criminal Code on the Bribery of Foreign Public Officials for the purpose of ensuring coverage of bribes that benefit third party beneficiaries was re-submitted by the Executive in December 2003 and approved by Congress in July 2005.

54. The United States authorities did not submit case law directly on point under the FCPA, nor did they submit case law on the domestic bribery offence regarding the coverage of bribes that benefit third party beneficiaries. In Phase 1 the Working Group had recommended that this issue be re-examined in

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15 Japan pointed out that the case cited did not mention this aspect of the offence.
Phase 2. The Phase 2 Report points out again the absence of supporting case law regarding the situation where a benefit is directed to a third party beneficiary upon the agreement of the foreign public official. It also refers to a case in which a conviction was obtained in 1979, involving the provision of a benefit directly to a third party beneficiary—i.e. funds to a political party—in return for a government contract from a foreign public official (i.e. the Prime Minister of the foreign country), and notes that this case was prosecuted as an offence of bribing a political party under the FCPA as opposed to the bribery of a foreign public official as well as that it is not clear from the plea agreement that the political party influenced the Prime Minister. The Working Group recommended review of this issue as further case law develops.

55. The Korean authorities indicated that the foreign bribery offence under the FBPA covers the case where the benefit is directed to a foreign public official for the benefit of a third party, but stated that they were doubtful whether the Convention requires that the situation be covered where an agreement has been reached between a briber and a foreign public official to transmit a bribe directly to a third party. They supported their argument with the text of Article 1 of the Convention, which they feel could be interpreted in the same way. The Korean authorities confirmed that the domestic bribery offence under the Criminal Act covers the case where a benefit is delivered directly to a third party. Korea undertook to amend the FBPA accordingly, if difficulties arise as a result of the difference in language between the foreign and domestic bribery offences. The Working Group recommended that Korea clarify that the FBPA covers the situation where a bribe is transmitted directly to a third party, consistent with the domestic bribery offence.

Conclusions

56. Under the Phase 2 process, the Working Group has been consistent in addressing in some depth the coverage of each Party’s foreign bribery offence in respect of bribes that benefit third parties, but has made different recommendations depending on the facts of each examination. In some cases, the Working Group has required case law supporting the position of the Parties that this situation is covered. In others, where a Party’s domestic bribery offence expressly covers this situation, the Working Group has recommended that the foreign bribery offence be amended to align it with the domestic bribery offence. The Working Group might therefore decide to ensure consistency in its approach to recommendations regarding the absence of express language for bribes directly benefiting third party beneficiaries.

g. Defences contemplated under the Convention

i. Defence for small facilitation payments

57. Pursuant to Commentary 9 on the Convention, “small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly are not an offence”. Four Parties so far examined under the Phase 2 procedures have expressly established a defence to their foreign bribery offences that is intended to implement Commentary 9 (Australia, Canada, Korea, and the United States). One Party (Switzerland) considers a defence for facilitation payments to be provided under a proviso in the Penal Code, which states that (i) prosecution shall be waived where the offender’s guilt and consequences of his/her act are so insignificant that a penalty would be inappropriate, and (ii) advantages authorised by department regulations and advantages

16 Article 1 of the Convention covers the offer, promise or gift of an advantage “to a foreign public official, for that official or for a third party”.

17 With respect to the scope of the defence for “small facilitation payments”, Commentary 9 also states that “such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned”. 

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of minor value in conformity with socially accepted practices shall not be considered undue advantages. Another Party (Japan) provides in practice an exception for facilitation payments, according to Guidelines issued by the Ministry of Economy, Trade and Industry (METI) although the exception is not expressly provided under the implementing legislation.

58. Canada and the United States provide defences for facilitation payments that are very similar. Under the Canadian CFPOA, the defence is available for a “loan, reward, advantage or benefit…made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions”. An inclusive list of actions of a routine nature that would qualify for the exception is provided, and includes “issuance of a permit, licence or other document to qualify a person to do business” and “the processing of official documents such as visas and work permits”. Similar to the FCPA, the defence under the CFPOA is not limited to “small” payments. However, the United States defence is limited to a “payment” whereas the Canadian defence covers a “loan, reward, advantage or benefit”. The Canadian courts had not yet interpreted the defence. The Phase 2 Report on Canada notes a high level of dissatisfaction with the exception for facilitation payments on the part of corporate and criminal defence lawyers, and that it was the opinion of some lawyers that the defence creates a large area of uncertainty, some who felt it should be repealed. The Working Group recommended that the Canadian authorities should consider issuing some form of guidance to assist in interpreting the defence.

59. The defence for facilitation payments in the United States FCPA was introduced through an amendment in 1988. It provides an exception to the foreign bribery offence for “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by” one of the foregoing. The term “routine governmental action” is defined as an “action which is ordinarily and commonly performed by a foreign official” and an inclusive list of such actions is provided, including “obtaining permits, licenses, or other documents to qualify a person to do business in a foreign country”, and “processing governmental papers, such as visas and work orders”. The Phase 2 Report on the United States comments that a similar exception is not provided in the statute governing domestic bribery. It also points out that no court has interpreted the exception, and that there have not been any relevant Opinion Releases of the Department of Justice. Companies that participated in the on-site visit had developed different strategies to address the exception. The Working Group recommended that the United States consider developing specific guidance in relation to the facilitation payments exception. In the written follow-up report of the United States, given in March 2005, it is stated that this recommendation was carefully considered, but that it was determined that the language of the FCPA, including the definition of “facilitating or expediting payments” is sufficient guidance.

60. The defence for facilitation payments under section 70.4 of the Australian Commonwealth Penal Code is largely modelled after the defence in the United States FCPA, except for two main differences. First, the Australian defence expressly states that the payment must be of a “minor nature”. Second, the defence only applies if a record of the payment has been kept in accordance with subsection 70.4(3). The Phase 2 Report on Australia discusses some concerns about this defence raised during the on-site visit. For instance, a pamphlet published by the Attorney-General’s Department entitled “Bribery of Foreign Public Officials is a Crime” states that the defence “is rarely (if ever) available in circumstances where the payment was made to facilitate making a decision to award business to a company”, thus implying that there may be circumstances where a “routine government action” consists of a decision to award business. Following the on-site visit, the Attorney-General’s Department amended this document, and undertook to amend a similar guidance document available on its website. The Working Group recommended that the amendment to the document on the website be carried out as soon as possible.
However, there was also some confusion within the Australian private sector concerning the limits of the defence. The code of conduct of an Australian resource company provided misleading information about the defence, and certain private sector representatives were not aware of the record-keeping requirement. One major business association felt that it was unlikely that companies would abide by the record-keeping requirement, given that doing so could be perceived as an admission of guilt. In addition, the tax authorities confirmed that a tax record kept in accordance with the Commonwealth Criminal Code is not needed for the purpose of obtaining a tax deduction for facilitation payments, and members of the legal profession confirmed that facilitation payments are prohibited under most State criminal codes. In view of these matters, the Working Group recommended follow-up of the application of the defence of facilitation payments.

Korea implements Commentary 9 on the Convention with article 3.2.b of the FBPA, which provides a defence where a “small pecuniary or other advantage is promised, given or offered to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official’s business”. Article 3.2.b departs from the language in Commentary 9 in two main respects. First, it is not restricted to “payments” but applies to “pecuniary and other advantages”. Second, it does not provide the example of “issuing licenses or permits”. The Working Group recommended follow-up of this exception.

In the case of Japan, although the implementing legislation does not provide an exception for facilitation payments, both the “METI Guidelines to Prevent Bribery of Foreign Public Officials” and the “METI Guidebook on the UCPL” contain discussions on the acceptability of certain forms of facilitation payments. The METI Guidelines, in particular, provide information that the Working Group felt could be misleading and contrary to Commentary 9 on the Convention. For example, a footnote in the METI Guidelines states that the subject of facilitation payments “needs to be examined by taking the context in the respective countries into consideration”. The METI Guidelines also provide the legislative provisions of eight Parties to the Convention containing exceptions for small facilitation payments, apparently in order to assist companies in determining the level of acceptability for facilitation payments in those countries. The Working Group was also concerned that this might be considered an invitation to companies to choose whichever exception for facilitation payments that fits its needs. The Working Group recommended that METI review the interpretation of facilitation payments in all relevant instruments, and in consultation with the Ministry of Justice, other relevant ministries and prosecutorial authorities, with a view to amending it where appropriate to ensure clarity and consistency with the Convention.

With respect to Switzerland, the foreign bribery offence only applies to payments to an official for an act that is “contrary to his duties or depends on the exercise of his discretionary powers”. This is in contrast to the offence of bribing a domestic public official, which covers, in addition to the foregoing, payments made to an official “so that he accomplishes the duties of his position”. Thus, the foreign bribery offence does not cover payments made to a foreign public official for the purpose of accomplishing duties of his/her position. In addition, contrary to Commentary 9 on the Convention, the Swiss offence does not limit the exception to “small” payments, and does not provide the example of “issuing licenses or permits”. The Working Group recommended follow-up to verify whether, excluding the case of small facilitation payments, an official’s acceptance of an improper advantage constitutes the basis for the offence of foreign bribery.

The Canadian Phase 2 Report reveals that, at least in Canada, legal representatives of companies are having difficulty knowing how to delineate the exception for facilitation payments. The Report indicates that the companies interviewed find the exception ambiguous. In Japan, companies were generally finding ways of defining facilitation payments in line with the METI Guidelines. In Korea, the issue of corporate compliance with the exception does not appear to have been explored.
Conclusions

66. Given that, where an exception for facilitation payments is available, companies will have to address the exception in their internal compliance programmes, any Phase 2 follow-up on this issue as recommended by the Working Group could review how in practice companies are defining and applying the exception. In addition, to ensure that the Phase 2 reports provide sufficient information for the Working Group to review the impact of the exception in Commentary 9 for facilitation payments on the effectiveness of the Convention, it is important that future Phase 2 examinations routinely include a review of how companies are interpreting and applying the exception. Although companies cannot be compelled to provide this kind of information, the codes of conduct of many large companies involved in international business transactions are publicly available, and thus could be consulted in this regard. In addition, the Working Group may need to consider in each Phase 2 examination whether an exception for facilitation payments has been introduced through less formal means, such as interpretive guidelines.

67. Moreover, the Working Group might decide to undertake a mid- to long-term analysis about whether the exception for “small facilitation payments” in Commentary 9 is too vague to implement in practice. Such an analysis could also address the socio-economic factors related to the issue of small facilitation payments. It might also be prudent to canvass whether Parties that do not provide such an exception under their laws will nevertheless apply one in practice through, for instance, the exercise of prosecutorial discretion.

ii. Defence where the payment is permitted or required by the law of the foreign public official’s country

68. Commentary 8 on the Convention clarifies that an offence is not committed “if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law”. So far, four Parties (Australia, Canada, Korea and the United States) have expressly provided a defence in their implementing legislation for the purpose of giving effect to Commentary 8.

69. Pursuant to the Canadian CFPOA, no person is guilty of bribing a foreign public official, if the loan, reward, advantage or benefit “is permitted or required under the laws of the foreign state or public international organisation for which the foreign public official performs duties or functions”.

70. Article 3.2.a of the Korean FBPA provides a defence to the offence of bribing a foreign public official where “such payment is permitted or required by the law of the foreign public official’s country”. The Phase 2 Report on Korea points out that this provision is not entirely consistent with Commentary 8, as it is not limited in application to “written” law. However, the Explanatory Manual published by the Ministry of Justice states that this defence is limited in application to cases where the payment is permitted or required by the “written law or regulation of the foreign public officials’ country”.

71. In 1988, the United States FCPA was amended to provide an affirmative defence to the foreign bribery offence where “the payment, gift, offer or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country”. The Phase 2 Report on the United States observes that the term “unlawful” leaves open the issue of what is lawful under the written laws of a country. The Report also summarises the advice in Opinion Releases of the Department of Justice related to this issue, in which the reason given for not taking enforcement action is most commonly because the conduct in question did “not violate” or was “not in violation of” the local law. In a Department of State publication entitled “Fighting Global Corruption—Business Risk Management”, it states that “whether a payment was lawful under the written

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18 This publication was produced in consultation with other government departments concerned.
laws of a foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilising the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment”. Prosecutors from the Department of Justice were not aware of any prosecutions where this defence was raised.

72. With respect to Canada, Korea and the United States, the Working Group appeared satisfied that their respective defences were in conformity with Commentary 8 on the Convention, as no recommendations have been made to these Parties in this regard. On the other hand, questions were raised in the Phase 2 Report on Australia, which provides a different interpretation of Commentary 8. In general terms, the Australian defence applies where the briber “would not have been guilty of an offence against a law in force” in the place where the central administration is located for which the official performs his or her duties. In other words, the Australian defence provides a rule of dual criminality, which applies even where the offence takes place in Australia. The Working Group felt that this defence exceeded the limits of Commentary 8, and Australia has already undertaken to amend the defence. The Working Group recommended that Australia carry out this undertaking as soon as possible.

Conclusions

73. Given that one Party (Australia) has codified the defence under Commentary 8 for a payment that is “permitted or required by the law of the foreign public official’s country” in a manner which the Working Group considers exceeds the limits of Commentary 8, the Working Group might decide that it would be prudent to review systematically how in practice the law enforcement and other authorities of Parties that include such a defence under their laws interpret it in practice. It might also be prudent to canvass whether Parties that do not provide such a defence under their laws will nevertheless apply it in practice through, for instance, the exercise of prosecutorial discretion.

h. Defences not contemplated under the Convention

i. Reasonable expenses incurred in good faith

74. Two Parties (Canada and the United States) provide a defence for reasonable expenses incurred in good faith, although the defences are not identical under both Parties’ implementing legislation. The Canadian CFPOA states that “no person is guilty” of bribing a foreign public official if “the loan, reward, advantage or benefit” “was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to (i) the promotion, demonstration or explanation of the person’s products and services, or (ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions”. The defence under the United States FCPA is similar to the one under the Canadian CFPOA, except in two main respects. First, the FCPA provides an affirmative defence, which means that the defendant has the burden of raising and proving it. On the other hand, under the CFPOA the prosecution has the burden of proving beyond a reasonable doubt that the defence does not apply. Second, the FCPA expressly states that “travel and lodging expenses” are of the nature of expenditures covered by the defence; whereas the CFPOA does not provide this additional information.

75. Neither the Canadian nor the United States courts have interpreted this defence. However, the United States Department of Justice has issued some relevant Opinion Releases, which included approval for proposed payments for purposes including the following: 1. entertainment of a foreign official and his wife; 2. bringing foreign officials to the United States to show them a factory; and 3. training for employees of a foreign government, where the training was required by local law. In addition, the legislative history of the defence under the FCPA indicates that it is only intended to apply where no corrupt intent is present. Nevertheless, the Phase 2 Report on the United States observes that there appears
to be ambiguity among companies concerning the ambit of the defence, in light of the level of corporate resources that have been dedicated to seeking counsel’s opinion on this issue. The written follow-up report of the United States (March 2005), addresses the recommendation of the Working Group that if the defence is to be maintained, appropriate guidance be provided. The United States explains that the recommendation was reviewed and based on enforcement experience, it was decided that specific guidance beyond that afforded by the Opinion Procedure is not appropriate or necessary. The Working Group still held the view that in the absence of authoritative guidance, the defence may lead to uncertainty.

76. In the Phase 2 examination of Canada, the Working Group recommended follow-up of the application of the defence for reasonable expenses incurred in good faith. In the case of the United States, the Working Group questioned the need for this defence, and recommended that if it is maintained, appropriate guidance be provided.

**Conclusions**

77. In the absence of adoption of the defence of reasonable expenses incurred in good faith by Parties other than Canada and the United States, it might appear that the Working Group needs only to consider the impact of the defence specifically in relation to the foreign bribery offences in Canada and the United States. However, since a Party could apply the defence implicitly in the exercise of prosecutorial discretion, without having it expressly provided as a defence under the law, it would seem prudent to canvass this issue systematically in respect of all Phase 2 examinations.

ii. Effective regret

78. Two Parties (Greece and the Slovak Republic) provide a defence, commonly known as the defence of “effective regret”, where the briber confesses to the authorities that he/she has committed the offence of bribery. Under the Greek Penal Code, a briber is not punishable if he/she confesses to the offence before the commencement of a preliminary examination by the law enforcement authorities. The Greek authorities confirmed that this defence applies to the offence of bribing a foreign public official. In practice, where the defence applies, the proceeds of bribing are confiscated, but the bribe is returned to the briber. The Greek authorities also stated that in practice cases are prosecuted where the defence applies, pursuant to the principle of mandatory prosecution, but that it is the trend of the Greek courts to impose a light penalty, taking into consideration the degree of co-operation of the defendant. Case law interpreting the defence was not provided. The Working Group recommended monitoring of the application of the defence.

79. In the case of the Slovak Republic, section 163 of the Penal Code provides a defence of “effective regret” which only applies to the bribery of a foreign public official where the following two criteria are satisfied: 1. the official solicits the bribe, and 2. the briber reports the matter “voluntarily and without delay to the prosecutor, investigator or police”. Moreover, the Slovak authorities point out that they are able to proceed against the foreign public official who has solicited the bribe, since the Penal Code also establishes the offence of the passive bribery of a foreign public official, to which nationality and universal jurisdiction apply. Although the Slovak authorities provided strong policy arguments for the defence in relation to domestic bribery, the lead examiners doubted its usefulness for foreign bribery cases. The Working Group thus recommended that the Slovak Republic amend the Penal Code to exclude the defence in respect of the foreign bribery offence.

19 The Slovakian authorities highlight that the defence only applies to the giving and promising of a bribe to a foreign public official.
80. In Hungary, the defence of effective regret was repealed in relation to the bribery of foreign public officials following the Phase 1 examination. Such a defence has been retained for the offence of bribing a domestic public official where the briber: 1. confesses the conduct directly to the law enforcement authorities, 2. surrenders the advantage obtained through the offence, and 3. discloses the circumstances of the offence to the law enforcement authorities. The Working Group thought it prudent to monitor whether in practice cases of foreign bribery are not prosecuted due to the presence of the same factors that would trigger the defence of effective regret for the domestic bribery offence, and to consider the extent to which such factors might be considered mitigating circumstances in sentencing.

Conclusions

81. The Working Group has not been consistent in the treatment of the defence of “effective regret” so far, having recommended repeal of the defence of “effective regret” in the case of Bulgaria in Phase 1, and on the other hand in Phase 2 recommending monitoring of its application with respect to Greece where the defence still applies and in Hungary where it has been repealed but still applies to the domestic bribery offence.

82. It is also likely the case that, although the concept of “effective regret” does not constitute a defence in other Parties, it is at least taken into consideration at the sentencing stage. In addition, in some Parties there has been increasing emphasis on obtaining evidence from co-operative accomplices, sometimes in exchange for immunity from prosecution or a reduced sanction. However, the Phase 2 examinations have not so far routinely considered Parties’ policies in this regard. Thus, the Working Group might decide that it would be timely to address this issue on a systematic basis in all the Phase 2 examinations.

iii. Coercion by the foreign public official

83. Two Parties (Hungary and Italy) provide defences where the public official has put pressure on an individual to provide a benefit. The term “pressure” is used broadly here, as the defence under each Party’s law defines to some extent the nature of the pressure that must be exerted in order for the defence to be met. In Hungary, “duress”, which includes extortion pursuant to the Criminal Code, could be a defence or mitigating factor in sentencing for foreign bribery cases. The Hungarian authorities made it clear that the defence is very limited in scope, and only applies where the offender proves that the public official directly threatened physical or psychological harm to him/herself or his/her family. They were thus of the opinion that it would be difficult to establish such a defence in foreign bribery cases. The prosecutorial authorities were of the view that psychological coercion does not include the interposing of obstacles or delays in the normal performance of activities, or cases where the public official threatens that in the absence of a bribe he/she will not carry out his/her duties. In the absence of case law or guidelines to support the view of the prosecutors, the Working Group recommended follow-up.

84. Under Italian criminal law, an individual is not guilty of bribery if the public official abuses his/her functions or power to oblige or induce the individual to unduly give or promise money or other assets to the official or a third party. Instead, pursuant to article 317 of the Criminal Code, the public official has committed the offence of concussione, and the individual who provided the benefit is considered a victim. The defence of concussione which applies in relation to domestic and foreign bribery, was the subject of much discussion in the Phase 2 examination, and the Italian authorities did not all have the same view of the scope of the defence. One prosecutor stated that the defence arises when an individual provides an advantage to avoid harm or damage. An official from the Ministry of Justice stated that it applies when a public official’s conduct is “promotional” in nature. The Court of Cassation held that concussione applies when a public official has psychologically coerced a private individual, through, for instance, “the interposing of specious obstacles or delays in the normal performance of the administrative
activity”. The jurisprudence has also developed the notion of concussione ambientale, which applies in cases where the circumstances lead an individual to believe that an advantage must be provided to a public official either to avoid harm or to obtain something to which he/she is entitled. The Working Group commented that the defence of concussione is likely connected to the underlying requirement of an agreement between the briber and the public official, since a valid agreement does not exist where one party has entered it under duress.

85. The Working Group commented that the defence of concussione may play an important role in the prosecution of cases of bribing a domestic public official, because, for instance, the official will be prosecuted, and the primary objective of the domestic bribery offence is to preserve the integrity of the domestic public administration. On the other hand, these justifications do not apply to the offence of bribing a foreign public official. Prosecution of a foreign public official by the foreign country is not guaranteed. Moreover, the Convention primarily aims to preserve good governance and economic development and to prevent distortion of international competitive conditions. The Working Group recommended that Italy amend its legislation to exclude the defence of concussione from the offence of bribing a foreign public official.

Conclusions

86. Although the defences of “duress” and “concussione” seem restricted to Hungary and Italy respectively, the related issue of the link between the bribery of foreign public officials and extortion has not been explored in any depth. Although extortion is commonly considered to involve the wrongful obtaining of an advantage from another through actual or threatened bodily injury, it is possible that in some Parties extortion applies in less onerous circumstances.

i. Potential deficiencies that do not form clear trends across Parties

i. Nature of business sought by bribery

87. Pursuant to Article 1 of the Convention, the type of “business” covered by the offence of bribing a foreign public official is “business (or other improper advantage) in the conduct of international business”. Two Parties (Canada and Japan) interpret “business” in a manner that is unclear and might not be in compliance with the standard under the Convention. In the case of Canada, the relevant interpretation is provided under the implementing legislation, and in Japan it is provided by interpretive guidelines.

88. Pursuant to section 3(1) of the Canadian CFPOA, the offence of bribing a foreign public official applies in respect of a person who bribes “in order to obtain or retain an advantage in the course of business”. Section 2 defines “business” as “any business, profession, trade, calling, manufacture or undertaking of any kind carried out in Canada or elsewhere for profit” (emphasis added). Since the Convention does not distinguish between business for profit and business not for profit, the Working Group was concerned about the actual and intended application of this requirement. The Working Group noted that during the passage of the implementing legislation through Parliament, the Senate voiced concern about whether the term “for profit” meant to exclude non-profit corporations or transactions that are not for profit. However, the Senate accepted the assurances of the Minister of Foreign Affairs that the “for profit” requirement “fits the OECD Convention, which was to deal with business transactions”, and that if a non-profit organisation was “in the business of making a profit” it would be covered. During the on-site visit, some confusing information was provided about whether the “for profit” requirement pertains to the transaction or the business in question. The Working Group stated that the term “for profit” in the CFPOA is very unclear and thus there is a high risk of uncertainty about its application. The Working Group recommended Canada to consider amending the definition of “business” in the CFPOA in this respect.
89. Regarding Japan, the METI Guidelines interpret the term “international business transactions” as “acts concerning business repeatedly and continuously conducted for the purpose of profit” (emphasis added). Ministry of Justice officials clarified that it is not required that the illegal act is repeated and continuously conducted, but that the company in question has the intention to carry out the business activity, “which is any act conducted in a repeated or continuous manner in order to make a profit”. The Japanese authorities further clarified that a company engaging in its first business transaction would be covered, unless it did not conduct any further business. The Working Group felt that the interpretation by Japan of the meaning of “international business” raised two issues; the first regarding the requirement of an intent to conduct the business continuously, and the second regarding the requirement that the business is conducted for the “purpose of profit”. The Working Group recommended that Japan review, in consultation with the Ministry of Justice and other relevant authorities, the interpretation of “international business transactions” provided in the METI Guidelines and all other relevant guidance issued by the Japanese authorities, to ensure that they conform to the Convention and Commentaries on the Convention and do not mislead companies about the acts covered by the foreign bribery offence.

Conclusions

90. The interpretations by Canada and Japan of “business” under Article 1 of the Convention appear specific to those Parties, and there has not been any indication in the other Phase 2 examinations that the application of the offence would be limited by a requirement that the business be for profit or repeatedly and continuously conducted.

ii. Acts and omissions outside an official’s authorised competence

91. Article 1.4.c. of the Convention states that the term “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence”. Commentary 19 on the Convention clarifies that “one case of bribery which has been contemplated…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”. Issues arose in the Phase 2 examinations of four Parties (Belgium, Finland, Greece and Switzerland) concerning the coverage of those Parties’ foreign bribery offences in cases where the bribe is for the purpose of obtaining an act of a foreign public official that entails the use of the public official’s position outside the official’s authorised competence.

92. The issue arose in Greece beginning in Phase 1, when the Greek authorities stated that “according to legal doctrine and case law, an offence is committed solely when the official acts or refrains from acting in the performance of duties assigned to him by a law decree, regulation, circular or instruction; it is not committed when an official makes use of his position in excess of his powers”. The Greek authorities explained that the Greek courts would directly apply the Convention to cover acts outside an official’s authorised competence. In this context (as well as with respect to the definition of “foreign public official”), the Working Group recommended in the Phase 1 Report on Greece that the direct applicability of the Convention in domestic law be examined on a horizontal basis at a later stage. However, in Phase 2, the Greek authorities took the position that the foreign bribery offence covers bribery of an official who uses his/her position in excess of his/her powers and that thus it is not necessary to resort to the direct applicability of the Convention. In the absence of supporting case law, the Working Group recommended follow-up.

20 In Phase 1 the Greek authorities explained that generally recognised rules of international law, as well as international conventions (when they are ratified by statute) become an integral part of domestic Greek law and shall prevail over any contrary provision of the law.
93. In Finland, the Office of the Prosecutor General explained that in order to prove the offence of bribing a foreign public official it is necessary to prove that the bribe was intended for an official who had the “exact powers” to provide the act or omission that the briber intended to obtain. The Office of the Prosecutor-General conceded that it might be difficult to obtain the requisite evidence, in particular if the foreign public official’s government is not eager to pursue the case. The Working Group recommended follow-up of the application of the foreign bribery offence in this regard.

94. In Switzerland, the issue arose in the context of a ruling of the First Public-Law Chamber of the Federal Tribunal in 2003 on a request for mutual legal assistance concerning the bribery of a foreign (former) Head of State. In determining whether the requirement of dual criminality had been met, the Federal Tribunal commented that it doubted that the alleged acts of the former Head of State fell within the scope of the duties of the Head of State because he was alleged to have intervened in the management of a private firm in which the State held a majority of the subscribed capital. The Working Group therefore recommended follow-up of whether enforcement of the foreign bribery offence by the judicial authorities leads to a broad interpretation of the definition of the exercise of the official function of a Head of State.

95. With respect to Belgium, the foreign bribery offence under the Criminal Code applies in relation to three kinds of acts (or omissions) by the official: 1. acts forming part of his or her official duties (where the bribery is intended to induce the official to perform a lawful act), 2. acts in relation to his or her official duties (where the intended act is unlawful), and 3. omissions to do something within the scope of his or her official duties. Due to a recent decision of the Cour de Cassation (11 February 2003) in a domestic bribery case, in which the Court decided that the official must have performed “an act forming part of his official duties or his employment”, the examination team felt that there was potential for a similar interpretation of the foreign bribery offence. The Working Group thus recommended follow-up in order to verify that the exercise of the public official’s position is construed broadly.

iii. Meaning of “undue”

96. Article 1 of the Convention applies to the offer, promise or gift of “any undue pecuniary or other advantage”. Interpretation of the notion of what is “undue”, arose in the Phase 2 examinations of five Parties (Australia, France, Luxembourg, Norway and Switzerland), although the implementing legislation might use different terminology such as “without right” or “improper advantage”.

97. Under the French Criminal Code, the offer, promise or giving of advantages must be made “without right”. So far, this concept has only been considered indirectly in cases concerning the bribery of domestic public officials. It is the view of the Minister of Justice that “without right” means that the advantage is neither based on nor justified by a current legal text or court ruling. Thus, the requirement of “without right” might not apply where the law of a foreign public official’s country allows him/her to receive the advantage in question. According to the Public Prosecutor’s Office, there is a presumption of an absence of the right to an advantage. However, a trial judge believed that the prosecution would have to prove beyond a reasonable doubt that the foreign public official was not entitled to receive the advantage. The Working Group recommended follow-up of this issue.

98. The Criminal Code of Luxembourg also incorporates the notion of “without right”. The Luxembourg authorities state that the purpose of this requirement is to exclude from the scope of the foreign bribery offence the offering, promising or giving of any salary or advantage that is formally provided by statute. In the absence of concrete cases, the Working Group recommended follow-up.

99. In Norway, the relevant language was amended in 2003 from “favour” to “improper advantage”. The Preparatory Works on the amendment state that the new term does not import a different meaning, and provides examples and guidelines concerning what is proper and improper. Since the relevant article of the
Criminal Code covers not just foreign bribery, but also domestic bribery and bribery in the private sector, the Preparatory Works explain that what is improper may vary depending on the type of bribery. Criteria for determining whether an advantage is improper include the purpose of the advantage, and whether the employee’s principal was aware of the advantage. The determination of whether an advantage is improper must be made on a case-by-case basis. The Working Group recommended follow-up.

100. The foreign bribery offence under the Swiss Penal Code states that there are no grounds for prosecution if the advantage is “of minor value in conformity with socially accepted practices”. It is the position of the Swiss authorities that the purpose of this provision is to exclude from the purview of the offence advantages that are insignificant and deemed to present no risk of inciting public officials to act in a manner inconsistent with their duties or likely to influence them in the exercise of their discretion. They further stated that no payment for the purpose of obtaining a breach of duties or influencing the exercise of discretion could be regarded as a socially accepted practice. Four judgements concerning the bribery of domestic public officials have considered whether the payments in question constituted a socially accepted practice. In addition, the impact of the notion of “socially accepted practice” has been the subject of discussion in at least one cantonal prosecutor’s office. The Working Group recommended follow-up.

101. With respect to Australia, pursuant to subsection 70.2(1)(b) of the Commonweath Criminal Code, the foreign bribery offence requires that the benefit provided be “not legitimately due”. This provision also sets out the circumstances that should be disregarded in determining whether the benefit is “not legitimately due”. To a large extent, the circumstances to be disregarded are those similarly listed under Commentary 7 on the Convention. However, contrary to Commentary 7, consideration of: 1. the “results” of the conduct, and 2. the “alleged necessity of the payment”, is not prohibited. The Working Group thus recommended that Australia take appropriate measures to clarify and ensure that the foreign bribery offence cover such cases.

iv. Corruption pact

102. In three Phase 2 examinations (France, Italy and Luxembourg), an issue emerged regarding the need for an agreement or “corruption pact” between the briber and the foreign public official in order to prove the offence of bribing a foreign public official. The requirement of an agreement raises questions regarding compliance with Article 1 of the Convention, which covers offering and giving any undue pecuniary or other advantage regardless of the presence of an agreement between the briber and the foreign public official (or for that matter even knowledge on the part of the foreign public official), as well as proof of the existence of an agreement.

103. The French courts have required the existence of a “corruption pact” in order to convict in the bribery of domestic public officials. The French authorities clarified that a formal written contract is not needed—it is sufficient that the public official knew that the briber intended to obtain an act or omission in return for an unlawful advantage. Thus, at some level there must be a “meeting of minds” between the briber and the public official. Many of the participants in the on-site visit felt that due to the inclusion of the phrase “at any time” in the foreign bribery offence (i.e. “the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time”), the meeting of minds sealing the “corruption pact” could take place before or after the act or omission of the foreign public official takes place. However, the courts have not yet interpreted this phrase. With respect to the question of proving the

21 Commentary 7 states that “it is also an offence irrespective of, inter alia, 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”.

22 A “corruption pact” is also necessary to prove the offence of trading in influence.
existence of a “corruption pact”, participants in the on-site visit emphasised the challenges involved in obtaining such evidence from a non co-operative foreign country. Nevertheless, magistrates and the police stated that the existence of a “corruption pact” can be proved through different kinds of evidence, including witness statements and expert opinions. The Working Group recommended follow-up of whether the necessity of proving a “corruption pact” allows effective prosecution of the foreign bribery offence.

104. Under Italian law, the acceptance of a bribe by an official is an essential element of the offence of bribery, including the bribery of a foreign public official. The Italian authorities explained that due to the underlying requirement of an agreement as the basis of bribery, the practice has been to prosecute cases where there is no agreement with the offence of *istigazione alla corruzione* pursuant to article 322 of the Criminal Code.23 This offence covers the case where the official has not accepted (including a refusal of) the offer or promise, but not an offer or promise that was not received by the official. The Italian authorities explained that for article 322 to apply, the offer or promise must be “serious”, “potentially and functionally likely to induce the recipient to perform an action contrary to his official duties”, and of such a nature that it is likely to be accepted by the public official. The likelihood of the offer or promise achieving its purpose of being accepted by the public official must be assessed through an *ex ante* judgement involving consideration of the magnitude of the reward, the personal qualities of the recipient, his/her financial position, and other aspects of the individual case. The Working Group commented that the offence of *istigazione alla corruzione* therefore appears to take into account considerations prohibited under Commentary 7 on the Convention.24 The Working Group recommended follow-up.

105. Under the law of Luxembourg, it is also necessary to prove the existence of a “corruption pact” in bribery cases. Prosecutors and investigating magistrates who participated in the on-site visit believed that an amendment introduced to the Criminal Code in 2001, which extends the bribery offences (including the offence of bribing a foreign public official) to bribery *ex post facto*, has the effect of extending the offences to cases where the “corruption pact” was entered into after the act or omission of the official took place. Magistrates stated that the mere payment of a bribe would be sufficient for the purpose of proving the existence of a prior agreement. In the absence of case law on this issue, the Working Group recommended follow-up.

106. It is worth mentioning that in Belgium, the necessity of a “corruption pact” was eliminated by the implementing law of 10 February 1999. However, despite this amendment, the Working Group decided to follow up the application of the foreign bribery offence under article 246 of the Criminal Code, because it does not expressly cover the giving of a bribe (*i.e.* it only covers “the proposal of an offer, promise or advantage of any kind”).

**Conclusions**

107. *The Working Group has consistently recommended follow-up where a Party’s law or interpretation thereof requires an agreement between the briber and the foreign public official. In addition, it may be prudent to canvass whether Parties that do not require such an agreement will nevertheless require one in practice, in particular given that in the absence of proof of such an agreement it may be difficult to prove the purpose of the payment made to the foreign public official.*

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23 Prosecution under article 322 results in a reduction of the sentence by one-third.

24 Pursuant to Commentary 7 on the Convention, “it is also an offence irrespective of, *inter alia*, 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”.
v. Unclear elements under the legislation of individual parties

108. Agent-Principal Relationship: In the United Kingdom, the Prevention of Corruption Act 1906 (1906 Act), addresses the bribery of an agent in relation to his/her principal’s affairs or business. Given that foreign public officials may often accept (or solicit) bribes without the knowledge or acquiescence of their supervisors or managers, the Working Group was concerned about any possible impact of the agent-principal construct on the implementation of the Convention. The United Kingdom authorities stated that a defence based on the consent of the principal, has no basis in the United Kingdom law, and added that in 100 years of case law such a defence has never been raised. However, the Joint Committee on the Draft Corruption Bill recommended abandonment of the agent/principal concept on the ground that discarding it would extend the offence to bribes that are sanctioned by the agent’s principal, thus making the definition of corruption less complex.

109. Interstate Nexus Requirement: The United States FCPA requires proof of an interstate nexus (i.e. “use of the mails or any means or instrumentality of interstate commerce”) in respect of “issuers” and “domestic concerns” or their agents who bribe within the United States. Pursuant to the FCPA, “interstate commerce” includes trade, commerce, transportation, or communication among the Parties, or between any foreign country and any State or between any State and any place or ship outside the state, as well as the intrastate use of a telephone or other interstate means of communication. This requirement does not apply to non-United States nationals and businesses bribing in the United States, or to United States nationals and businesses bribing abroad, because such cases inherently involve an element of interstate commerce.25 The United States authorities are confident that the requirement of an interstate nexus does not pose any serious difficulty in proving the foreign bribery offence. Nonetheless, in one specific case, the SEC did not charge a company with the offence of bribing a foreign public official under the FCPA because the complaint did not allege use of the mails or any means or instrumentality of interstate commerce in furtherance of the bribe. Moreover, the Department of Justice concedes that at least the following two other cases would not be covered: 1. where an e-mail is not sent to the foreign public official until long after the bribe has been paid, even if it discusses the now-completed bribe, and 2. where a private mail carrier is used and it does not cross state lines. Given that nationality jurisdiction over the foreign bribery offence had not yet been tested at the time of the Phase 2 examination, the Working Group recommended follow-up. The United States maintains that, the remarks on the interstate nexus requirement are no longer relevant given the statutory amendments to the FCPA to introduce nationality jurisdiction, and that the validity and application of nationality jurisdiction under the FCPA has not so far been contested by the defendant in the one case brought to date that charges an offence utilising nationality jurisdiction.

110. Obtaining or Retaining Business: Pursuant to the United States FCPA, the purpose of bribing a foreign public official must be to obtain, retain or direct business to any person. Contrary to Article 1 of the Convention, the formulation in the FCPA does not also cover the obtaining or retaining of an “improper advantage in the conduct of international business”. When Congress debated the 1988 FCPA amendments, it rejected a House proposal that would have prohibited payments to procure “legislative, judicial, regulatory or other action in seeking more favourable treatment by a foreign government”. Then in 1998, Congress added the term “improper advantage”, but did not insert it where it would modify the business purpose test (i.e. the bribe must be for the purpose of “(iii) securing any improper advantage...in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person”). Apparently, United States enforcement officials were reluctant to modify the well-established language. In April 2002, the United States District Court (Southern District of Texas) addressed this issue, and adopted the narrower business purpose interpretation, mentioning that Congress had rejected the broader language

25 The basis of this distinction is the limited jurisdiction granted to the federal government in the United States Constitution "to regulate commerce with foreign Nations, and among the several States".
in the Convention. At the time of the Phase 2 examination, the United States Government had filed a notice of appeal in this matter. The Working Group recommended that the United States consider amendments to the FCPA to bring the language in this regard into compliance with Article 1 of the Convention. The Department of Justice confirmed that the United States would consider such amendments. Subsequently, the United States informed the Working Group in its oral follow-up report (December 2004) and written follow-up report (March 2005) that a decision of the U.S. District Court of Appeal had since confirmed that the existing language of the FCPA encompasses an “improper advantage”. The decision of the Court of Appeal is binding on courts within the Fifth Circuit and may be persuasive authority for other circuits.

2. Responsibility of Legal Persons for Foreign Bribery Offence (Article 2 of Convention)

a. The OECD Convention as a catalyst for reform on the responsibility of legal persons for criminal offences

111. Pursuant to 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”. Although the attribution of responsibility to legal persons for criminal offences is a well-entrenched principle in common law systems as well as in Japan, it is a relatively new concept for most Western European continental law countries, and is just beginning to emerge in many other countries, including those of Eastern Europe. Moreover, the law on the liability of legal persons for criminal offences is in a state of flux as many countries’ legal systems struggle to respond to the evolution of complex corporate decision-making structures.

112. The requirement under the Convention to establish the liability of legal persons for the bribery of foreign public officials has been an important catalyst for the development of Parties’ laws in this respect. It has prompted the majority of Parties that did not already have in place appropriate legal provisions, to establish the liability of legal persons for the foreign bribery offence (Greece, Hungary, Italy, Mexico and Switzerland). In addition, most of these Parties took the opportunity to establish the liability of legal persons for other offences as well (Hungary, Italy, Mexico and Switzerland). In Italy, the new legislative provisions also cover offences including false accounting, domestic bribery and extortion. In Mexico, criminal sanctions for legal persons also apply to violations of article 253 of the Federal Criminal Code regarding acts or omissions seriously affecting national consumption. With respect to Hungary and Switzerland, the new liability of legal persons is very broad in application—in Switzerland it applies to crimes or misdemeanours and in Hungary to any intentional breach of the Criminal Code.

113. In addition, the requirement under Article 2 of the Convention has generated recommendations by the Working Group for improving the effectiveness of several Parties’ standards for establishing the liability of legal persons for the foreign bribery offence. It has also generated recommendations regarding procedural aspects, such as the application of prosecutorial discretion and the link between proceedings against the natural person who perpetrates the foreign bribery offence and the legal person on whose behalf

26 The decision concerned payments made by defendants to customs officials in a foreign country in order to obtain a reduction in customs duties.

27 United States v. Kay, 359 F.3d. 738 (5th Cir. 2004).

28 However, it should be noted that the Swiss Criminal Code establishes two standards for applying liability, one much narrower in application than the other. The narrower standard applies to all criminal offences, whereas the broader one only applies to six specific offences, including the active corruption of domestic public officials as well as the bribery of foreign public officials.
the offence is committed. The substance of these recommendations is discussed later in this part of the study.

114. One Party (Greece) has amended its provision on the liability of legal persons in response to a recommendation of the Working Group in Phase 1 regarding the non-application of the implementing legislation to foreign bribery offences committed by certain legal persons. In 2002, Greece amended the legislation to cover “any legal entity or undertaking”. Another Party (Mexico) has submitted two bills to Parliament proposing several amendments that would have a significant impact on the liability of legal persons for foreign bribery offences. According to the Phase 2 Report on Mexico, these amendments would establish the criminal liability of legal persons, as opposed to the current system which imposes criminal sanctions but not criminal liability per se although the relevant provision is contained in the Federal Criminal Code. Specific procedures would be established for imposing criminal liability on legal persons.

b. Functional equivalence

115. Similar to the implementation of Article 1 of the Convention on the offence of bribing a foreign public official, Parties have employed various legislative approaches to implementing Article 2 of the Convention. This is a testament to the success of the principle of “functional equivalence” in the Convention, enabling Parties to tailor their methods of establishing the liability of legal persons for the foreign bribery offence to the limitations of their legal systems. However, Parties are subject to two restrictions. First, Commentary 20 on the Convention states that a Party is not required to establish criminal responsibility for foreign bribery if, pursuant to its legal system, criminal responsibility is not “applicable” to legal persons. Second, pursuant to Article 3.1 of the Convention, legal persons shall be subject to effective, proportionate and dissuasive criminal sanctions for foreign bribery, and pursuant to Article 3.2, in the event that a Party’s legal system does not provide for the criminal responsibility of legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions. How Parties have implemented Article 2 taking into consideration the first restriction is discussed in this part of the study.

116. Of the eighteen Parties examined so far in Phase 2 that had established the responsibility of legal persons for the foreign bribery offence by the time of their Phase 2 examinations, twelve had established criminal responsibility (Australia, Belgium Canada, Finland, France, Iceland, Japan, Korea, Norway, Switzerland, the United Kingdom and the United States) and six (Germany, Greece, Hungary, Italy, Mexico and Sweden) had established a non-criminal form of responsibility in order to satisfy the standard under Article 2 of the Convention. Three of the Parties that had employed non-criminal means established the administrative liability of legal persons for the offence (Germany, Greece and Italy) and three (Hungary, Mexico and Sweden) provided for criminal sanctions for legal persons, but did not consider the liability criminal per se. The Mexican authorities indicate that the federal authorities have presented to the Mexican Senate for approval, an initiative to establish the criminal liability of legal persons for most federal crimes.

117. In the case of Italy, the Italian Constitution restricts the application of criminal responsibility to natural persons, thus limiting Italy’s option in this respect to administrative liability. On the other hand, in 1998 the German Government debated whether to introduce criminal corporate liability, deciding, through the Commission on Reform of the Criminal Law Sanction System set up by the Federal Minister of Justice, not to introduce such liability. The German authorities explain that, in addition to the fundamental difficulties in considering legal persons as subjects of criminal law with regard to the principle of guilt, the main rationale for the decision was the absence of a practical need for such liability. It was the view of the Commission that the existing administrative fines under the Administrative Offences Act and additional
administrative sanctions and civil compensation effectively address the issue of corporate responsibility, and that the standards to attribute liability to legal persons are sufficiently broad.

118. At the time of the Phase 2 examination of Mexico, proposals were under discussion by the Mexican Parliament regarding the establishment of the criminal responsibility of legal persons for all offences including foreign bribery. Thus the Mexican legal system also appears to envisage such responsibility. On the other hand, the Phase 2 reports on Greece and Hungary do not touch on this issue, except that the report on Hungary indicates that the Hungarian authorities believe that the Convention leaves it open for national authorities to decide whether to implement Article 2 by prescribing criminal or administrative penalties for legal persons. The Working Group has not so far interpreted the extent of the obligation on Parties to establish the criminal liability of legal persons for foreign bribery where their legal systems do not preclude its establishment.

119. In the Phase 2 examinations, the Working Group has focussed on the effectiveness of the system for attributing responsibility to legal persons for the foreign bribery offence, regardless of whether the system is administrative or criminal. Thus the reports do not presume that the criminal form of liability is superior to administrative liability. Instead, in each examination the Working Group has assessed the effectiveness of the Party’s liability of legal persons by reviewing factors including the following: 1. the forms of legal persons covered; 2. the standard of liability, including whether the natural perpetrator must be identified, prosecuted or convicted; 3. the effectiveness of territorial and nationality jurisdiction; 4. the availability of mutual legal assistance for proceedings against a legal person brought by a Party within the scope of the Convention; 5. the application of prosecutorial discretion; and 6. investigative powers. These issues are discussed below under their respective headings.

Conclusions

120. The Phase 2 reports have provided an objective analysis of the various systems for establishing the liability of legal persons for the foreign bribery offence. By focussing on the effectiveness in practice of each Party’s system in this regard, the Working Group has not favoured one form of liability over another (i.e. administrative versus criminal liability). This has been especially important in terms of respecting the principle under the Convention of “functional equivalence”. Nevertheless, once there has been sufficient practice under the Convention, the Working Group might deem it expedient to assess whether one form of liability appears to favour a more effective treatment of foreign bribery cases involving legal persons, both in terms of enforcement activity, the level and forms of sanctions obtained, and the ability to provide and obtain MLA. Such an analysis could help Parties determine whether it would be advisable to revise their systems for the liability of legal persons, and would also be helpful for those Parties (and countries not party to the Convention) in the process of proposing draft legislation.

c. Parties that have not established the liability of legal persons

121. By the time of their Phase 2 examinations, three Parties (Bulgaria, Luxembourg and the Slovak Republic) had not complied with Article 2 of the Convention. At the time of the Phase 1 examination of Bulgaria in July 1999, the Working Group strongly recommended that its legislation be amended as soon as possible so as to provide for the responsibility of legal persons. At the time of the on-site visit in November 2002, a draft law had been prepared for the purpose of introducing the administrative liability of legal persons, including monetary sanctions, for active bribery, money laundering, trading in influence, organised crime and certain other offences committed by officials for their benefit, and were expected to be submitted to Parliament later that year. Nevertheless, the Bulgarian authorities seemed to continue to struggle with the notion of attributing responsibility to an artificial entity, which they viewed as incapable of possessing a culpable state of mind. In addition, the majority of Bulgarian officials that participated in
the on-site visit believed that it is always possible to pursue the natural person behind the illegal acts of legal persons.

122. The Working Group was of the opinion that Bulgaria had not given due consideration to the problems of attributing liability to specific individuals in increasingly large, decentralised, complex corporate structures where corporate operations and decision-making are diffuse. By not having provided for the liability of legal persons, Bulgaria might not be able to meet other related obligations under the Convention effectively. For instance, the Working Group raised the issue of whether the offence of money laundering would apply where the predicate offence of foreign bribery had been committed by a legal person (i.e. in a foreign jurisdiction that recognises the liability of legal persons for the predicate offence). The Working Group was also concerned that Bulgaria might not be able to provide MLA for proceedings within the scope of the Convention brought by a Party against a legal person, and that confiscation of the proceeds of bribing a foreign public official might not be available from legal persons. By the time that Bulgaria provided its oral follow-up report in January 2005, a Bill had been tabled in the National Assembly establishing the administrative liability of legal persons. In its written follow-up report given in October 2005, Bulgaria announced that the administrative liability of legal persons for criminal offences had been introduced by the National Assembly on 21 September 2005 by adopting the Law on Administrative Offences and Sanctions.29 The Bulgarian authorities explained that pursuant to the Law, sanctions shall be imposed on the legal person irrespective of the penal responsibility of the natural perpetrator.

123. At the time of the Phase 1 examination of Luxembourg in April 2001, Luxembourg indicated that a draft law introducing the principle of criminal liability of legal persons would be submitted to Parliament by the end of 2001. The Working Group urged the Luxembourg authorities to implement Article 2 of the Convention as soon as possible. By the time of the Phase 2 on-site visit in November 2003, Luxembourg had only progressed to the stage of preparing a preliminary draft law on the responsibility of legal persons in the Ministry of Justice. The Working Group therefore recommended that the Luxembourg authorities introduce the liability of legal persons for the foreign bribery offence within the year following the evaluation of Luxembourg under the Phase 2 procedures. By the time of the oral follow-up report given by Luxembourg in October 2005, Luxembourg continued to be in non-compliance with Article 2 of the Convention. The Luxembourg authorities stated that Luxembourg is committed to taking such a step, but that rather than adopting a complicated model the preferred choice is to integrate the liability of legal persons into the current criminal legal framework in a coherent way.

124. With respect to the Slovak Republic, in Phase 1 it had not established the liability of legal persons for the foreign bribery offence, but stated that it planned to introduce the criminal liability of legal persons by 1 January 2002. Since Phase 1, the Slovak government has attempted twice to establish the criminal liability of legal persons in the Penal Code, but the attempts failed before the legislature. Moreover, the lead examiners noted that at the on-site visit there was no support for it from legislators, legal practitioners, or criminal law academics, due to the belief that criminal liability derives from the fault of a natural person, and concerns that it raises issues of double jeopardy, since both the natural and legal persons would be punished for the same wrongdoing. Nevertheless, the Minister of Justice hopes to introduce the liability of legal persons through a stand-alone law, which was submitted to Parliament in September 2005. The Working Group “strongly” recommended that the Slovak Republic establish such liability without delay.

29 The Law provides for a monetary sanction of up to 1 million Leva (approximately EUR 500 000) but not less than the amount of the advantage obtained or that could have been obtained. Confiscation of the proceeds of crime is also provided for by the Law.
Conclusions

125. Two Parties (Luxembourg and the Slovak Republic) continue to be in non-compliance with Article 2 of the Convention; and globally many non-Parties have not established the liability of legal persons, including those that struggle with the notion of such liability. The Working Group could address the reasons for non-compliance by these Parties with the idea in mind that the problem is broader, and the broader problem could have a serious impact on the effective implementation of the Convention due to obstacles in obtaining MLA for foreign bribery offences committed by legal persons from countries that have not established the liability of legal persons.

d. Forms of legal persons covered

126. Eight Parties received comments from the Working Group concerning the scope of legal persons covered by the liability (Finland, France, Greece, Hungary, Italy, Mexico, Norway and the United Kingdom). Of these Parties, the majority of the Working Group’s comments concerned the application of the liability of legal persons to state-owned and state controlled companies (Finland, Italy, Mexico and Norway). Indeed, in the Phase 1 reports of two Parties (Mexico and Portugal), the Working Group agreed that the liability of state-owned and state-controlled companies for the foreign bribery offence is a horizontal issue that should be followed in Phase 2.

127. In Finland, the relevant authorities believed that for liability to apply, the company would probably have to be majority state-owned. The Working Group recommended that Finland provide guidance to law enforcement agencies and prosecutors clarifying the application of the relevant Penal Code provisions to legal persons in respect of the coverage of state-owned and state-controlled companies. In Norway, the criminal liability of enterprises applies to “a company, society or other association, one-man enterprise, foundation, estate or public activity”. Although state-owned and state-controlled enterprises are not expressly covered, the preparatory works state that they are and the Norwegian authorities believe that this issue is beyond dispute. Indeed, in a recent case, the city of Oslo was convicted for a breach of security norms resulting in an accident. The Working Group recommended follow-up of the application of the liability of legal persons, but did not make a specific recommendation in regard to the coverage of public enterprises.

128. In the case of Italy, the Legislative Decree on the administrative liability of legal persons applies to a wide range of entities, including companies and associations that do not have personality, but expressly excludes state, regional and local public authorities, other not for profit public bodies, and bodies “performing functions of constitutional significance”. The representative of the State Audit Court (Corte dei Conti) explained that companies audited by the Court “should” be covered, but conceded that this theory has not yet been tested. Moreover, in an ongoing foreign bribery investigation only the officers of a state-controlled company allegedly involved in the offence had been charged. The Ministry of Justice indicated that only the officers had been charged because the company had not received an advantage. The Working Group noted that Legislative Decree 231/2001 on the administrative liability of legal persons does not require that bodies receive an advantage, but only that they the offence is “committed in their interest or at their advantage”.

129. Similarly, Article 11 of the Federal Criminal Code of Mexico applies to “an association, corporation or enterprise of any kind”, but exempts “government institutions”. Proposed amendments to Article 11 do not extend the coverage to state-owned and state-controlled companies, due to restrictions under the Mexican Constitution. However, the Constitution has been amended to establish the Government’s liability for certain kinds of damages, including those incurred as a result of criminal conduct of government employees. The Working Group recommended that Mexico revise its current provisions on legal persons to ensure that state-owned and state-controlled entities are subject to liability
for the foreign bribery offence. In the oral follow-up report given by Mexico in October 2005, the Mexican authorities stated that the current Bill before Senate for the purpose of amending certain aspects of the liability of legal persons (discussed below) does not address this issue because of restrictions under the Constitution.

130. The Phase 2 examination of two Parties (France and Norway) raised the issue of the application of liability to companies after mergers. In France, the Court of Cassation held in June 2000 that when an offence is committed by a company that is subsequently absorbed by another, criminal responsibility cannot be transferred to the company performing the takeover. The French authorities thought that it would be possible to prosecute the acquiring legal entity if it had profited from the offence, but supporting case law was not available. In Norway, the Supreme Court has held that the merger of a company with a parent company that did not participate in illegal price fixing did not affect the liability of the company that committed the offence. A prosecutor from Norway indicated that in the case of corporate break-ups, the prosecutor would have discretion to decide which company to prosecute. The examination of Norway also raised the issue of the liability of foreign enterprises for the foreign bribery offence. The Norwegian authorities were not aware of any foreign enterprises having been sanctioned under the Criminal Code, and a prosecutor could foresee problems in practice with attributing liability to a foreign legal person.

131. With respect to the United Kingdom, the Interpretation Act 1978 states that any reference to a “person” in a statute or subordinate legislation includes “a body of persons corporate or unincorporated”. The United Kingdom authorities explained that although in theory unincorporated bodies such as trusts and partnerships can commit offences, in practice it would be difficult to prosecute them because in the absence of a theory of attribution the prosecutor must prove the individual guilt of each of the persons involved in the unincorporated enterprise. In the case of partnerships, the individual guilt of each partner must be proven. In the case of Greece, the relevant provision of amending Law 3090/2002 covers “any legal entity or undertaking”, which according to the Greek authorities includes all legal persons and enterprises. The Working Group recommended that Greece ensure that the liability of legal persons for foreign bribery is effective, particularly regarding the categories of persons whose acts may trigger the liability.

Conclusions

132. Given that the issue of coverage of bribery committed by state-owned and state-controlled companies has been raised in a number of Phase 2 reports, and that this issue was already identified as a horizontal issue in the Phase 1 reports of two Parties, the Working Group might want to consider, in light of emerging law enforcement activity, any trends regarding the application of the foreign bribery offence to such companies. The analysis could also look at Parties in which the bribery of state-owned and state-controlled entities does appear to be covered, due to the risk of a conflict of interest with the State in such prosecutions.

133. The issues regarding the application of the liability of legal persons after mergers and to foreign legal persons as well as to trusts and partnerships have not been raised systematically in the Phase 2 examinations. The findings of the Working Group concerning France and Norway in these respects therefore cannot be compared to the situation for other Parties. The Working Group might want to assess whether these issues are of sufficient importance to raise them as a matter of course in all Phase 2 examinations.
e. Standard of liability

i. Linkage of liability of legal persons to acts of management or person in senior position

134. In general, the law regarding the liability of legal persons for offences is in a state of flux. It is therefore not surprising that the standard of liability for legal persons was raised by the Working Group for all of the Parties that had established some form of liability of legal persons for the foreign bribery offence. With respect to 12 Parties (Canada, France, Germany, Greece, Hungary, Iceland, Italy, Mexico, Norway, Switzerland, the United Kingdom and the United States) the Working Group commented on the level of authority within the organisational structure of an entity that must be held by the natural person responsible for the offence.

135. The liability of legal persons for the foreign bribery offence is linked to the acts of management or someone in a senior position pursuant to the laws of eight of these Parties (Canada, France, Germany, Greece, Hungary, Italy, Mexico and the United Kingdom). For five of these Parties (Canada, France, Germany, Hungary and the United Kingdom), there appears to be a degree of coverage where management has delegated decision-making authority to lower level employees or subordinates, or the lower level employee or subordinate is under the direction or supervision of management. With respect to Germany, the written follow-up report given in June 2005 states that the Federal Ministry of Justice sent to the Länder a draft amendment (approved by the Länder) to the Guidelines for Criminal Proceedings and Administrative Fines Proceedings, which was expected to be passed in 2005. The amendment, which is intended to clarify the circumstances under which prosecutors should request the imposition of an administrative sanction on a legal person, states that prosecutors should consider prosecuting the dereliction of the duty of supervision by management of a legal person.30

136. With respect to Canada, at the time of the Phase 2 examination the standard of liability, commonly known as the “identification theory” was contained in the common law. The leading case on this principle was established by the Supreme Court of Canada in 1985, which held that liability for a criminal offence can be attributed to a company when an offence is committed by a “directing mind” or the “ego” of the company. The Court stated that the directing mind could be located in the board of directors, managing director, superintendent, manager or anyone else to whom the board of directors has delegated governing executive authority of the company. A company can be held liable for the act of a “directing mind” when the action taken by him or her was within the field of operation assigned to him or her, was not totally in fraud of the company, and was by design or result partly for the benefit of the company. In addition, where acts of the “ego” of the company are taken within the assigned managerial area, corporate criminal liability may be triggered regardless if there has been a formal delegation, the board of directors or officers of the company are aware of the activity, or there has been an express prohibition of the activity in question. The notion of the “directing mind” was qualified by two further court decisions. In 1993 the Supreme Court of Canada stated that the “key factor which distinguishes directing minds from normal employees is the capacity to exercise corporate policy, rather than merely to give effect to such policy on an operational basis”. In a decision of the Ontario Court of Appeal in 1997, the Court located the “directing mind” at a lower level of authority—i.e. the appellant was a case officer and director of operations of one of the management arms of the legal person.

137. In Canada, reform of the law on the criminal liability of legal persons was underway at the time of the Phase 2 examination. In 2002 the Government of Canada accepted the conclusion of the Standing

30 The draft amendment also provides two other circumstances under which an administrative fine should be requested for a legal person. These circumstances are linked to (i) the economic situation of the legal person, and (ii) the economic advantage acquired through the act.
Committee on Justice and Human Rights that the Government table in the House of Commons legislation to deal with the criminal liability of corporations, officers and directors. The proposal could be summarised as follows: liability would apply where a senior person with policy or operational authority (i) commits an offence personally, (ii) has the necessary intent and directs the affairs of the corporation in order that lower level employees carry out the illegal act, or (iii) fails to take action to stop criminal conduct of which he or she is aware or wilfully blind. In June 2003, the Minister of Justice tabled Bill C-45 in Parliament, which appeared to embody the Standing Committee’s proposals. The Working Group welcomed this initiative, believing that the reform would significantly improve the effectiveness of the liability of legal persons in Canada, and recommended follow-up of the revised law. Canada has since announced that the new law entered into force in March 2004.

138. The law in the United Kingdom on the criminal responsibility of legal persons was based on two principles, the longstanding “identification principle” originally adopted in 1972 (and subsequently adopted and modified in the Canadian courts) in a decision of the House of Lords, and a newer test set out in a Privy Council decision of 1995. The “identification theory” provides that the acts and states of mind of certain corporate organs or officers are the embodiment of the company (i.e. the “directing mind”) when acting in the company’s interests. Pursuant to this principle, corporate criminal liability is restricted to the “acts of the Board of Directors, Managing Director and perhaps other superior officers of a company who carry out functions of management and speak and act as the company”. Pursuant to the newer test, attribution of liability to the legal person should depend on the purpose of the provisions creating the relevant offence rather than a “metaphysical” search for a directing mind. The Working Group questioned whether it would be difficult to identify the purpose of an offence, and was not confident that the new test would effectively address offences committed by large companies with decentralised operations or operations away from the corporate head office.

139. The French Court of Cassation held in 2001 that the delegation, or even sub-delegation, of powers to an employee or subordinate is sufficient for the holder of such power to be treated as a representative of the legal person. The examination team explored to what extent companies would therefore not be liable for the acts of employees and subordinates. Some of the French magistrates indicated that the employee or subordinate would have to have acted on the orders or with the authorisation of a company organ or representative, who would be considered a co-perpetrator or accomplice. On the other hand, some of the magistrates believed that the mere fact that the company board knew of the offence would be enough to trigger liability. In Germany, the Administrative Offences Act establishes the liability of legal persons for offences where any “responsible person” acting for the management of the company commits a criminal offence, including foreign bribery, or an administrative offence, including the violation of supervisory duties. The German authorities explained that the violation of supervisory duties would, for example, occur where the bribery is committed by an ordinary employee acting within the legal scope of the activity of the legal person and the bribery could have been prevented by the “lead/responsible person” fulfilling his or her supervisory or control obligations. In addition, for liability to be triggered either the duties of the legal entity must have been violated, or the legal entity must have gained or was supposed to have gained a “profit”.31

140. In Hungary, the liability of the legal persons for the foreign bribery offence can be triggered where bribery is committed by the following: 1. one of the members or officers of the legal entity entitled to manage or represent it, or a supervisory board member and/or their representatives acting with the legal scope of activity of the legal persons; 2. a member of the legal entity or an employee acting within the legal scope of the activity of the legal person, provided that the bribery could have been prevented by the chief

31 The German authorities explained that “profit” means any more favourable structuring of assets, including an indirect advantage such as an improved competitive situation.
executive fulfilling his or her supervisory or control obligations; or 3. a third party individual, provided that the legal entity’s member or officer entitled to manage or represent it had knowledge of the facts. The Working Group recommended that Hungary consider the following: 1. defining more clearly and broadly, than by reference to a “chief executive”, the class of persons whose failure to supervise can trigger the liability of the legal person; and 2. establishing minimum standards with regard to appropriate supervision by such a person in order to avoid liability. In Italy, Legislative Decree 231/2001 establishes the liability of the legal person for foreign bribery committed in its interest or advantage by the following persons: 1. those in senior positions carrying out “activities of representation, administration, or management of the body or of one of its organisational units having financial and operational autonomy”; or 2. persons who are under the direction or supervision of one of the aforementioned.

141. With respect to the laws of two Parties (Greece and Mexico), the liability of legal persons for the foreign bribery offence appears to be only triggered by acts of management or someone in a senior position. In Greece, Law 2656/1998 imposes administrative sanctions against a legal person for foreign bribery upon the “fault of its managers”. Greece states that the term “management” covers the statutory organs of the legal entity, as stipulated in the law and its own constitution. The Working Group recommended that Greece ensure that the liability of legal persons for foreign bribery be effective, particularly regarding the categories of persons whose acts may trigger the liability of the legal person. In Mexico, a “member or representative” must have committed the offence. The Mexican authorities state that a “member or representative” could be any employee of the legal person, but the preparatory works on the law only refer to “natural persons who embody the management instances”. The Working Group did not specifically target this issue in its recommendation to Mexico to revise the current provisions on legal persons.

142. With respect to the laws of four Parties (Iceland, Norway, Switzerland and the United States), the liability of the legal persons for the foreign bribery offence is not linked to the acts or omissions of management or persons in senior positions. In Iceland, Act 144/1998 on the Criminal Responsibility of Legal Persons on account of Bribery of Foreign Public Officials applies to bribery committed by an “employee or staff member” of a legal person, who bribes in order to “secure or maintain business or other improper advantage for the benefit of the legal person”.

143. Similarly, the Norwegian law does not require the direct involvement of a leading person of the enterprise. Thus the liability could be triggered by acts of an ordinary employee as long as the enterprise could have prevented the offence through guidelines, instructions, training, controls or other measures. The United States employs the respondeat superior theory, which holds a legal person accountable for the unlawful acts of its officers, employees, and agents, when one of the foregoing acts: 1. within the scope of his or her duties; and 2. for the benefit of the corporation. Thus a legal person is generally liable for the acts of its employees, regardless of the participation, acquiescence, knowledge or authorisation by higher level employees or officers, unless their acts are completely outside the employee’s assigned duties or are contrary to the corporation’s interests.

144. It should be noted that already in the Phase 1 reports of two Parties (Canada and Greece) the Working Group recognised that varying standards of liability are evolving across the Parties and considered whether the effective implementation of the Convention will depend, in part, on all Parties enacting equivalent thresholds for corporate liability. The Working Group thus recommended a horizontal analysis of the standards for the liability of legal persons in all Parties to the Convention.

Conclusions

145. In view that the standard of liability for legal persons is largely in a state of flux across the Parties, and that the Convention has been an important catalyst for the general development of this kind
of liability, it might be useful for the Working Group to follow closely whether certain standards are more effective than others in addressing foreign bribery perpetrated by legal persons. In addition, a horizontal analysis of this type was recommended in two Phase 1 reports. Since it is beneficial to the fight against foreign bribery for non-Parties to meet the standards under the Convention, in part to ensure that they can provide effective MLA, sharing the work in this respect could also be useful for non-Parties contemplating the establishment of the liability of legal persons.

ii. The liability for bribes that benefit related legal persons

146. The issue of the liability of legal persons for bribes that benefit related legal persons was raised in the Phase 2 examinations of three Parties (Italy, Japan and Korea). The issue arose in Japan and Korea in part because of the predominance of enterprise groups or conglomerates in those Parties. Pursuant to article 15 of the Japanese Unfair Competition Prevention Law, a legal person is liable for foreign bribery where the bribe was made by a natural person “with regard to the business of the legal entity”. This formulation seems to require that the bribe benefit the legal person from which it emanates, meaning that bribes for the benefit of related companies, such as subsidiaries, holding companies, or members of the same industrial structure (business conglomerate) might not be covered.

147. Similarly, pursuant to article 4 of the Korean Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA), liability of the legal person is restricted to the acts of a representative, etc., of a legal person “in relation to its business”. In addition, the Explanatory Manual on the Convention and the FBPA, published by the Ministry of Justice, states that “it should be clear that fundamentally, the fact that bribery has been committed concerning the affairs of a legal entity leads to criminal responsibility of the related legal body”. The Working Group was therefore concerned that bribes for the benefit of a member of the same enterprise group would not be considered a bribe in relation to the company that makes the bribe.

148. Under the Italian Legislative Decree 231/2001, the offence must be committed in the interest and to the advantage of the legal person. Pursuant to article 5, a legal person is not liable if the principal offender acted in the interest of himself or herself or a third party. The Working Group therefore stated that it remains to be seen whether the Legislative Decree imposes liability on a body when a principal offender bribes to the advantage of a subsidiary or vice versa.

iii. Issues pertaining to individual parties

149. Pursuant to the Hungarian Law on Criminal Measures against Legal Persons, in order for a legal person to be liable for an intentional offence in the Criminal Code, the perpetration of the act in question must have been “aimed” at or have “resulted in the legal entity gaining a financial advantage”. The Working Group was concerned that liability might not apply where the financial gain is obtained by an affiliate (e.g. parent or subsidiary), although judges at the on-site visit indicated that they might be willing to sanction legal persons in such cases. The Working Group recommended that Hungary amend the law on the liability of legal persons to eliminate, with respect to the bribery of foreign public officials, the requirement that the bribe must have been aimed at or resulted in the gain of a “financial advantage” to the legal person.

32 “Financial advantage” is defined as “any object, right of pecuniary value, claim or preference...as well as cases where the legal entity is exempt from expenditure according to an obligation arising from a rule of law or contract or according to the rules of reasonable business management”.
150. Under the Mexican law it is necessary that the foreign bribery offence is committed “with means provided by the legal person…for such purpose”. The Working Group viewed this requirement as possibly necessitating proof of at least an authorisation by the management of the legal person to use the means of the legal person to bribe the foreign public official, which could be difficult to prove. In addition, this requirement appears to preclude the liability of the legal person where the means for bribing is provided by a related legal person (e.g. subsidiary or parent). The Working Group recommended that Mexico revise the current provisions to eliminate the requirement that the offence be committed “with means provided by the legal person…for such purpose”. Mexico informed the Working Group in its oral follow-up report in October 2005 that a Bill currently before the Senate would remove the language “for such purpose”.

151. In Switzerland, pursuant to article 100quater of the Criminal Code, liability of the legal person is triggered when the offence is “committed within an enterprise in the pursuit of its commercial activities in conformity with its objects”. The Working Group considered that this requirement might preclude liability where a representative of an affiliate makes the undue payment, or the legal person uses an external agent for the purpose of bribing a foreign public official. The Swiss authorities indicated that all that is required is a hierarchical or organisational link between the individual perpetrator and the legal person, and that, thus, for instance, bribery perpetrated by external agents would be covered. With respect to the requirement that the bribery is in pursuit of the legal person’s “commercial activities in conformity with its objects”, judges and prosecutors at the on-site visit stated that this is intended to exclude private acts from the ambit of the liability. However, this interpretation has not yet been confirmed by case law.

152. Under Chapter 36, section 7 of the Swedish Penal Code, “corporate fines”33 may be applied where the offence entails a “gross disregard for the special obligations associated with the business activities” or is otherwise of a “serious kind”. The Swedish Phase 2 Report notes that only one court decision interprets the standard of liability under section 7, and that it pertains to a case based on acts of “gross negligence”, which is punishable under the Chemical Products Act. In light of the absence of corporate fines for bribery offences in Sweden, and the assessment of the lead examiners that corporate fines have not been applied routinely to intentional crimes, the Working Group recommended that Sweden draw to the attention of the relevant authorities that corporate fines are mandatory and that they apply to intentional crimes. Moreover, since the Ministry of Justice is considering a proposal for the reform of the system of corporate fines34, the Working Group recommended that the Swedish government complete the review as a matter of priority, and include in its reform a review of whether there are any legal or practical obstacles to imposing corporate fines.

153. Pursuant to article 5 of the Belgian Criminal Code, a legal person is criminally liable “for offences that are intrinsically connected with the attainment of (its) purpose or the defence of (its) interests, or for offences that concrete evidence shows to have been committed on its behalf”. The lead examiners were concerned that the standard of liability does not address the intent to be imputed to the legal person. In addition, the travaux preparatoires do not clarify this issue, due to the following two seemingly inconsistent statements: 1. the intent of the legal person is a question of fact to be assessed by the judge, and 2. it is necessary to show that the intention is also present at the management level. The lead examiners further noted that the term “management” is not defined for this purpose. Given that the Minister of Justice has reconstituted a working group to propose amendments for the revision of the criminal liability of legal

33 Under the Swedish Penal Code, a “corporate fine” is included as a “special legal effect of crime”.
34 The main proposals for the reform of the system on corporate fines in Sweden are: 1. to cover “minor offences”; 2. extend corporate fines to cases where an offence has been committed by a person in the legal person holding a leading position or with special supervisory responsibilities; and 3. to increase the maximum fine. Sweden also informed the Working Group that the Ministry of Justice, when reviewing the system on corporate fines, will consider establishing the criminal liability of legal persons.
persons, the Working Group recommended that in revising the law, the Belgian authorities clarify how the mental element is to be attributed to the intentional offence of foreign bribery.

154. The Phase 2 Report on Australia comments that section 12 of the Commonwealth Criminal Code, which came into effect in late 2001, establishes a progressive and ambitious organisational model for the criminal liability of legal persons. Pursuant to section 12, criminal liability is attributed to legal persons where the board of directors or a high managerial agent, intentionally, knowingly or recklessly carries out the conduct in question, or expressly, tacitly or impliedly authorises or permits it to occur. In addition, the legal person is criminally liable for a “corporate culture” conducive to the conduct in question. Since the new provision came into force, its application has essentially been limited to regulatory offences such as those resulting in environmental damage, and no legal person has been prosecuted for domestic bribery. The Working Group recommended follow-up of section 12 once there has been adequate time for the development of case law and practice in this regard.

iv. Requirement of identification, prosecution or conviction of natural perpetrator

155. Twelve of the Phase 2 reports (Finland, France, Germany, Greece, Hungary, Italy, Japan, Korea, Mexico, Norway, Sweden and the United Kingdom) discuss whether there is a requirement for the identification, prosecution or conviction of the natural perpetrator in order to proceed against or sanction the legal person. In eight of these examinations (Finland, Hungary, Italy, Japan, Korea, Mexico, Sweden and the United Kingdom), the issue was related to a provision in the Parties’ laws on the liability of legal persons. In the other four examinations (France, Germany, Greece and Norway), the issue was related to the absence of bribery cases where the legal person had been convicted independently of proceedings against the natural perpetrator. The Working Group has routinely emphasised this issue in the Phase 2 examinations because of its concern that increasingly complex corporate decision-making does not lend itself to the identification of specific individuals involved in corporate wrongdoing, in particular due to the collective and sometimes decentralised nature of such decision-making. In these circumstances, proceeding against the legal person alone may provide a convenient and fair alternative to prosecuting a mere agent of the corporation or low level employees who may have bribed due to corporate pressure.35

156. The laws of three Parties (Hungary, Mexico and the United Kingdom) require a direct link between the liability of the natural perpetrator and the legal person. In Hungary, article 3(1) of Act CIV of 2001 states that measures can be applied against a legal entity “if the court has imposed punishment on the person committing the criminal act”, unless the perpetrator is not punishable due to mental illness or death. The Hungarian authorities indicated that the process for the liability of legal persons allows for the commencement of proceedings against a legal person provided that an investigation and prosecution against the natural perpetrator has already been initiated. The Working Group did not consider such a regime to be in compliance with Article 2 of the Convention, and recommended that Hungary amend the law to eliminate, in respect of foreign bribery offences, the requirement that a natural person be convicted and punished as a prerequisite to the liability of the legal person.

157. Pursuant to the Mexican Federal Criminal Code, a member or representative of the legal person must have been convicted of the foreign bribery offence in order to impose a sanction on the legal person. Under the draft law, which was under discussion in Parliament at the time of the Phase 2 examination, the conviction of the natural person is still necessary. The Working Group recommended that Mexico revise the current provision in order to eliminate the prerequisite of the conviction of a natural person. In the oral follow-up report given by Mexico in October 2005, the Working Group was informed that a Bill currently

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35 The rationale of the Working Group for looking at this issue is discussed in the Phase 2 reports of Germany, Japan and the United Kingdom.
before the Senate eliminates: 1. the requirement of a conviction of a natural person in order to sanction a
legal person; and 2. provides that the sanction for the legal person not be dependent on the sanction for the
natural person. Under the law of the United Kingdom, the conviction of the natural perpetrator is not
necessary in order to convict the legal person, but a culpable act and intent by a single representative of the
legal person must be proved. It is not possible to establish a corporate mens rea by aggregating the states of
mind of different people in the legal person.

158. With respect to four Parties (Finland, Italy, Japan and Korea), although the law does not
expressly require a direct link between the liability of the natural perpetrator and the legal person, such a
link appears to be implied. In Italy, article 8(1) (a) of Legislative Decree 231/2001 states that a body may
be held liable even if the principal has not been identified or is not indictable because, for instance he or
she has fled or died. However, the process provided under the Legislative Decree for the administrative
liability of legal persons does not contemplate separate proceedings for the legal person. Instead, article 38
contemplates that the body and the natural person will generally be tried together.36

159. In Finland, Chapter 9 of the Penal Code states that a legal person cannot be sanctioned where the
offender cannot be sentenced due to the expiration of the statute of limitations, but that in any case the
minimum period shall be five years. The Phase 2 Report on Finland addresses this requirement as an issue
respecting the statute of limitations applicable to proceedings against legal persons. However, the link
between the statute of limitations for natural and legal persons appears to imply that the natural perpetrator
must at least be identified. On the other hand, the Finnish Penal Code also stipulates that a "corporate fine
(punishment applicable to legal persons) may be imposed even if the offender cannot be identified or
otherwise is not punished".

160. Article 15 of the Japanese UCPL on the liability of legal persons, which is entitled “Dual
Liability”, states that the legal person shall be liable to a fine “in addition to” the liability of the natural
person to a sanction under Article 14 of the UCPL. The Japanese authorities explained that the language
“in addition to” appears quite often in Japanese legislation and does not introduce the notion of dual
liability. Similarly, pursuant to the Korean FBPA, a legal person shall be subject to a fine penalty “in
addition to the imposition of a sanction on the actual performer”. A representative of the Supreme Public
Prosecutor’s Office stated that the actual perpetrator must be identified, and that there are the following
two options for proceeding: 1. the court makes a finding of fact that the natural person bribed the foreign
public official without proceeding against the natural person; or 2. the natural person is proceeded against,
and the legal person is only found guilty if the natural person is convicted and sanctioned, unless
imposition of a sanction on the natural person is not possible for procedural reasons. The Working Group
noted that the foreign bribery case that had been adjudicated by the time of the Phase 2 examination
resulted in a conviction of the natural perpetrators as well as the legal person.

161. With respect to the Parties for which the link between the liability of the natural perpetrator and
the legal person related to the practice as opposed to constraints under the law, the Working Group
identified procedural as well as evidentiary reasons for the link. In France, despite the non-identification of
the natural perpetrator, a legal person was prosecuted in 2000 for forging attestations in the course of a
judicial inquiry. In this case there was clear evidence that the offence had been committed by one of the
company’s organs. French magistrates agreed that the identification of the natural perpetrator is an
important pre-condition for prosecuting the legal person, although such identification is not required under
the law.

36 Article 38(1) states that proceedings against the legal person shall be consolidated with the criminal
proceedings against the offender, and article 38(2) provides the only circumstances under which
proceedings for a legal person shall be separated from those against the natural person.
162. In Germany, the issue arises because under the Administrative Offences Act and the Code of Criminal Procedure, administrative fines against legal persons are in principle imposed in the course of criminal proceedings against natural persons. In addition, the German authorities emphasised that the imposition of administrative fines under the Administrative Offences Act is an “incidental consequence” of the offence of the natural person. In practice, no proceedings against a legal person had been instituted for domestic bribery offences without having proceeded against the natural perpetrator, but there is no disagreement in practice and in academia that independent proceedings against legal persons apply to bribery cases under the same conditions as other offences. Pursuant to section 30(4) of the Administrative Offences Act, legal persons are exempt from liability where the natural perpetrator cannot be prosecuted for “legal reasons”. However, the Federal Court of Justice has held that it is possible to sanction legal persons in separate proceedings where the natural perpetrator is not prosecuted due to, for instance, the exercise of prosecutorial discretion, or because he or she died or cannot be identified. In practice “legal reasons” has only covered expiry of the statute of limitations for the natural perpetrator. In addition, the German authorities explain that the law does not require identification or conviction of the natural person in the high managerial post in the legal person whose act or negligence triggers the liability. The only requirement in this regard is that it is proved that someone in the leading circle of the entity committed the offence or violated the supervisory duty. Such application has been established in practice in fields other than bribery, including the field of environmental damage. Also, Germany cites a case of fraud where the Court mentioned in obiter that the natural person need not be identified for the purpose of punishing a legal person.

163. Under article 5 of the Greek Law 2656/1998, separate proceedings against the legal person are contemplated. However, by-laws or decrees have not been issued to establish an institutional framework for this purpose, with the result that in practice the Financial Crime Squad (SDOE) will only proceed against a legal person upon conviction of the natural person. In Norway, the relevant authorities were absolutely certain that there are no procedural obstacles to prosecuting a legal person in the absence of the identification of the natural perpetrator. In addition, an investigation on charges of corruption had been initiated against a company alone. However, supporting case law was not available.

164. In the case of Sweden, the prosecutors who participated in the on-site visit stated that, although the legal and natural persons are usually proceeded against together, it is possible to proceed against the legal person independently, including cases where no natural person has been identified. The Phase 2 Report remarks that there have been three cases in which a legal person was prosecuted in the absence of proceedings against the natural person. However, these cases involved environmental and safety crimes. The Working Group did not make a specific recommendation in this regard.

Conclusions

165. Having regard to the number of Parties for which the identification and/or prosecution/conviction of the natural person was raised as an issue in relation to the liability of legal persons, it appears that it might be prudent for the Working Group to follow-up emerging enforcement actions in this regard. In addition, even where a Party’s laws clearly do not require the identification of the natural person, it might be advisable to follow up whether in practice the foreign bribery offence can be effectively enforced in relation to the legal person involved in the absence of identifying or prosecuting/convicting the perpetrator(s). Since one of the main purposes of legal person liability is to address “aggregate behaviour” and complex, decentralised decision-making systems, it is vital that the liability of legal persons for the purpose of implementing the Convention be workable in the absence of the identification, etc. of specific individuals.
f. **Effect of internal compliance programmes on liability or sanctions**

166. The Phase 2 examinations of six Parties (France, Italy, Korea, Norway, Switzerland and the United States) discuss the effect of proper supervision or internal compliance programmes on the liability of legal persons for the offence of bribing a foreign public official. For two of these Parties (Italy and Korea), a complete defence to the liability of legal persons applies where the relevant criteria are satisfied. In the case of Norway, an implied defence appears to apply in similar circumstances. In the case of Switzerland, punishment of a legal person is linked to the absence of internal compliance measures. With respect to the two other Parties (France and the United States), such considerations might mitigate the severity of the sentence upon conviction.

167. Pursuant to article 6(1) of the Italian Legislative Decree 231/2001, a body is not liable for an offence committed by a person in a senior position if it proves the following: 1 before the offence was committed the body’s management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that occurred; 2. the body had set up an autonomous organ to supervise, enforce and update the model; 3. the autonomous organ had sufficiently supervised the operation of the model; and 4. the natural perpetrator committed the offence by fraudulently evading the operation of the model. Article 6(2) outlines the essential elements of an acceptable organisational model, including: 1. identification of activities that may give rise to offences; 2. procedures for preventing the offences; and 3. a disciplinary system for non-compliance. When designing an organisational model, a body may rely on codes of conduct drafted by business associations and approved by the Ministry of Justice, but the existence of such a code is not conclusive proof of a model’s sufficiency for the purpose of applying the defence.

168. Section 4 of the Korean FBPA states that a legal person is not subject to a sanction for the bribery of a foreign public official if it “has paid due attention or exercised proper supervision to prevent the offence”. The FBPA does not expand upon what constitutes “due attention” or “proper supervision”. A representative of the Supreme Prosecutor’s Office explained that the exemption is triggered when a director or “superior person” exercises due attention. The Explanatory Manual issued by the Ministry of Justice states that “it is difficult to standardise the extent of attention or supervision in deciding whether a legal person can be exempted from criminal punishment”. It suggests that a company could be exempted from liability if management had in place a policy prohibiting bribery, in the form of a code of conduct, a website posting, or contained in the contract of employment, and that if bribery occurs regardless of “this kind of management” it is an “individual scandal” that is unrelated to the company. The Korean authorities indicated that the information in the Explanatory Manual is not meant to suggest ways of escaping liability, but rather to provide examples of how Korean companies can prevent foreign bribery. The Phase 2 Report on Korea comments that the exemption could be tightened so that a company is required to prove that it operated a full compliance programme. The Working Group also questioned the appropriateness of the exemption in relation to cases where a person with operational and management authority (as opposed to a person under his or her supervision) commits the bribery offence personally, orders a lower level employee to do so, or fails to take steps to stop bribery activity of which he or she is aware.

169. Section 48b of the Norwegian Penal Code prescribes discretionary grounds for not imposing a penalty on legal persons. One of these grounds is whether the enterprise could have prevented the offence by guidelines, instruction, training, control or other measures. The Working Group recommended follow-up of the effectiveness of the criminal liability of legal persons in general. The Norwegian authorities point out that although at the time of the Phase 2 examination, no legal person had been held criminally liable for acts of corruption, statistics for the period 1997 to 2002 disclosed that a total of 1 516 fines (conviction or optional fines) had been imposed on legal persons for offences in general.
170. Pursuant to article 100quarter (paragraph 2) of the Swiss Penal Code, an enterprise shall be punished independently of the punishment of any individual (including for the foreign bribery offence) “if it must be criticised for having failed to take all reasonable and necessary organisational measures to prevent such an offence”. The Swiss authorities explained that this means that consideration must be given to the general due diligence obligation that extends to the overall activity of the enterprise. They further explained that the courts would need to consider the following: 1. what another comparable enterprise would have done; 2. what instructions were given; 3. the internal controls in place; and 4. the overall organisation of the enterprise. The Working Group recommended follow-up taking into consideration the notion of defective organisation.

171. In France, there was uncertainty as to whether an internal company policy for refusing bribes involving, for instance, an internal warning procedure, might exonerate the legal person or at least reduce the penalty. The Working Group recommended general follow-up of the effectiveness of the criminal liability of legal persons in France. With respect to the United States, under the applicable sentencing guidelines, the sanction for bribing a foreign public official could be mitigated if an “effective” compliance programme had been in place. According to the United States authorities, the essential features of a good compliance programme are a strong commitment from senior management in creating and communicating a “compliance culture”, regular and effective training and consistent enforcement. Specific elements of a compliance programme might include internal controls coupled with a review by the internal audit committee, a policy prohibiting discretionary payments and training on the main provisions of the FCPA.

**Conclusions**

172. Since internal compliance programmes can play a role to varying degrees in either mitigating sanctions or releasing legal persons completely from liability, they represent a significant issue in the liability of legal persons for the foreign bribery offence. The Working Group might therefore deem it expedient to compare the impact of internal compliance programmes on the liability of legal persons for the foreign bribery offence, once there has been sufficient practice. In addition, because internal compliance programmes play such a prominent role in enforcement actions, corporate management is increasingly establishing such programmes, and sometimes including anti-foreign bribery elements in them. The Working Group might therefore consider it useful to do a comparative analysis of such programmes and identify the key elements of an effective corporate compliance programme for the purpose of detecting and preventing the bribery of foreign public officials.

**g. Powers of investigation in relation to legal persons**

173. The powers to investigate foreign bribery offences committed by legal persons were discussed in the Phase 2 examinations of three Parties (Germany, Greece and Italy). Although the liability of legal persons in Germany is administrative in nature, the proceedings for attributing liability to legal persons is criminal, which means that full investigative powers, including coercive powers, are available. The German authorities explained that these powers would be available to investigate a legal person for the foreign bribery offence, even if the natural perpetrator was not also under investigation. However, practical examples were not available, and the law does not expressly refer to such a possibility. The Greek authorities confirmed that the Financial Crime Squad (SDOE) has the same investigative powers in relation to legal and natural persons, pursuant to the enabling statute of the SDOE.

174. Pursuant to articles 34 and 35 of the Italian Legislative Decree 231/2001, the Code of Criminal Procedure and all procedural provisions concerning the defendant apply to legal persons to the extent that

37 This sentencing guideline applies to all federal crimes, including the bribery of domestic public officials.
they are compatible. However, the issue arose in Phase 2 whether investigatory powers can only be applied to legal persons in connection with investigations of natural persons. The Working Group raised this question due to the absence of an express provision in the Legislative Decree providing the authority to conduct investigations of legal persons. Moreover, two key procedural provisions under the Legislative Decree pre-suppose that a natural person has been identified and charged. The Guardia di Finanza and the Ministry of Justice believed that all investigative powers available for natural persons are available for legal persons. In this respect, the Working Group recommended follow-up of whether Italy can effectively prosecute legal persons in the absence of proceedings against natural persons.

h. Discretion to prosecute or impose sanctions on legal persons

175. Five Phase 2 examinations identify as an issue an apparent greater degree of prosecutorial discretion applicable to legal persons in comparison to natural persons (Finland, Germany, Iceland, Mexico and Norway). The authorities of four of the Parties (Finland, Germany, Mexico and Norway) do not contest that a greater degree of prosecutorial discretion applies to legal persons. The degree of the discretion is discussed in some detail in two of these examinations (Germany and Norway).

176. The German authorities explained that the application of discretionary prosecution, as opposed to mandatory prosecution (which applies in Germany to natural persons) stems from the administrative law basis of the liability of legal persons. Although specific guidelines on the exercise of the discretion have not been issued, prosecutors would normally weigh all the relevant circumstances, including the impact of the offence, degree of culpability, economic advantage, and conduct of the legal persons following the offence. However, it would be contrary to waive prosecution due to a company’s market position or for political reasons. At the time of the Phase 2 examination, the Federal Ministry of Justice was preparing specific guidelines for the purpose of promoting the uniform exercise of discretion and emphasising the importance of using the system of administrative liability for legal persons. The Working Group recommended that Germany take measures to ensure the effectiveness of the liability of legal persons, which could include the provision of guidelines concerning prosecutorial discretion.

177. Pursuant to section 48a of the Norwegian Penal Code, the criminal liability of an enterprise is discretionary. Section 48b prescribes the considerations for not imposing a penalty on a legal person at the discretion of the court, including the following: 1. the preventive effect of the penalty; 2. the seriousness of the offence; 3. whether the offence could have been prevented through guidelines, training, control, etc.; 4. whether the enterprise has or could have obtained an advantage; 5. the enterprise’s economic capacity; and 6. whether other sanctions have been imposed on the enterprise or any person who has acted on its behalf. The Norwegian authorities added that other factors, such as the status and rank of the natural perpetrator within the organisation can be taken into account.

178. Under Section 19c of the Icelandic General Penal Code, a “legal person may be fined” (emphasis added) as opposed to Section 109, which states that natural persons “shall be sanctioned” (emphasis added). The Icelandic authorities explained that the difference in language is not intended to establish discretion for ordering fines where the offence has been proved. They further provided that the language simply reinforces the notion that there are exceptions to the general principle of the non-liability of legal persons. The Working Group recommended follow-up of the criminal liability of legal persons, to ascertain within a reasonable period whether the foreign bribery offence is effectively applied to legal persons.

38 Article 38(1) states that proceedings against the legal person shall be consolidated with the criminal proceedings against the natural offender, and article 38(2) provides the only circumstances under which proceedings for a legal person shall be separated from those against the natural person.

39 Pursuant to Section 48a an “enterprise may be liable to a penalty”.
i. Mutual legal assistance regarding foreign bribery offences committed by legal persons

179. In three Phase 2 examinations (Germany, Italy and Luxembourg), the Working Group discusses the requesting and/or provision of mutual legal assistance (MLA) for proceedings within the scope of the Convention against legal persons. The issue was raised in respect of these Parties because of concerns that since they do not provide for the criminal responsibility of legal persons, they may not be able to: 1. effectively respond to requests for MLA from Parties that have established the criminal liability of legal persons for the foreign bribery offence, or 2. obtain effective MLA in respect of non-criminal proceedings against legal persons in their own countries.

180. The German authorities were confident that the non-criminal nature of the liability of legal persons in Germany would not be an obstacle to obtaining evidence in foreign bribery investigations, either where the request is for the purpose of a consolidated proceeding against the natural and legal persons or an independent proceeding against the legal person. The Italian authorities stated that although the system for the liability of legal persons in Italy is administrative in nature, Italy can provide and obtain MLA for investigations against legal persons, and regardless if the natural perpetrator is also under investigation.

181. The MLA issue in Luxembourg arose because it has not established the liability of legal persons for the foreign bribery offence. The Luxembourg authorities indicated that nevertheless, they would be able to respond to requests for MLA relating to legal persons, and that the legality of executing the request would be determined in view of the factual information presented in the request.

182. In respect of Australia, the reverse situation was raised—whether Australia’s capacity to provide MLA in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence. In addition to identifying this as an issue for follow-up once there has been sufficient practice, the Working Group noted that this is a horizontal issue affecting many Parties.

Conclusions

183. The issue of providing and obtaining mutual legal assistance regarding foreign bribery offences committed by legal persons has only been systematically raised for Parties that have not established the criminal responsibility of legal persons. However, it is conceivable that, contrary to Article 9.1 of the Convention, Parties that have the criminal liability of legal persons for the foreign bribery offence might not necessarily be able to provide prompt and effective legal assistance for non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. Thus, consistent with the remark of the Working Group in the Phase 2 recommendations to Australia, once there has been sufficient practice in this area, it might be useful to undertake a horizontal analysis of the compatibility between administrative and criminal systems for the liability of legal persons for the purpose of providing and obtaining mutual legal assistance concerning offences within the scope of the Convention.

j. Use in practice of liability of legal persons

184. By the time of the Phase 2 examination of the Parties that had established the liability of legal persons, only two Parties (Korea and the United States) had final convictions for the offence of bribing a foreign public official. In Korea, one legal person was convicted and sentenced under the FBPA in August 2002. In the United States, since the enactment of the FCPA in 1979, there had been 22 charges against legal persons for FCPA violations. Convictions were obtained in all but one case. At the time of the Phase 2 examination of Canada, one charge was pending against a legal person for a violation of the CFPOA.
Since then the company pleaded guilty in January 2005. In Norway, a legal person was under investigation for acts within the scope of Norway’s foreign bribery offence.

185. Due to the limited time that Parties had to accumulate practice on the liability of legal persons for the foreign bribery offence since implementation of the Convention, the Working Group also looked at their statistical records concerning domestic bribery cases and sometimes offences in a wider sense. The record concerning enforcement actions for domestic bribery was generally quite low. Eight Parties (Finland, France, Hungary, Iceland, Mexico, Norway, Switzerland and the United Kingdom) reported no prosecutions against legal persons for the bribery of domestic public officials. However, in the case of Hungary and Switzerland, the liability of legal persons had been recently enacted (i.e. following their Phase 1 examinations).

186. Officials from Germany explained that administrative fines have rarely been imposed on legal persons for corruption offences. On the other hand, according to the Federal Ministry of Justice, administrative fines have frequently been imposed on legal persons for other offences, including anti-trust violations, tax evasion and offences concerning the environment. In addition, some German jurisdictions had applied administrative fines for domestic bribery more frequently than in others. For example, according to the statistics of the Anti-Corruption Division of one Public Prosecutor’s Office, from 1994 to September 2002, administrative fines were imposed on 122 legal persons for bribery, fraud, anti-trust violations, etc. In Iceland the criminal liability of legal persons had been applied in only a few cases, and except for one case, these had all involved tax offences. Italy had one conviction of domestic bribery under its recently enacted Legislative Decree 231/2001. In addition, 16 cases under the Decree were pending, with eight companies having been ordered to stand trial, while the others had plea-bargained. In the United Kingdom, prosecutors were unable to point to any prosecutions of legal persons for any offences “close to bribery”.

187. With respect to Japan, statistics indicated that between 1998 and 2002, on average 1 747 legal persons were prosecuted for offences each year and 259 were convicted. According to statistics on the number of violations prosecuted from 1980 to 2002 under the UCPL, which establishes the foreign bribery offence as well as various intellectual property offences, the number of prosecutions ranged from zero in 1997 and 1998 to 37 in 2002. The average number of prosecutions per year was approximately 15.

Conclusions

188. When undertaking any of the further analysis suggested in this part of the Mid-Term Study concerning the liability of legal persons for the foreign bribery offence, it will be important for the Working Group to keep in mind the low level of enforcement activity so far in relation to legal persons for the offence, and whether any of the issues identified could individually or cumulatively be the reason for this.

k. Sanctions for legal persons

189. In relation to criminal penalties for foreign bribery offences, the general obligation is contained within Article 3.1 of the Convention, which requires Parties to apply sanctions that are sufficiently effective, proportionate and dissuasive. In the event that under the legal system of a Party, criminal liability is not applicable to legal persons, then that Party must ensure, pursuant to Article 3.2, that legal persons are subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions.

190. Confiscation of the proceeds of crime is also an important element of the sanctions applicable to combat foreign bribery. Article 3.3 provides that each Party is required 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
monetary sanctions of comparable effect are applicable.

191. Pursuant to Article 3.4 of the Convention, Parties must also consider the imposition of additional
civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public
official. The Commentaries on the Convention state that among the civil or administrative sanctions, other
than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign
public official are: exclusion from entitlement to public benefits or aid; temporary or permanent
disqualification from participation in public procurement or from the practice of other commercial
activities; placing under judicial supervision; and a judicial winding-up order.

192. Across the 21 Parties examined at the time of this Mid-Term Study, there were substantially
different approaches to the imposition of liability and sanctions, with varying degrees of effectiveness.
That said, in the absence of convictions for foreign bribery in most Parties, it has not been possible for the
Working Group, to analyse the effectiveness of sanctions applicable to legal persons comprehensively.

i. Monetary penalties under legal systems that have established criminal responsibility

193. In relation to those Parties examined, 19 have established the responsibility of legal persons, of
which twelve Parties (Australia, Belgium, Canada, Finland, France, Iceland, Japan, Korea, Norway,
Switzerland, the United Kingdom and the United States) have established criminal responsibility for the
foreign bribery offence.

194. Some of the toughest criminal penalties for offences of foreign bribery are found within the
United States FCPA. For criminal violations of the FCPA’s anti-bribery provisions, corporations and other
business entities are subject to a fine of up to USD 2 million per violation. Furthermore, if the criminal
offence causes a pecuniary gain or loss, United States law authorises alternative maximum fines equal to
the greater of twice the gross gain or twice the gross loss, and fines for individual violators may be
increased. Applicable sentencing guidelines allow courts to increase the criminal penalties for FCPA
violations, opening the way to heavy fines. A point system is used to calculate the penalties under the
guidelines, with certain mitigating factors serving to reduce the total number of points.

195. A brief survey of the FCPA criminal prosecutions brought to date and that resulted in convictions
under the FCPA or related charges indicates however that most of them resulted in moderate fines for
corporations until recently. Between 1977 and 2001, 21 companies were convicted for criminal violations
of the FCPA. Corporate fines had ranged from USD 1 500 to USD 3.5 million (an agreement by Lockheed
in January 1995 to pay a record fine of USD 21.8 million being the only instance in which this range was
exceeded). Since the Phase 2 examination, corporate fines for FCPA violations have gone as high as USD
13 million. In 2005, record combined civil and criminal sanctions of USD 28.4 million were imposed on a
corporation. The same year, in another FCPA prosecution a criminal fine of USD 10.5 million was
imposed. At the time of the Phase 2 Report, the United States Sentencing Commission had developed a
proposal to raise the base level offence to correspond to that of domestic bribery and was expected to have
an impact in future prosecutions: fines were expected to increase.

196. Although the fines imposed in practice were assessed to be moderate, the Working Group
recognised the important deterrent effect of the collateral consequences of an FCPA investigation or
conviction in the United States. The Phase 2 Report stated that it would be misleading to look only at the
levels of fines and other sanctions available on the statute book. The types of collateral consequences
include the impact of adverse publicity, investigation, indictment and prosecution on companies, which
may be a more important deterrent than fines or imprisonment. Conduct that violates the bribery provisions
of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. Taken together, the potential collateral consequences operate as a strong disincentive to having the corporation indicted, let alone contesting the case to trial.

197. In relation to other Parties with criminal penalties, the Working Group noted certain aspects of particular legislative provisions, as they apply in practice, and whether actual fines for foreign bribery are effective, proportionate and dissuasive:

- In Korea, sizeable fines of up to 1 billion Korean won (approximately EUR 848 300) may be imposed on legal persons for foreign bribery offences. If the profit obtained through the offence exceeds a total of 500 million won (EUR 424 150) the legal person shall be subject to a fine up to twice the amount of the profit. A legal person is not however, subject to the foregoing sanctions where it has paid “due attention” or exercised “proper supervision” to prevent the offence. Guidelines on how to calculate the profit from bribery have not been issued, and thus it is uncertain how it would be quantified in practice. In Korea’s first case adjudicated under the FBPA, a legal person was convicted and sentenced for the bribery of a foreign public official and was sentenced to a fine of 100 million won (EUR 84 830). The total amount of the bribes was 471 million won (EUR 400 000). Thus the bribes totalled approximately 4.7 times the amount of the fine. Moreover, the contracts in question were worth substantially more than the amount of the fine—20 billion won (EUR 17 million). It was recommended that Korea take steps to ensure that the actual fines for foreign bribery are effective, proportionate and dissuasive, especially in light of the absence of the confiscation of the proceeds of bribery in that country.

- In Switzerland, if “all reasonable and necessary organisational measures” have not been taken to prevent commission of the foreign bribery offence within an enterprise, the company may incur criminal liability which may attract a fine for as much as CHF 5 million (approximately EUR 3.3 million). The courts determine the liability of legal persons according to the seriousness of the crime, the organisational failing and the damage caused, as well as the legal entity's economic capacity. The message to parliament on the introduction of corporate liability says that the maximum fine of CHF 5 million should rarely be imposed. The Phase 2 Report stated that courts could be receptive to arguments that excessively heavy fines could destroy small firms and thus strike at the heart of the small business sector that is a mainstay of the Swiss economy.

- Although in Norway companies and other legal persons are liable to a fine with no upper limit and subject to prohibitions, deprivations of rights and professional disqualifications, the Penal Code prescribes grounds that allow the court not to impose a penalty on legal persons at its discretion. The grounds for exercising this discretion include the preventive effect of the penalty, the seriousness of the offence, whether the enterprise could have prevented the offence by guidelines, instruction, training, control or other measures, whether the enterprise has had or could have obtained any advantage by the offence, and the enterprise's economic capacity.

- In Australia, it was recommended that the fine for legal persons for the foreign bribery offence be increased to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as multi-national enterprises (MNEs) with headquarters in Australia. In that regard, Australian authorities have announced that the

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40 The conversion from the Korean won to Euros has been made according to the exchange rate on 31 December 2005.
Australian government has commenced a review of all criminal penalties, including the fines for legal persons.

198. In Finland, a separate issue was identified in relation to monetary sanctions for foreign bribery. The enforcement of a fine for legal persons lapses five years after the final judgement was given, and the enforcement of a sanction of confiscation lapses ten years after that day. The report concluded that the provisions on the lapsing of sanctions could provide another obstacle to the application of effective, proportionate and dissuasive sanctions and could seriously undermine deterrence. The Working Group therefore recommended assessing the impact of these provisions in any follow-up on the imposition of sanctions in practice to the foreign bribery offence.

ii. Monetary penalties under legal systems that have established a non-criminal form of responsibility

199. Of those Parties examined in Phase 2, six (Germany, Greece, Hungary, Italy, Mexico and Sweden) had in place a non-criminal form of responsibility in order to satisfy the standard under Article 2 of the Convention. Three of the Parties that employ non-criminal means established the administrative liability of legal persons for the offence (Germany, Greece and Italy) and three (Hungary, Mexico and Sweden) provide for criminal sanctions for legal persons, but do not consider the liability criminal per se.

200. In relation to all the Parties with the non-criminal form of responsibility, the Working Group had concerns about whether legal persons are subject to effective, proportionate and dissuasive monetary sanctions:

- In the Phase 2 Report on Germany, two points were noted. First, although administrative fines have been frequently imposed in other fields, they have rarely been imposed on legal persons for corruption offences, and some jurisdictions had imposed them more often than others for domestic bribery. Second, concerns were expressed that a fine of EUR 1 million may not be sufficient for large companies. Since the Phase 2 evaluation of Germany, the maximum level of monetary sanctions for legal persons has not been increased. This issue has recently been re-examined and the German authorities have concluded that the statutory maximum of EUR 1 million is sufficient and proportionate, in particular because this threshold has been doubled as recently as in 2002, and the EUR 1 million threshold has to be exceeded if necessary to siphon off the economic benefit of the offence. The Working Group remained doubtful as to whether this sanction represented an adequate deterrent, especially for large companies.

- In Italy, the amount of the fine that may be imposed against a body for foreign bribery depends on the nature and gravity of the offence. Bribery and istigazione alla corruzione of official acts is punishable by a fine of up to EUR 312 000. Bribery and istigazione alla corruzione for acts against official duties, and aggravated bribery where the offence was committed in favour of or against a party to legal proceedings are punishable by a fine of EUR 52 000 to 936 000. Aggravated bribery that results in a wrongful conviction, or involves the award of public offices, salaries, pensions or contracts with the government attracts a fine of EUR 78 000 to 1.248 million. The fine imposed in a given case may be reduced by the presence of certain mitigating factors, for example a fine is reduced by between one-third and one-half if, before a trial against a body commences, the body compensates any victims, takes effective steps to eliminate the consequences of the offence, and implements an appropriate organisational model to prevent similar offences in the future. However, regardless of any mitigating factors, a fine cannot be reduced to less than EUR 10 400. The Working Group was concerned that the maximum fine that may be imposed for non-aggravated bribery is only EUR 936 000, which may not be sufficiently high considering the size of Italian companies. Further, the various mitigating factors discussed above may substantially reduce the base fine and thus diminish its impact.
Again, however, in the absence of sufficient case law, it was not possible to adequately assess whether in practice sanctions under Italian law are effective, dissuasive and proportionate.

- The Greek legislation imposes an administrative fine of up to three times the value of the “benefit” against legal persons who are responsible for foreign bribery. The Law does not define how the “benefit” is determined, nor have the Greek authorities issued guidelines for this purpose. There may be cases in which a fine cannot be imposed because no contract is involved. For instance, a legal person might bribe not to obtain a contract but to obtain tax relief, subsidies or a permit to conduct business. A bribe might also be offered but not accepted, thus resulting in no contract.

- Concerns were also expressed by the Working Group about a proposal by the Mexican Government to modify existing sanctions. The new law, which was approved in July 2005, allows in principle for higher monetary sanctions, but does not modify the basis for calculating the fine—i.e. the declared income of the person. This method would create a loophole in the case where a legal person did not properly declare its income, or had no income (e.g. in the case of a vehicle specifically created for the purpose of bribery). The Mexican authorities were encouraged to reconsider the current proposal in order to prevent possible loopholes. Nevertheless, they maintained that the scope for a loophole is limited by the Federal Fiscal Code, which criminalises tax evasion.  

Conclusions

201. Given that the vast majority of Phase 2 reports raise the issue of whether in practice fines for legal persons for the foreign bribery offence are “effective, proportionate and dissuasive”, the Working Group could consider undertaking a horizontal analysis for the purpose of determining how in practice Parties can meet the standard under Article 3.1 of the Convention. The Working Group could also consider whether various factors, such as the size of a Party’s economy, should be taken into account in determining whether the applicable sanctions meet the standard under Article 3.1.

iii. Confiscation

202. Pursuant to Article 3.3 of the Convention, most Parties examined to date under Phase 2 have established some form of confiscation legislation applicable to legal persons. However, not all Parties are able to confiscate both the bribe and the proceeds of the bribery of a foreign public official.

203. Confiscation, hitting directly offenders’ pocket books, can prove to be a powerful measure; and it can counterbalance the fact that the primary penalties imposed by the courts for economic and financial offences tend to be modest and not particularly dissuasive.

204. Switzerland takes a pro-active approach in this area. Although there are no official statistics, a Federal Department of Finance survey showed that cantons confiscated CHF 51 million (EUR 33 million) in 1998-99, mostly related to organised crime or money laundering, but some involved bribery of Swiss public officials. In Switzerland, confiscation can apply to assets that are the proceeds of the bribery offence (for example, objects acquired with the proceeds of the bribery offence) and those used to commit the offence. Assets invested in Switzerland that derive from a bribery offence may also be confiscated as proceeds of money laundering. Confiscation is not linked to conviction of the offender. If the offender

41 The Mexican authorities add that legal persons declare their revenues upon sworn statement, and that the fiscal authorities have the possibility to verify the accuracy of the statement, and address abuses.
manages to escape Switzerland's criminal authorities, the assets may still be confiscated under a separate procedure specifically designed to secure confiscation. The fact that the assets concerned may not be available, either because they have disappeared or because they have been incorporated into other assets in such a way that they cannot be identified with certainty, does not prevent a penalty from being imposed. In its most active form, confiscation includes the possibility for the Swiss criminal authorities to order restitution in place of confiscation.

205. In Italy, upon conviction a court must confiscate from a legal person the “profit and the price of the offence”. In the context of foreign bribery, this provision requires a court to confiscate both the bribe payment and the proceeds of bribery. If it is not possible to confiscate the property, “sums of money, goods or other assets of a value equivalent to the price or profit of the offence may be confiscated”. The ability to confiscate proceeds of crime in Italy reduced but did not entirely eliminate the concern of the lead examiners about the sufficiency of penalties applicable under Italian law.

206. The German experience has been quite positive in this respect. According to the Federal Ministry of Justice, the Länder have allocated extensive resources to training prosecutors on how to assess the benefits of offences to be skimmed off pursuant to the Penal Code (StGB-§§ 73ff.) and the Criminal Procedure Code (StOP-§§ 111b) (e.g. approximately the equivalent of EUR 500 million in 2000). With respect to the assessment of a “financial benefit” or “proceeds”, two cases of active domestic bribery have been cited. In the first case, a company was fined the equivalent of EUR 1.5 million, which included the siphoning off of proceeds.42 In the second case, the Federal Court of Justice imposed, in March 2002, a monetary penalty that took into account the speculative profit that would be obtained as a result of bribing a public official to re-zone the defendant’s land as a more valuable classification.

207. In the United Kingdom, there have not been any cases of seizure or confiscation of assets in foreign bribery cases. Nor have the United Kingdom authorities provided any examples of the actual use of such powers in domestic bribery cases. There have, however, been important statutory developments that appear to improve substantially the regime applicable to the recovery of assets from offenders and third parties in the United Kingdom. The new Proceeds of Crime Act 2002 (POCA) establishes a hierarchical regime of “asset recovery” (extending through criminal confiscation, civil forfeiture and taxation). POCA created a new state organisation, the Assets Recovery Agency (ARA). The director of the ARA has the power to apply for criminal confiscation orders, apply for restraint orders, bring appeals and enforce confiscation orders. This development was welcomed, although it was noted that it was too soon to evaluate the effect of POCA in this regard.

Conclusions

208. Given the preponderance of issues raised regarding the level of fines for legal persons for the foreign bribery offence, there is a significant potential for the confiscation of the proceeds of bribery to compensate at least to some extent for weaknesses in this respect. However, at this stage there has not been sufficient practice to assess the effectiveness of confiscation as a sanction for foreign bribery. In addition, there is not sufficient information about how in practice Parties will quantify the proceeds of bribing a foreign public official. The Working Group could thus include the application of the confiscation of the proceeds of bribing a foreign public official in any mid- to long-term analysis of monetary sanctions for legal persons.

42 In this case, a fully authorised representative of the company bribed an airport official for the purpose of acquiring insider information on a building project.
iv. Additional civil or administrative sanctions

209. Pursuant to Article 3.4 of the Convention, “each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official”. Commentary 24 on the Convention clarifies that “civil or administrative sanctions” might include “exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order”. The imposition of additional civil or administrative sanctions upon a legal person subject to sanctions for the bribery of a foreign public official has not been universal or consistent amongst Parties to the Convention. Some Parties have introduced express laws applicable to legal persons that entail particular prohibitions or deprivations of rights upon conviction for the foreign bribery offence (France, Germany, Greece, Hungary, Italy, Norway and the United States), whilst others rely on the policies of particular government bodies to preclude participation in public procurement contracts, official development assistance contracts, and to restrict access to official export credits or other government assistance (Canada, Korea, Japan and the United Kingdom).

210. Despite the positive introduction of certain additional civil or administrative sanctions by some Parties, the Working Group did identify a number of issues, including matters to be clarified or addressed by these Parties:

- Under German public procurement law, a company can be excluded from public contracts for bribing domestic or foreign public officials on the ground of “unreliability”. At the Land or municipal level, several jurisdictions (e.g. Hessen, Nordrhein-Westfalen and Hamburg) establish corruption registers and have thereby excluded corrupt companies from public contracts. However, the effectiveness of these registers could be increased by a nation-wide exchange of information between these registers. A legal framework for a nation-wide corruption register is still under examination at the federal level.

- In addition to a monetary penalty under Italian law, a body may be subject to prohibitive sanctions. Italian officials stated that such sanctions are available for all forms of foreign bribery except bribery and istigazione alla corruzione for official acts. The length of the prohibition is at least one year. The range of available measures include: suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence; prohibition on contracting with the public administration, except to obtain the performance of a public service; denial of facilitations, funding, contributions and subsidies, including those already granted; and prohibition on advertising. If a court considers that none of these sanctions are adequate, it may prohibit the body from conducting business activities. A court must also consider the presence of mitigating factors before imposing a prohibitive sanction. Prohibitive sanctions apply “in connection with the offences for which they are explicitly provided”, which includes domestic bribery offences, but it is not clear that such sanctions apply to the foreign bribery offence.

- The Norwegian authorities indicated that they can take into consideration a conviction for bribery of a foreign public official when allocating state aid or awarding public contracts. In the area of public procurement, a potential bidder who has committed bribery may be excluded from

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43 The treatment of legal persons as well as individuals convicted of foreign bribery by Official Development Assistance (ODA) and Official Export Credit Support agencies is the subject of a more in-depth discussion under A. 12 (“Prevention, Detection and Combating of Foreign Bribery though Systems for Official Development Assistance and Official Export Credit Support”).
participating in the bid for a contract. However, no system has been established to ensure that public entities can receive information about a particular party convicted of bribery. Discussions are ongoing within the Ministry of Foreign Affairs on whether such parties should be listed in an official register.

- **Powerful provisions applicable to combating foreign bribery within the United States** enables the suspension of export privileges, as happened to the Lockheed Corporation in 1994, or the withdrawal of eligibility to bid for government contracts or apply for government programmes. A mere indictment for an FCPA violation is grounds for suspension, as happened to the Harris Corporation which was tried – and acquitted – on FCPA charges in 1991. Once an agency bars or suspends a company from federal non-procurement or procurement activities, other agencies in turn are required to exclude the company by the Code of Federal Regulations under Title 48 (Federal Acquisition Regulations System).

- **Greek authorities stated that individuals and companies with a history of bribery are banned from the public procurement process in Greece.** A participant in a tender is required to produce a certificate from the competent authority which demonstrates that he/she does not have a previous conviction for “an offence concerning his/her professional conduct”. According to the Greek authorities, this includes convictions for bribery. If the applicant is a legal person, it must demonstrate that it has not been banned previously from the procurement process (but not whether it has a prior criminal conviction). However, there are no statistics on bans that have been imposed. The Greek authorities added that if a contractor is convicted of bribery while a contract is in effect, the contract is rescinded under the Civil Code and the contractor is banned from participating in future procurements. After the on-site visit, Greece amended the tender procedure for private contracts with a view to further enhancing the transparency of the system. However, some legal persons who have been convicted of foreign bribery may nevertheless be able to avoid these sanctions since a legal person is only required to demonstrate that it has not been banned previously.

- **In Hungary, measures applicable to legal persons provide for the following sanctions: winding-up the legal entity, limitation of the activity of the legal entity, and imposition of a fine.** Measures to limit the activity and impose a fine may be ordered independently or jointly, but winding-up the legal entity may not be combined with other sanctions. The requirement of a conviction of a natural person as a prerequisite to the liability of a legal person will prevent the application of effective, proportionate and dissuasive sanctions to legal persons. Under Hungarian law, the court, in sentencing a legal person found guilty of a crime, may limit the ability of the entity to participate in public procurement procedures and rescind existing public procurement contracts. These provisions have not yet been applied. During the on-site visit, public procurement representatives complained that as a general matter they have no link with the courts and that they do not receive information from the courts. There is no commercial register to record information about convictions concerning companies. The lead examiners encouraged the Hungarian authorities to consider introducing additional civil or administrative sanctions for natural persons convicted of foreign bribery, as is the case for legal persons, notably to ensure that individuals responsible for a company’s criminal activities cannot benefit from public funding or participate in public tenders.

211. In general, for those Parties where there were few or no additional civil or administrative sanctions applicable to legal persons upon conviction of the foreign bribery offence, the Working Group recommended that such sanctions should be considered for future introduction. In doing so however, it was acknowledged that responsible agencies for various government procurement programmes, official export credit support and official development assistance (ODA) had in certain cases developed policies to deal
with companies convicted of foreign bribery offences [This topic is dealt with in more detail under A. 12 (“Prevention, Detection and Combating of Foreign Bribery through Systems for Official Development Assistance and Official Export Credit Support”):

- At the time of the Phase 2 examination, Canadian law did not provide for the imposition of additional civil or administrative sanctions upon legal persons convicted of foreign bribery. That said, key Canadian agencies involved in providing contracting and financing opportunities to Canadian firms had developed policies on dealing with applicants convicted of bribery and corruption. The Working Group recommended that Canadian authorities consider reviewing these policies to ensure that they are sufficiently effective for the purpose of deterring companies that deal with them from engaging in the bribery of foreign public officials.

- Japan does not directly provide administrative sanctions upon conviction of the foreign bribery offence for either natural or legal persons (e.g. automatic disbarment from participation in public procurement). It was therefore recommended that the Japanese authorities encourage agencies such as the Japan Bank for International Co-operation (JBIC), the Nippon Export and Investment Insurance Agency (NEXI) and the Japan International Co-operation Agency (JICA) and its public procurement authorities to revisit their policies on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrent.

- At the time of the Korean Phase 2 examination, the Korean authorities were considering the introduction of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official, including disbarment from participating in public procurement contracts. In the absence of additional civil and administrative sanctions, the Working Group recommended that Korea ensure that authorities responsible for development aid and privatisation can take appropriate actions, such as informing the competent authorities or imposing non-criminal sanctions, where persons and companies are determined to have bribed foreign public officials. In addition, it was recommended that the Korean government examine the eligibility requirement for participating in privatisation bids, so that participation could be denied as a sanction for foreign bribery in appropriate cases. The Working Group recommended the possible addition of non-criminal sanctions by ODA and privatisation authorities, where persons and companies are determined to have bribed foreign public officials.

- In Switzerland, even if a company is convicted of a bribery offence, there seems little risk in practice that it will be excluded from public procurement contracts or public subsidies, even though exclusion can be a very powerful tool since it could encourage enterprises to take practical steps to prevent bribery. There is no across-the-board rule in Switzerland relating to the conditions under which an awarding authority can exclude a bidder or revoke a contract after it has been awarded. These conditions vary from one canton to another and between the cantons and the Confederation; furthermore, they contain no explicit reference to conviction for bribery (of Swiss or foreign public officials) as grounds for exclusion. In order to strengthen the overall effectiveness of the penalties for the offence of bribery of foreign public officials, it was recommended that the Swiss authorities envisage, in the context of the revision of the federal law on public procurement, measures to temporarily or permanently ban any company convicted of bribery of foreign public officials from participating in public procurement procedures, and that a similar treatment be envisaged for access to official export credit support.

- Current the United Kingdom law does not impose any such complementary sanctions on legal persons. The Department for International Development (DFID) is the United Kingdom government department responsible for promoting development and the reduction of poverty. DFID has incorporated in its procurement contracts anti-foreign bribery provisions and clauses
for disqualifying from participating in DFID’s activities contractors who have committed an offence under the relevant legislation. No cases of disqualification for foreign bribery were identified. The Export Credits and Guarantees Department (ECGD) is the official United Kingdom Export Credit Agency (ECA). In examining an application for support, if ECGD suspects bribery is involved in the transaction, it will inform investigative authorities and will make inquiries with a view to determining whether it might withhold support for the transaction in question. If, in relation to the transaction, ECGD is aware of a legal judgment of bribery against the applicant, or has sufficient evidence of bribery, it will normally withhold support for the transaction. In light of the absence of additional administrative penalties upon persons and entities convicted of the bribery of a foreign public official, it was recommended that the United Kingdom consider revisiting the policies of agencies such as DFID and ECGD on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrent.

Conclusions

212. In light of the number and substance of the concerns raised in the Phase 2 reports regarding monetary sanctions for legal persons convicted of bribing a foreign public official, there is significant potential for non-criminal penalties, such as debarment from participating in public procurement contracts, to compensate for weaknesses in monetary penalties. However, due to the differing approaches by Parties to this issue, and the variety of concerns raised by the Working Group where some form of civil or administrative sanction is available, any mid- to long-term analysis of monetary sanctions could include an assessment of the relationship between monetary sanctions and civil or administrative sanctions.

3. Sanctions for Natural Persons including Seizure and Confiscation (Article 3 of Convention and Paragraph II v) of Revised Recommendation)\(^4\)

a. Criminal sanctions

213. Article 3.1 of the Convention requires that Parties apply sanctions for the offence of bribing a foreign public official that are sufficiently effective, proportionate and dissuasive for foreign bribery offences. Among the 21 Parties covered by this study, imprisonment sentences (maximum penalty) ranged from two years (for the non-aggravated form of bribing a foreign public official) (Finland)\(^45\) to 15 years (Belgium and the United States), which raised the Working Group’s concern over the very wide range across all Parties. In nearly half of the Parties already examined under the Phase 2 procedures, the maximum imprisonment sentence is five years. This is almost always the same as for domestic bribery offences. It should be noted that in the United States, at the time of the Phase 2 examination, the maximum imprisonment term for natural persons was 15 years for the bribery of a domestic public official, while only 5 years for the bribery of a foreign public official under the FCPA. This was the subject of a recommendation by the Working Group for follow-up. The United States announced in providing its oral follow-up report in December 2004 that, as of November 2003, the maximum penalty of imprisonment for foreign bribery was raised to 15 years, in line with the maximum penalty for domestic bribery.

\(^4\) See Annex for an overview of the applicable sanctions in the 21 countries reviewed in the Mid-Term Study.

\(^45\) In Finland, the sanction for the aggravated bribery of a foreign public official is imprisonment from four months to four years.
214. Very few foreign bribery cases have reached the conviction stage in most Parties evaluated under Phase 2. With the exception of the United States, which has had the FCPA in place since 1977 and thus has had the opportunity to see a number of cases brought to court (approximately 32 criminal prosecutions and seven civil enforcement actions brought by the Department of Justice since October 2002), there had been only four foreign bribery cases finalised in the courts at the time of their Phase 2 examinations (one petty case in Switzerland and three cases in Korea). In the first Korean case, the CEO of the company was sentenced to imprisonment for 18 months and a fine of 10 million Korean won (EUR 8 483) and in the second case the natural person defendant was sentenced to 10 months of imprisonment and a fine of 10 million won. In the third case, three natural person defendants were sentenced to fines of 7 million won (EUR 6 000), 5 million won (EUR 4 250) and 1.5 million won (EUR 1 300), respectively. Other Parties had ongoing proceedings at the time of their Phase 2 examinations (e.g. Canada, Norway and Sweden). Four Parties have had convictions for foreign bribery since their Phase 2 examinations (Canada, Bulgaria, Germany and Sweden). The conviction in Germany resulted in a fine of EUR 250 000 for the natural person. In Canada the defendant company was fined, but the charges against the two natural persons (the director and an officer of the company) were stayed. In Sweden, two natural persons were sentenced to 18 months and one year of imprisonment respectively.

215. The range of fines available under Parties’ laws for natural persons sanctioned for foreign bribery offences varies greatly. Fines are not available for natural persons in certain Parties (e.g. Italy and Switzerland), or are quite moderate (e.g. maximum EUR 2 550 in Bulgaria). Certain Parties (e.g. Germany and Sweden) do not provide for concurrent sentences of imprisonment and a fine. On the other hand, some Parties (Canada, Norway and the United Kingdom) place no upper limit on the fine, and some Parties may potentially impose heavy fines on individuals (e.g. EUR 150 000 in France, EUR 187 500 in Luxembourg, USD 100 000 in the United States). It should be noted that two Parties have introduced or increased pecuniary sanctions for the foreign bribery offence following the conclusions by the Working Group in Phase 1 (Bulgaria introduced the possibility of a fine, and Mexico raised its maximum applicable fine).

216. These imprisonment and pecuniary sanctions tend to mirror those existing under national legislation for domestic bribery offences. This has notably raised three issues across the spectrum of reports:

- As domestic bribery case law showed in many Parties, a large majority of domestic bribery offences involved petty bribery of lower ranking officials. This raises a question concerning the appropriateness of mirroring sanctions available for foreign bribery offences, which aim to sanction bribery on a grander scale, on sanctions for domestic bribery offences.

- Domestic bribery is usually considered an offence against the State itself. For this reason, as case law shows, domestic public officials accepting bribes may be more severely sanctioned than the bribers (for instance in two out of three cases of domestic bribery cited by the Luxembourg authorities, the domestic official who received the bribe, but not the briber, was prosecuted). This raises the question of whether it is appropriate to mirror foreign bribery sanctions on domestic bribery sanctions, when the purpose of domestic bribery offences is to sanction crimes against the

46 The company was fined 100 million won (approximately EUR 85 000 based on the exchange rate on 31 December 2005).

47 Bulgaria informed the Working Group in its written follow-up report that the conviction for foreign bribery was not in relation to an international business transaction.

48 The company was fined CDN 25 000.
State? Should sanctions for foreign bribery offences not be comparable to those for other economic and financial offences?

- Sanctions available for economic and financial crimes are sometimes not available for a foreign bribery offence because the latter has been mirrored on the domestic bribery offence, which is not considered an economic crime (e.g. in Italy, natural persons are not liable to fines for the foreign bribery offence, whereas fines are available for economic and financial offences). Furthermore, much higher penalties tend to be available for economic and financial crimes (notably for breach of competition provisions). However, few Phase 2 reports have compared foreign bribery sanctions to those imposed for other economic offences. The unavailability or insufficiency of specific statistics in this respect has tended to hamper the review of sanctions applied in practice to different categories of offences. To further evaluate the effectiveness, proportionality, and deterrent effect of sanctions for foreign bribery offences in the different Parties, it could be useful to undertake a more systematic review of sanctions for other economic and financial offences, based notably on complete and sufficiently detailed statistics.

217. The Working Group might consider the fines and/or imprisonment sanctions for domestic bribery to be rather moderate. As for domestic bribery cases, sanctions handed down by the courts often appeared relatively low (low fines and/or suspended prison sentences). However, as pointed out above, circumstances surrounding domestic bribery cases may not be comparable to those in foreign bribery cases. Consequently, the Working Group considered it difficult to assess how sanctions have been applied in practice, and whether they will be sufficiently effective, proportionate and dissuasive. This has been the subject of recommendations for follow-up in virtually all Phase 2 reports to date.

b. Confiscation

218. In line with Article 3.3 of the Convention, all Parties examined to date under Phase 2 have in place some form of confiscation legislation. However, not all Parties are able to confiscate both the bribe and the proceeds of the bribery of a foreign public official, as prescribed under the Convention.

219. Confiscation of the bribe is almost always provided for under the foreign bribery legislation. However, two Parties only allow this possibility where the bribe is still in possession of the offender (Iceland and Luxembourg). The Working Group only found one Party’s position unclear regarding the possibility of confiscating the bribe: Greece’s legislation does not expressly allow confiscation of “undue advantages” which may constitute a bribe. In addition, in Sweden, the bribe cannot be declared forfeited as proceeds of crime if it has remained in the hands of the briber. The Swedish authorities explain that in Sweden, the notion of proceeds of crime presumes that someone has gained from the crime. Thus, if the bribe remains in the hands of the briber, it is not regarded as a profit. However, pursuant to Chapter 36, section 5 of the Penal Code, the bribe can be forfeited from the person who has received the bribe and been convicted of the crime as well as other persons in certain situations.49

220. A large majority of Parties provide for the confiscation of the proceeds of the foreign bribery offence. In fact, a number of Parties consider the confiscation of proceeds the most important sanction, given that: 1. the bribe may often no longer be available for confiscation if it is already in possession of a

49 Pursuant to Chapter 36, section 5 of the Swedish Penal Code, “forfeiture of property or its worth in consequence of any crime may, if no provision is otherwise made, be exacted” from persons including the following: “(a) the offender or an accomplice”; “(b) the person whose position was occupied by the offender or an accomplice”; and “(c) the person who profited from the crime or the entrepreneur described in section 4”.

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foreign public official in a third country; and, more importantly; 2. the proceeds may represent a very substantial pecuniary penalty for the briber, which may compensate for potentially low monetary sanctions, and thus have a much more important deterrent effect. For this reason, some Parties impose the mandatory confiscation of proceeds (Hungary, Italy, Luxembourg, Mexico, Norway, the Slovak Republic and Switzerland), whereas confiscation of the bribe remains mostly discretionary. Three Parties, however, do not provide for confiscation of the proceeds of a foreign bribery offence. One Party (the United States) stated that the absence of confiscation measures for the proceeds was compensated for by the possibility to impose a fine equivalent to twice the gain, an argument not fully accepted by the Working Group. Two other Parties (Japan and Korea) had not provided for the confiscation of the “proceeds” of foreign bribery at the time of their Phase 2 examinations. In Japan, quantifying the proceeds of bribery is considered too difficult. The position concerning the difficulty to quantify proceeds has also been put forward by Parties with respect to the practical application of confiscation measures. The absence of confiscation of the proceeds of bribery is of particular concern where the fine sanction is low.

221. In Korea, fines up to twice the amount of the “profit” are available under the implementing legislation (FBPA) where the profit obtained through the offence exceeds the specified threshold (i.e. 10 million won for natural persons)\(^ {50}\). However, such fines had not been applied in practice in the four adjudicated foreign bribery cases, and the Korean authorities were not sure how the profit from bribing a foreign public official would be calculated. Although confiscation of “criminal proceeds” is available under the Proceeds of Crime Act the Ministry of Justice explained that the proceeds of bribing a foreign public official are not covered (i.e. only the bribe is covered) because of the difficulty in quantifying them. In addition, a representative of the Ministry of Foreign Affairs and Trade explained that the confiscation of the proceeds of bribery is too severe a sanction, and a representative of the Supreme Public Prosecutors Office stated that the Korean legal system is not familiar with it. In Phase 2, the Working Group recommended follow-up of how the profit is quantified for this purpose. Following the Phase 2 examination, the Korean authorities emphasised that confiscation of the “proceeds of crime” is provided by the Proceeds of Crime Act, and indirectly under the FBPA, which provides for the imposition of a fine twice the amount of the profit where the profit exceeds the specified threshold.

222. As previously mentioned, relatively few cases have reached the conviction stage in the 21 Parties examined under this Mid-Term Study. Furthermore, out of the three Parties that, at the time of the their Phase 2 examinations, had already handed down foreign bribery (Korea, Sweden\(^ {51}\) and the United States), the United States did not provide for the confiscation of proceeds of foreign bribery at the time that many of the convictions were obtained\(^ {52}\), and the Phase 2 Report on Sweden indicates that confiscation had never been applied against a briber, although it had been applied to the corrupted person. It is thus not possible at this stage to draw any conclusion regarding the application of confiscation measures in foreign bribery cases. Furthermore, lack of detailed statistics in a number of Parties examined concerning the application of confiscation measures in both domestic and foreign bribery cases, as well as for other economic and financial offences, makes it difficult to evaluate the application in practice of their confiscation regimes.

223. Where available, a review of case law and discussions with law enforcement authorities concerning domestic bribery offences or other economic and financial offences showed that confiscation of

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50 The threshold for legal persons is 500 million won.
51 At the time of the Phase 2 examination of Sweden, the conviction was under appeal.
52 Note that as a result of a legislative amendments in 2000 and 2001, the United States can now directly forfeit bribe proceeds without the need to demonstrate a separate money laundering transaction and can forfeit property located in the United States that constitutes the proceeds and instrumentalities of bribery committed outside the United States.
proceeds is, in effect, rarely sought by the prosecuting authorities, and/or imposed by the courts. For instance, in Sweden, although the confiscation of the proceeds of bribery is available, to date it has not been applied against a briber. Phase 2 reports have highlighted recurring difficulties in imposing the confiscation of proceeds in practice. Prosecuting authorities of the Parties examined often put forward the difficulty in interpreting the notion of “proceeds” as an explanation to the lack of application of confiscation measures. For instance, how are proceeds quantified where the improper advantage obtained in return for a bribe is a contract, how is the value of the contract measured? Should confiscation of the proceeds be equivalent to the total amount of that contract, or should only part of the contract be considered as proceeds from the bribe? Should costs and outlays be deducted? Further and greater difficulties will exist where confiscation of the monetary equivalent is not possible, which is still the case, for instance, in Finland and Mexico. In this case, non-material proceeds may not be confiscated. Furthermore, there will be no possibility to confiscate the monetary equivalent of any proceeds in possession of bona fide third parties. In light of the generally poor record concerning the confiscation of proceeds, it is notable that the German experience in this respect has been quite positive [see previous discussion regarding Germany under k. (iii) on confiscation for legal persons].

224. Given the absence of case law concerning bribery of foreign public officials in most Parties, as well as the apparent low number of confiscation measures imposed for comparable offences, the practical application of confiscation measures in foreign bribery cases has been the subject of recommendations for follow-up in a large majority of Phase 2 reports.

4. Jurisdiction (Article 4 of Convention)

225. The Phase 2 reports provide relatively limited information about the practical application of jurisdictional rules in foreign bribery cases. Norway and the United States so far stand alone in having applied both territorial and nationality-based jurisdiction in foreign bribery cases. Nonetheless, the Phase 2 reports to date offer important insights with regard to territorial and nationality jurisdiction over both natural and legal persons. They also raise certain issues with regard to co-operation between Parties with regard to the exercise of jurisdiction.

a. Jurisdiction over natural persons

i. Territorial jurisdiction over natural persons

226. Foreign bribery is an offence that occurs primarily abroad practically by definition. As the Convention recognises, it is thus vital that the territorial contacts with the Party are not required to be extensive to establish territorial jurisdiction. Most Parties provide for territorial jurisdiction over cases where part of the offence occurs in the territory of the Party, as required by Article 4.1 of the Convention, either by statute or authoritative case law. Some Parties, such as Bulgaria, do not explicitly extend jurisdiction over cases that occur only partly within the national territory, but have indicated generally that jurisdiction would exist. Korea appears to rely on the direct application of the Convention under Korean law in this regard. In many cases, it appears that the applicable territorial jurisdictional principles are general principles and should apply to a broad range of economic crime cases. Nonetheless, so far, there

53 At the time of adoption of its Phase 2 Report, Mexico had inserted in a draft bill the possibility to confiscate assets the value of which is equivalent to the proceeds of the offence, which would bring Mexican legislation in line with Article 3.3 of the Convention.

54 For convenience, the jurisdiction to prosecute citizens or nationals for offences committed abroad is referred to as “nationality jurisdiction” in the Mid-Term Study.
has been, with some exceptions, relatively little analysis of how the courts apply these principles to economic crime cases with limited jurisdictional contacts.

227. What constitutes a sufficient part of the offence to allow territorial jurisdiction appears to vary to some degree. In many Parties, it appears that an element of the offence must occur within the national territory. Other Parties appear to apply a potentially broader requirement, which could base jurisdiction on more diffuse contacts without the need to prove the existence of an element of the offence. An important practical issue for territorial jurisdiction in this regard is its application to acts of preparation or complicity in an offence otherwise committed abroad. For example, a person might instigate or aid and abet foreign bribery within the territorial jurisdiction of the Party, but not otherwise be involved in the commission of the offence. The issue of whether jurisdiction would exist over such a person remains unclear for many Parties or is not always addressed in the reports, but it appears that Parties apply differing rules in this area. German law allows for territorial jurisdiction based on the acts of participants and Japanese law provides for territorial jurisdiction based on acts of complicity. In Sweden, territorial jurisdiction over a foreign bribery case was recently established on the basis that it was sufficient that the preparatory stage (such as withdrawals from accounts, purchase of travel cheques, arrangement of money transfers, etc.) took place in Sweden. French law allows for territorial jurisdiction over acts of complicity in France for a crime committed abroad, but only if dual criminality exists and if a final decision of a foreign court has determined that the offence occurred, which limits the practical effect of the provision. In Switzerland, acts of participation committed by foreigners in Switzerland do not provide sufficient grounds for attributing jurisdiction to the Swiss courts when the principal foreign perpetrator acted abroad.

228. The importance of coverage of preparatory acts under territorial jurisdiction principles varies depending on other applicable rules and in particular on whether a Party also has nationality jurisdiction. Where the law includes nationality jurisdiction, it should exist over a citizen who is complicit with a bribe paid abroad. For Parties that do not apply nationality jurisdiction, however, coverage of preparatory acts or complicity under territorial jurisdiction is critical. In its absence, citizens (and companies, including parent companies) may be able to instigate foreign bribery with impunity from the national territory. For Canada, the lead examiners considered that an element of the offence would likely be required for territorial jurisdiction thus perhaps suggesting that acts of complicity in Canada might not be sufficient on their own. For Parties that have nationality jurisdiction, there are still cases where territorial jurisdiction over acts of complicity would be important, such as where a non-citizen (or foreign company) is instigating bribery abroad from the territory of the forum.

229. While the language of the Convention refers to commission of “part” of the offence within the national territory, some reports note the existence of other useful principles relating to territorial jurisdiction. Certain Parties (Finland, Germany and Switzerland) also expressly provide for territorial jurisdiction over cases where the effects or consequences of a crime committed abroad are felt in the national territory. France has also applied such a rule in at least some economic crime cases. Another rule that expands territorial jurisdiction in some Parties (France and Belgium) provides for jurisdiction over offences committed abroad where they are closely connected with or inseparable from offences committed in the national territory.

ii. Nationality jurisdiction over natural persons

230. A number of reports have noted that territorial jurisdiction is often insufficient to allow effective investigation and prosecution of foreign bribery cases, and underlined the importance of nationality jurisdiction in this regard. For example, the Japanese authorities explained that investigations for “non-
filed” cases had not been continued mainly due to the non-existence in Japanese law of nationality jurisdiction, noting that a new law introducing nationality jurisdiction would enter into force shortly after the Phase 2 examination. The United States authorities noted that the 1998 addition of nationality jurisdiction would ease the prosecution's burden. It is thus a welcome development and a major achievement for the Working Group that practically all Parties examined have established nationality jurisdiction for the foreign bribery offence for individuals. In certain common law Parties such as the United Kingdom and the United States this represented a relatively novel concept and a significant and welcome change. Among the Parties covered in this study, only Canada has not yet established nationality jurisdiction for the foreign bribery offence.

231. While nationality jurisdiction is now widely applicable, it remains largely untested. For Parties that follow the common law tradition, the principle is new and unusual and one report (the United Kingdom) noted that certain judges who participated in the on-site visit appeared to be unaware of the new ground for jurisdiction. In civil law Parties, the basic principle of nationality jurisdiction is frequently well established, but its actual application in economic crime cases appears to remain infrequent or at least does not attract comment in the Phase 2 reports.

232. Nationality jurisdiction over foreign bribery is subject to a dual criminality requirement in about half the Parties covered in this Study. Many Parties (Belgium, Finland, France, Greece, Iceland, Mexico and Switzerland) continue to have dual criminality requirements for all foreign bribery offences, and one Party (Luxembourg) has dual criminality requirements for at least some such offences. Some Parties (Germany, Hungary, Korea and Norway) do not have a dual criminality requirement. The reports of six Parties (Australia, Bulgaria, Iceland, Italy, the United Kingdom and the United States) also do not refer to a dual criminality requirement.

233. Dual criminality requirements appear to vary in their strictness. In some Parties (Greece and the Slovak Republic), the law requires only that the act constitute an offence in the foreign jurisdiction even if it is a different offence from the one prosecuted by the Party. In other cases, it is not entirely clear from the Phase 2 report whether it is sufficient that the acts constitute an offence or whether the specific offence in question (i.e., foreign bribery) must also exist under the foreign country’s law. In addition, some Parties have more specific requirements. For example, in Finland, it is required that a sentence could have been issued in the foreign jurisdiction, which means that all local defences are potentially available, including shorter limitations periods. This could undercut the effectiveness of the offence. Another Phase 2 report noted that dual criminality requirements can apparently necessitate co-operation from the state of the foreign public official and, where such co-operation is lacking, investigations may be hampered. An investigation of a possible act of bribery of a foreign public official was stopped in Sweden because the prosecutor in charge of the case never received any answer to his MLA request and could not prove that the dual criminality requirement was met. Additional attention to the evidentiary requirements relating to dual criminality would appear to be warranted because any need for foreign law evidence for jurisdictional purposes could also arguably have the effect of undercutting the important principle of substantive law requiring the autonomy of the offence from foreign law.

234. It is notable that the Phase 1 reports of three Parties (Denmark, Netherlands and New Zealand) raise questions about the interpretation of dual criminality for the foreign bribery offence. In two of those Parties (Denmark and Netherlands) the concern was about the application of nationality jurisdiction in cases where the person bribed was a foreign public official from a third country. The Working Group recommended a horizontal analysis of this issue at a later stage. In the Phase 1 Report of New Zealand,

55 Inadequate evidence was also a reason cited for not continuing in certain cases.
which also recommended a horizontal analysis, dual criminality required that the act must constitute an
offence under the law of the country where the foreign public official’s “principal office” is situated.

235. Nationality jurisdiction is subject to special restrictions in some Parties, which have generated
concern in the Working Group. For example, France requires that the victim or the foreign state file a
complaint in order to commence such a case. However, this needs to be viewed in light of the wide degree
of territorial jurisdiction conferred on the French courts for bribery offences. The French authorities also
highlighted a possible evolution of case law to expand the notion of victim to entities beyond just the
foreign state, and the Working Group decided to follow up in light of subsequent practice. Greece has an
absolute requirement of a complaint by the government of the state where the crime was committed, and
the Working Group recommended that this requirement be eliminated. Belgium requires a prior complaint
by the victim or an official opinion from the foreign authorities to the Belgian authorities in order for a
public prosecutor to be able to commence such a case, and the Working Group recommended remedial
legislative measures. Italy appears to apply a regime of prosecution at the discretion of the Minister of
Justice rather than the generally applicable regime of mandatory prosecution, or possibly a regime
requiring a complaint by the victim or the Minister of Justice, and the Working Group determined that the
application of this regime should be followed up.56

236. It is also useful to recall a special restriction identified in the Phase 1 Report of Argentina, which
also led the Working Group to recommend a horizontal analysis of nationality jurisdiction. Under
Argentine law, nationality jurisdiction for the foreign bribery offence only applies to offences committed
abroad by Argentine public officials.

b. Jurisdiction over legal persons

237. The Phase 2 reports to date have not extensively discussed the issue of territorial jurisdiction over
legal persons, focussing primarily on the application of nationality jurisdiction to such persons. To reflect
this relative emphasis and for ease of presentation, nationality jurisdiction over legal persons is addressed
first.

i. Nationality jurisdiction over legal persons

238. In most Parties, nationality jurisdiction for foreign bribery also applies to or is expected to apply
to legal persons. In some cases (Japan and Korea), its application to legal persons in foreign bribery cases
is not expressly stated in the relevant statute and remains untested. In respect of Japan, the lack of clarity
largely stems from the recent establishment of nationality jurisdiction for the foreign bribery offence (i.e.
in January 2005, following the Phase 2 on-site visit), and thus the lack of opportunity for the Working
Group to make an assessment of its application in general, including to legal persons. The Working Group
therefore recommended follow-up of this issue. In respect of Korea, the Korean authorities were confident
that the courts will accept nationality jurisdiction over legal persons. The Korean authorities stated that
“general legal interpretation suggests that nationality jurisdiction will apply to legal persons in the same
manner as provided upon natural persons”. However, in the absence of supporting case law, the Working
Group recommended follow-up as practice develops. For Parties that do not comply with the Convention
because they do not have effective, proportionate and dissuasive sanctions for legal persons for bribery
(Luxembourg and the Slovak Republic), the jurisdictional issue with regard to legal persons also generally
remains to be resolved in connection with the necessary adoption of such liability.

The uncertainty about the applicable regime arises because panellists at the on-site visit referred to two
different provisions that could be applicable to foreign bribery cases.
239. However, even in Parties where nationality jurisdiction is expected to apply to legal persons, it is often based on the expected application of general provisions--rather than express provisions--and there is often little if any practice to confirm the expectation. For Parties with a civil law tradition, the absence of cases may result from the recent nature of the introduction of the liability of legal persons, whereas for Parties with a common law tradition, it may result from the recent nature of the introduction of nationality jurisdiction. In both cases, it raises significant cross-cutting issues because of the potential complexities and difficulties of its application in practice.

240. The application of nationality jurisdiction to legal persons raises a number of additional issues, including how the nationality of a legal person is determined. Generally, common law Parties such as the United States and the United Kingdom apply the law of the jurisdiction under whose laws the legal person is organised. Some civil law Parties (France, Greece, and Italy) determine or are expected to determine the nationality of legal persons by reference to their effective seat of operations or their head office, although some uncertainty often exists about the nature or application of these rules in practice in criminal cases. Some Parties explicitly define the nationals to which the foreign bribery offence will apply. For example, the relevant United Kingdom law considers individual citizens of its Overseas Territories and Crown dependencies to be nationals for purposes of nationality jurisdiction, but does not consider companies incorporated in those jurisdictions to be United Kingdom companies for the same purpose. In the Phase 2 Report, the lead examiners comment that the United Kingdom should bring the situation of the Crown dependencies and Overseas Territories in line with the principles of the Convention, notably as concerns coverage of legal persons incorporated within those jurisdictions. In addition, the United Kingdom law excludes unincorporated entities from the application of nationality jurisdiction.

241. In many cases, jurisdiction over legal persons appears to depend on the existence of jurisdiction over an individual. For example, in some Parties, (Italy, Japan, Korea and Sweden) nationality jurisdiction over legal persons requires or may require that the offence or relevant acts have been committed by a citizen or other individual over whom the Party has jurisdiction. For instance, In Korea, as is the case for establishing territorial jurisdiction over a legal person, it would appear that nationality jurisdiction over legal persons is only contemplated where the actual perpetrator of the foreign bribery offence is subject as well to such jurisdiction (i.e. a representative, agent, employee or other individual working for the legal person who is a Korean national commits the offence). The Korean authorities point out that were a director or employee who is a Korean national directs abroad a non-Korean to bribe a foreign public official, Korea may have jurisdiction over the legal person to which the director or employee belongs. In any case, the Phase 2 Report on Korea raises the concern that there may be a gap in coverage in cases where there is no jurisdiction over the individual perpetrator because, for example, he/she is a foreign citizen who committed the offence abroad on behalf of a domestic company. This jurisdictional rule also has the effect of excluding cases where no identifiable individual committed the offence and thus undercuts one of the key purposes of requiring the liability of legal persons, i.e., to cover cases where complex corporate structures and transactions make is difficult to identify an individual perpetrator. Not all Phase 2 reports address this issue, but it is an important cross-cutting issue for the Working Group as a whole because it undermines the effectiveness of the liability of legal persons. It is noteworthy in this regard that, as a matter of substantive law, the Working Group has repeatedly recommended the elimination of requirements of the conviction of an individual as a prerequisite to legal person liability.

57 With respect to Norway, the Phase 2 Report appears to contain a contradiction. Concerning the liability of legal persons, the Report states that it is the position of the Norwegian authorities that a legal person can be liable without identifying a natural perpetrator. Concerning jurisdiction over legal persons, the Report states that the Norwegian authorities provide that jurisdiction can be established over the legal person as long as it is established it over the natural perpetrator(s).
242. The application of jurisdiction to legal persons for offences committed abroad where the natural perpetrator was a non-national was already raised in two Phase 1 reports (Germany and Korea) as well as in two Phase 2 reports (Italy and Sweden) as a horizontal issue that could potentially affect implementation of the Convention by many Parties.

ii. Territorial jurisdiction over legal persons

243. The rules for the establishment of territorial jurisdiction over legal persons have attracted less attention than nationality jurisdiction. They are particularly important, however, in Parties that do not apply nationality jurisdiction or where it is of uncertain application. Even in Parties with nationality jurisdiction, territorial jurisdiction can be important, such as where the bribery of a foreign public official is perpetrated by a foreign company in the territory of a Party. Two reports (Greece and Italy) noted that for various reasons it may be unclear whether territorial jurisdiction can be applied to foreign legal persons that commit foreign bribery in their territories.

244. Territorial jurisdiction over legal persons is often particularly uncertain because the substantive law of legal person liability--itself subject to uncertainty--may determine whose actions matter for purposes of jurisdiction. For example, substantive law will determine whether the actions of sales representatives can trigger liability or whether only actions by organs of the company or legal representatives suffice. In addition to limiting liability as a matter of substantive law, such rules may preclude territorial jurisdiction. Although these issues have not been expressly analysed in many Phase 2 reports, they may explain the primary importance that the reports have given to nationality jurisdiction in this area.

iii. Related issue of responsibility of parent company for acts of subsidiaries

245. With respect to foreign bribery offences that take place in part in a Party’s territory, or wholly abroad, the Working Group sometimes looked at the issue from the perspective of the responsibility of a parent company for foreign bribery committed abroad by a foreign subsidiary. In the case of Greece, there must be a “sufficient” connection between the subsidiary and the parent. The Phase 2 Report on Greece comments that it is not clear what constitutes a “sufficient connection”. In the case of Mexico, the liability of a Mexican parent company for foreign bribery committed by a foreign subsidiary appears extremely limited because the means for bribing must be provided by the legal person that is responsible. Authorisation by the parent company of the bribery does not trigger the liability of the parent. However, Mexico stated, in its oral follow-up report in October 2005, that changes were made to the text of an initiative submitted to the Senate in September 2003 to amend the Federal Criminal Code in order that the liability of a legal person for foreign bribery is triggered where the offence is committed under the legal person’s name and with its consent or for its benefit.

246. Norwegian prosecutors stated that nothing would prevent the prosecution of a Norwegian company for acts committed by a foreign subsidiary provided that the subsidiary acted on behalf of the company and that the managers knew or should have known about the offence. Authorisation or instigation by the Norwegian parent company would likely be viewed as an aggravating circumstance. Concerning the United Kingdom, the Phase 2 report comments that if the offender is a wholly-owned subsidiary of a United Kingdom company, in order to prosecute the parent company, it would be necessary to show direction or authorisation by a directing mind.

Conclusions

247. Even though all Parties (except one) examined so far have established nationality jurisdiction over natural persons for the foreign bribery offence, the effectiveness of territorial jurisdiction in respect
of offences committed in part in the territory of a Party comes into play when the offence is committed abroad by an individual or legal person who is not a citizen of the Party, or it is difficult to obtain evidence abroad. Given that so far there has been little analysis overall of how Parties apply territorial jurisdiction to economic crimes, including bribery, which take place in part in their territory, and where the analysis has taken place, it discloses a variety of approaches, the Working Group might decide that this issue warrants a horizontal analysis in the mid- to long-term.

248. In addition, in view that the offence of bribing a foreign public official is an offence that will normally be perpetrated abroad, the effectiveness of nationality jurisdiction is a fundamental issue regarding implementation of the Convention. However, the application of nationality jurisdiction to foreign bribery cases remains largely untested by the Parties. Moreover, the principles for its application vary widely between the Parties, in particular with respect to the requirement of dual criminality and the application of special restrictions in some Parties. The Working Group might therefore decide that it would be appropriate to follow up the application of nationality jurisdiction to natural (as well as legal) persons on a horizontal basis in the mid-to long term. A horizontal analysis of the application of nationality jurisdiction was already recommended in four Phase 1 reports, including with respect to the requirement of dual criminality.

249. The application of nationality jurisdiction to legal persons raises further issues, given that practical experience in this regard is just evolving, and that in some Parties there is only a theoretical basis for such application. One such issue was recommended for a horizontal analysis already in two Phase 1 reports, and again in two Phase 2 reports—i.e., the application of jurisdiction for the foreign bribery offence to legal persons that use a non-national to bribe a foreign public official abroad.

c. Universal jurisdiction over foreign bribery

250. Although the Phase 2 reports focus principally on territorial and nationality jurisdiction, it is noteworthy that four Parties (Belgium, Hungary, Iceland and Norway) apply universal jurisdiction to foreign bribery. Courts in these Parties can thus take jurisdiction in some cases over a foreigner or foreign company (as well as over a national) who has committed the offence anywhere in the world. None of these Parties have applied such jurisdiction in practice. Icelandic authorities noted that they would only exercise such jurisdiction if the offender were found in Iceland. They would seek to extradite Icelandic citizens from abroad prior to prosecution. Universal jurisdiction in Norway is subject to the discretion of the King. Universal jurisdiction in Belgium is subject to restrictive conditions, including a requirement of an official opinion from the foreign authorities.

d. Consultation and co-operation with regard to jurisdiction

251. With the substantial expansion of nationality jurisdiction together with a broad concept of territorial jurisdiction, an increasing number of cases will be subject to the potential jurisdiction of more than one state. The offence may be committed in various Parties by individuals and companies from various Parties. The issue also arises where more than one Party has nationality jurisdiction, as well as where one or more Party has nationality jurisdiction and one or more has territorial jurisdiction. These situations raise important issues about how Parties co-operate with regard to prosecution in such cases, as the Convention recognises in requiring consultation between Parties on this issue.

252. The Phase 2 reports to date, together with the Phase 1 reports, provide some useful background about applicable rules in this area. Certain Parties have a legal rule requiring deference to foreign proceedings in certain cases. For example, in cases involving nationality jurisdiction over legal persons, Italy requires that the foreign state not have initiated proceedings against the entity in question. In contrast, Bulgaria provides that, in the absence of an applicable treaty, foreign proceedings are not an obstacle to
Bulgarian proceedings against the same person. Switzerland has detailed rules in this regard. Most Parties (Canada, Finland, France, Germany, Greece, Iceland, Japan, Luxembourg, Mexico, Norway and the United States) have no specifically applicable rules and would deal with the issue of co-operation on an *ad hoc* basis. Korea indicated that the notion of consulting about the transfer of cases is foreign to Korea, but it is prepared to handle requests for consultations. As noted in some Phase 2 reports, some of these issues, and in particular the transfer of cases, are partly covered for some Parties by applicable treaties, such as the European Convention on Transfer of Proceedings in Criminal Matters.

253. Rules requiring or suggesting deference to foreign proceedings have raised some concerns. While co-operation is recognised as vital, some reports have expressed concerns that excessively-rapid deference to other Parties or to non-Party foreign jurisdictions, particularly in cases where the offence took place, might unduly limit the number of investigations. Some Phase 2 reports have suggested that measures should be taken to ensure that deference is conditioned on the existence or likelihood of a meaningful investigation of the foreign bribery allegations in country that has concurrent jurisdiction. More broadly, important cross-cutting issues are raised with regard to the application of concurrent jurisdiction, including where: 1. the foreign jurisdiction may commence proceedings but has not yet done so; 2. the foreign jurisdiction has ongoing related proceedings but has not initiated proceedings against the company or individual at issue; 3. the foreign jurisdiction has ongoing proceedings against the company or individual at issue; and 4. the foreign jurisdiction objects to proceedings occurring in the Party’s jurisdiction. Additional issues relating to co-operation arise in cases involving consortia of companies from different Parties where multiple Parties may have nationality jurisdiction over different members of the consortium.

**Conclusions**

254. Implementation of the requirement under Article 4.3 of the Convention regarding consultations for determining the most appropriate jurisdiction for prosecution, has already been the subject of a recommendation in one Phase 1 report (Italy), due to the finding that Italian prosecutors may not have the discretion to refrain from prosecuting a foreign bribery offence where Italian jurisdiction can be established. The Working Group determined that this situation is not unique to Italy, and stated that it may need to be considered on a horizontal basis. Given the identification of the implementation of Article 4.3 as a horizontal issue in Phase 1, and that it has also been raised as an issue in some Phase 2 reports, the Working Group might consider undertaking a review of how Parties can enhance co-operation amongst themselves in this regard.

5. Enforcement (Article 5 of Convention)

a. Statistics

255. Comprehensive statistics are essential for a thorough evaluation of the enforcement system of an examined country. Data such as the number of reports, investigations, prosecutions and convictions relating to foreign bribery, the sanctions imposed, and how a crime was detected are indispensable. Such data are also crucial for research and the development of typologies, and measures to prevent and detect foreign bribery. The importance of statistical information on the investigation and prosecution of foreign bribery offences was highlighted in the German Phase 1 Report, in which the lead examiners stated that the necessity of such information could be reviewed at a later stage on a horizontal basis. It is obvious, however, that most examined Parties have had few (if any) foreign bribery cases. The sample size of the statistics on foreign bribery is thus too small in most cases to draw definitive conclusions. Nevertheless, in many instances, statistics on domestic bribery or even other types of economic crime would be a reasonable, if imperfect, substitute.
256. Unfortunately, the necessary statistics were not always available in the Phase 2 examinations. Some Parties (Canada, Finland, France, Japan and Switzerland) only keep statistics at the court level; there is thus no information on prosecutions and investigations that did not reach the courts. One Party (Bulgaria) only provided basic statistics that were lacking in details. Several Parties provided statistics that did not distinguish between domestic and foreign bribery, and the liability of natural versus legal persons (German police statistics). In some Parties (Canada, Germany and the United States), many law enforcement agencies are involved in enforcing the foreign bribery offence. This made it more difficult to collect data and to enforce uniform data standards across all agencies, which ultimately resulted in incomplete statistics.

257. The follow-up reports of three Parties (Bulgaria, Germany and the United States) report improvements in the collection of relevant statistics. The Bulgarian oral follow-up report in January 2005 indicated that since the beginning of 2004, the Bulgarian authorities have compiled court statistics on domestic and foreign bribery cases that differentiate between active and passive bribery. Germany, which faces special challenges due to its federal structure, explained in its written follow-up report of June 2005 that statistics on foreign bribery cases arising in some jurisdictions can now be provided. In addition, the United States explained in its written follow-up report of March 2005 that the Department of Justice was developing an internal database to track foreign bribery allegations.

Conclusions

258. In view that it would be difficult if not impossible to undertake any in-depth analysis of the cross-cutting issues identified in this Mid-Term Study in the absence of comprehensive statistics on the investigation and prosecution of the foreign bribery offence, the Working Group might consider agreeing in advance on the nature and type of statistical information to be compiled by the Parties for the purpose of any future analysis of the issues. Indeed, the need for the review on a horizontal basis regarding such statistics has been foreseen in the Phase 2 Report of Germany.

b. Co-ordination and communication

259. The number of agencies involved in enforcing foreign bribery laws varies among the examined Parties. None of the Parties have created a prosecutorial and/or investigative unit that is dedicated solely to foreign bribery. This is understandable, since there are insufficient cases to justify the creation of such units. Some Parties (e.g. Hungary, Mexico and the United States) have vested the responsibility for enforcement in one or a very limited number of agencies. But in many other Parties (see next paragraph), the competence to investigate and/or prosecute foreign bribery is shared by several law enforcement bodies.

260. There are different reasons for sharing competence over foreign bribery among different agencies. In Canada, because of the constitutional division of powers between the federal and provincial governments, three levels of police forces (federal, provincial and municipal) have competence to investigate foreign bribery. Similarly, German federalism requires the governments of the 16 Länder to investigate and prosecute foreign bribery. Due to concerns about the effectiveness of inter-Land communications concerning foreign bribery cases, the Working Group recommended in Phase 2 that Germany continue to keep under review whether the current mechanisms are effective. Germany’s written follow-up report in June 2003 provided information about initiatives to improve inter-Land communication. In particular, the Central Public Prosecution Proceedings Register has been established to provide public prosecutors with access to data on suspects and proceedings. In other Parties, competence is shared as a consequence of administrative organisation (e.g. Greece and the United Kingdom) or laws on criminal procedure (e.g. Bulgaria and Switzerland). Meanwhile, Italian prosecutors are only competent to prosecute crimes that are connected to the region in which their offices are located. But if a crime is
connected to more than one region, then more than one prosecutor may initiate proceedings. The reasons for sharing competence are thus very diverse.

261. With respect to Australia, although the Australian Federal Police (AFP) has the primary law enforcement responsibility for investigating the foreign bribery offence under the Commonwealth Criminal Code, since there is potential overlap with general bribery offences in several state criminal codes, communication between the different police bodies is essential. In addition, certain Australian states have established anti-corruption bodies with investigative powers that could potentially receive foreign bribery allegations. The lead examiners were particularly concerned about the potential for the non-communication by the state/territorial authorities of foreign bribery allegations to the AFP because the bribery offences under the state penal codes do not carry as heavy a penalty as the foreign bribery offence under the Commonwealth Criminal Code. In addition, the opportunity did not arise for the lead examiners to assess the level of priority of foreign bribery offences at the state/territorial level. Although the AFP and Commonwealth Attorney-General’s Department emphasised a high level of co-operation between the AFP and state/territorial police authorities, the Working Group felt it prudent to recommend that Australia consider establishing measures, such as MOUs, to ensure the continued referral of cases involving foreign bribery by state/territorial police and anti-corruption bodies to the AFP.

262. Regardless of the reasons for doing so, the sharing of competence can have the undesirable effect of giving rise to multiple proceedings. For instance, the Working Group found that it is not uncommon in Italy for multiple prosecutors to commence proceedings over the same crime. Multiple investigations may also arise when a case involves both foreign bribery and a related offence such as false accounting, money laundering or tax evasion. If the law enforcement body responsible for foreign bribery is not competent to investigate a related offence, different agencies may investigate different offences arising from the same case. Regardless of the cause, concurrent investigations and/or prosecutions waste scarce resources and can cause delays as conflicts of competence are being resolved.

263. In addition to multiple proceedings, distribution of competence for foreign bribery can also have the opposite effect of causing allegations to not be investigated. In Canada, for example, the Working Group found that it is conceivable that one police agency may close a case because it erroneously believes that another agency has already commenced an investigation. The Working Group thus recommended that Canada consider establishing a co-ordinating role for one of the principal agencies responsible for the implementation of the foreign bribery offence, for purposes including the collection of information from police and prosecutorial authorities at the federal and provincial levels about foreign bribery investigations and prosecutions. Canada informed the Working Group in its oral follow-up report of March 2005 that although a central co-ordinating agency has not been established to address this concern, the process for foreign bribery investigations and prosecutions has been streamlined by compiling information about all foreign bribery cases in an annual report to Parliament, and centralising the anti-corruption programmes of the Royal Canadian Mounted Police.

264. Shared competence over foreign bribery and related offences can also lead to fragmentation of efforts and a lack of specialised expertise. As noted in the United Kingdom report, when competence over foreign bribery is distributed over a number of bodies, each of these bodies is less likely to develop expertise on the crime. At the same time, the United Kingdom authorities point out that the sharing of competence does not necessarily hinder the development of expertise, and that in the United Kingdom there is a traditional division of responsibilities between different jurisdictions, which is well-established and unlikely to change. In other Parties, the Working Group observed that if an agency is responsible for investigating foreign bribery and related offences (e.g. false accounting), it is imperative that that agency be equipped with the expertise (e.g. forensic accounting) to do so.
265. The examined Parties have adopted different solutions to these problems. Establishing a centralised, co-ordinating body may alleviate the problem of duplicate investigations, but it is not always necessary. In Iceland, the system of co-ordination and communication among law enforcement agencies operates on an informal, case-by-case basis. The Working Group found that the system is adequate if it is coupled with guidelines to law enforcement bodies on how to proceed with a case. In Sweden, an informal system for communicating information about cases between three prosecutorial authorities (i.e. local authorities, the National Anti-Corruption Crime Unit and the Swedish National Economic Crimes Bureau) appeared satisfactory to date. However, the Working Group recommended monitoring the system of assigning cases and allocating resources for foreign bribery cases in view that the effect of increased allegations of foreign bribery on the system has not been tested.

266. Several Parties have turned to information technology to address the problem of communication and co-ordination. For instance, Germany maintains a register of ongoing and closed investigations, which includes information on progress and changes in the proceedings, and the reason for not bringing charges. The register is accessible to all the public prosecution offices in the Länder. Unfortunately, the lead examiners could not determine the register’s efficacy because it was too new. Italy has a similar national database accessible by all prosecutors, though again the lead examiners could not conclude whether the system adequately resolves conflicts of competence. The Slovak Republic has also established a centralised computer database to keep track of all ongoing investigations, to which all police and investigators have access. In responding to the Working Group’s recommendation in Phase 2, the United States, indicated in its written follow-up report of March 2005 that the Department of Justice maintains a non-public, computerised case tracking system to monitor the status of all foreign investigations, and is designing a pilot non-public, internal database to also track allegations. The Securities and Exchange Commission also maintains a computerised database of all FCPA investigations. Several other examined Parties, such as Canada and Bulgaria, planned to implement similar systems. Whether these technologies employed by all these Parties result in satisfactory co-ordination and communication is an issue that could merit further study.

267. To facilitate the accumulation of expertise in bribery cases, some Parties (e.g. Greece, Hungary, Mexico, the Slovak Republic and Sweden) have assigned competence over domestic and foreign bribery to the same law enforcement bodies. In Belgium, the Central Office for Corruption Repression (OCRC) has special police structures at the federal and local levels to deal with foreign bribery and other forms of corruption; although the OCRC does not have exclusive competence in such cases. When these bodies in question are called upon to investigate a foreign bribery case, they can thus readily draw on their experience in domestic bribery cases.

268. Expertise can be also shared if the same agency investigates and/or prosecutes foreign bribery and other complex economic crimes. Parties such as Iceland, Norway, Sweden and the United Kingdom have special, centralised units for investigating complex economic crimes. Moreover, Norway informed the Working Group in its oral follow-up report of June 2005 that by July 2005, each police district will have its own Economic Crime Unit. France expected to have a similar unit by 2003 and announced in its oral follow-up report in January 2005 that a central anti-bribery brigade (Brigade centrale de lutte contre la corruption) had been established with a staff of eight agents (and an objective of 20 agents). Other Parties like Luxembourg do not have dedicated units per se, but they may nevertheless have police, prosecutors or judges who specialise in economic crimes. In all of these Parties, these specialised investigators and prosecutors are also competent to investigate foreign bribery. Their experience and expert

58 In the case of Sweden, the National Anti-Corruption Unit (ACU) and the Swedish National Economic Crimes Bureau (ECB) both have competence in corruption cases. However, the ECB only has competence in corruption cases if they require expertise in taxation, business practices or bookkeeping.
knowledge in complex economic crimes (e.g. forensic accounting) are thus readily available in foreign bribery cases. These approaches not only obviate the need to co-ordinate and share information among multiple agencies, but they also pool together expertise and resources in bribery investigations to reap economies of scale.

c. Commencement and termination of proceedings and investigations

269. The Phase 2 reports have devoted a significant amount of time to analysing how proceedings are commenced and terminated. Two issues have attracted particular attention: the evidentiary threshold necessary to commence and continue prosecutions and investigations, and the role of improper considerations enumerated in Article 5 of the Convention.

i. The use of evidentiary thresholds

270. The requirement that there be sufficient evidence before commencing or continuing a criminal prosecution is found in many Parties. Canadian federal prosecutors may commence a prosecution only if there is sufficient evidence that gives rise to “a reasonable prospect of conviction”. Similarly, United Kingdom prosecutors may proceed only if the evidence supports “a realistic prospect of a conviction”, *i.e.* that a jury or magistrate is more likely to convict than not. French prosecutors may “shelve” a case because of a lack of serious and consistent evidence. Prosecutions in Luxembourg must have a sufficient level of evidence to offer a “reasonable prospect of success”. Norwegian prosecutors will terminate or suspend a prosecution where there is “a lack of sufficient proof to indict”, while Swiss prosecutors have a duty to prosecute only when there is “sufficient evidence … to presume that a crime has been committed”. According to the written follow-up report of the United States, the Department of Justice and the Securities and Exchange Commission weigh first and foremost the sufficiency of evidence in deciding whether to charge a company or individuals.

271. In addition to an evidentiary test for commencing *proceedings*, some Parties may have an additional evidentiary test for commencing *investigations*. For instance, in the United Kingdom, if the Serious Fraud Office receives an allegation of foreign bribery, it will open an investigation only if there is sufficient evidence. When the investigation is completed, prosecutors apply the second evidentiary test (*i.e.* whether there is a “realistic prospect of a conviction”) to determine whether charges should be laid. Nevertheless, the Phase 2 Report on the United Kingdom notes one case which was not taken beyond a “discreet internal inquiry” despite the availability of “substantial documentary evidence and witnesses who allegedly had first hand knowledge of suspicious transactions”.

272. The use of evidentiary tests is understandable. Putting the wheels of justice into motion consumes resources and, in some Parties, could have immediate prejudicial consequences for the accused. Therefore, many Parties exercise a degree of circumspection and avoid initiating the criminal justice process on the flimsiest of evidence. For these reasons, the Phase 2 reports do not criticise examined Parties for employing evidentiary tests in foreign bribery cases *per se*.

273. At first glance, nothing suggests that the thresholds for the evidentiary tests are not set at appropriate levels. The definitions of the tests are strikingly similar across Parties. Almost all use language such as “sufficient” evidence or a “reasonable” or “realistic” prospect of conviction. The definitions are somewhat vague, but it is arguable that a test of general application must necessarily be couched in general language.

274. More important is how these tests are applied in practice, since the vague definition of the tests affords wide latitude in interpretation. Unfortunately, the Phase 2 reports do not often go into this issue. In the examination of Luxembourg, police representatives referred to one domestic bribery case in which
prosecutors may have applied the evidentiary test too narrowly in declining to commence proceedings. The Working Group recommended that Luxembourg broaden its investigation powers at the preliminary inquiry stage and ensure that the evidentiary threshold of the prosecuting authorities at the investigative stage is not too high. In Luxembourg’s follow-up oral report in October 2005, the Luxembourg authorities stated that new legislation is under preparation in order to expand the investigative powers of law enforcement and magistrates (e.g. through provisions on the use of undercover agents and access to personal data held by public authorities). At the time of the Phase 2 examination of Japan, the Japanese authorities reported that four “non-filed” investigations of foreign bribery were no longer in progress due to the absence of nationality jurisdiction and inadequate evidence. Apart from these three instances, the Phase 2 reports do not address the evidentiary tests in practice by the Parties.

275. Despite the shortage of information regarding the application of evidentiary tests, and the consequent difficulty that this poses for assessing whether evidentiary tests might be an obstacle to effective investigations of foreign bribery for other Parties, it seems prudent to identify this as a potential cross-cutting issue. In particular, since a prosecution cannot occur without first opening an investigation, it might be advisable to explore the possibility of a wider loophole. In order to undertake such an analysis, the lead examiners will need to know the number of such cases and the reasons why an investigation or prosecution was declined. Since there are probably not enough foreign bribery cases to support a meaningful study, data may have to be drawn from domestic bribery and even other economic crimes. Without information of this nature, it is not possible to conduct a rigorous analysis of this issue.

ii. Improper considerations in the decision to prosecute

276. The potential for the investigation and prosecution of foreign bribery cases to 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” arises in the Phase 2 reports of a number of Parties for various reasons. It can arise because of the specific interpretation given to the “public interest”. It can also arise because of the need to obtain authorisation to investigate/prosecute foreign bribery cases (e.g. Attorney-General). There are often no rules for the decision-making involved in providing or withholding this kind of authorisation, and thus it may be possible for political considerations to creep in.

277. In Canada, in addition to meeting the evidentiary threshold, a prosecution may proceed only if it is in the public interest. Certain public interest considerations could potentially involve conflicts of interest. One such factor is described in the Federal Prosecution Service (FPS) Deskbook as follows: “...whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest”. It should be noted, however, that the FPS Deskbook partly negates the potential for certain considerations to create a conflict of interest by providing, under the list of “irrelevant criteria”, the “possible political advantage or disadvantage to the government or any political group or party”. The Working Group recommended that Canada clarify that, in investigating and prosecuting foreign bribery, there are no proper considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal entities involved. It also recommended that Canada establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. In response to this recommendation, Canada announced in providing its oral follow-up report in March 2005 that the FPS Deskbook had been amended so that prosecutors are now required to keep notes of their reasons for not proceeding when they do so on the basis of a public interest factor listed in the Deskbook.
Similarly, the German Criminal Code provides grounds for dispensing with prosecution where the offence was committed “within (the territorial scope of this statute), but through an act committed outside (of Germany)...” if the conduct of proceedings would pose a risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution”. This provision normally applies to offences relating to national security, defence, etc. and not to bribery offences.

279. In England, Wales and Northern Ireland, a prosecution for a statutory bribery offence cannot be instituted without the consent of the Attorney-General or Solicitor-General, which is only given after consideration of the public interest in light of the factors set out in the Code for Crown Prosecutors. The United Kingdom authorities explain that the purpose of this process is to maintain a consistent approach. Consent requirements apply to approximately 500 offences and there is a long tradition of independence of the Law Officers from partisan considerations in exercising discretion to give or withhold consent. In any event, in December 2003, the Government indicated, in a response to the Joint Committee on the Draft Corruption Bill, that it intended to follow up the recommendation of the Committee to include a provision in the Bill replacing the current Law Officer consent in corruption cases with the consent of the Director of Public Prosecutions and one nominated deputy. Statistics on the decisions of the Law Officer about consent are not made public in any systematic way. By acceding to the Convention, however, the United Kingdom confirmed that the circumstances covered by the Convention were public interest factors in favour of a prosecution.

280. In Sweden, the Penal Code provides an exception to the principle of mandatory prosecution where a bribe is given to certain persons, including certain categories of foreign public officials. In such cases, a public prosecutor may only prosecute if the crime is reported to prosecution by the employer or principal of the person exposed to the bribery or if the prosecution is called for in the public interest. In light of this factor and other concerns of the Working Group in relation to the decision to prosecute, such as the insufficiency of information on the meaning of “public interest” in the Code of Judicial Procedure, the Working Group recommended that Sweden issue guidelines to prosecutors clarifying that prosecution of foreign bribery cases is always required in the public interest, and that effective measures be taken to bring these guidelines to the attention of prosecutors.

281. In Australia, two issues regarding the application of prosecutorial discretion were raised. First, the Working Group recommended clarification of the Guidelines on the Prosecution Policy of the Commonwealth that the factors listed in Article 5 of the Convention must not be considered in decisions whether to prosecute foreign bribery cases (i.e. “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”). Second, according to the National Guidelines for Referring Politically Sensitive Matters to the Australian Federal Police (AFP), Commonwealth agencies are required to raise criminal matters of a politically sensitive nature with the Minister for Justice and Customs in the first instance. The Working Group was concerned that making such a notification could result in a delay in referring foreign bribery cases to the AFP, and recommended that this process be revised to eliminate the potential for delays.

Concerning the Slovak Republic, unclear statutory provisions concerning the tests for suspensions and stays, and the lack of supporting authority in case law or elsewhere concerning the meaning of such unclear terms (e.g. “significant contribution” and “the interest of society in clarifying that criminal offence”) were discussed in relation to the issue of immunity from prosecution of co-operating offenders. The Phase 2 Report states that “nothing precludes a judge or a prosecutor from considering the factors enumerated in Article 5 of the Convention”. However, no recommendation was made by the

59 Subsection 153c(3), Code of Criminal Procedure (StPO).
Working Group to clarify that prosecutions of foreign bribery must not be influenced by the considerations prohibited by Article 5.

283. The situation is somewhat different in Greece, where “political offences” and “offences through which the international relations of the state may be disturbed” could be exempt from prosecution. The Minister of Justice may postpone or suspend a prosecution of such offences. There are no clear definitions of such offences, nor rules or guidelines governing the use of this provision. However, since its enactment in 1951, the provision has been used no more than twice.

Conclusions

284. Implementation of Article 5 of the Convention, which lists considerations that shall not influence the investigation and prosecution of foreign bribery (i.e. the “national economic interest, potential effect upon relations with another State or the identity of the natural or legal persons involved”), has been raised systematically by the Working Group in the Phase 2 examinations. Although concerns about the implementation of Article 5 have so far only arisen in seven examinations, the importance of this issue cannot be underplayed, given that the bribery of foreign public officials is an offence that will often cause political embarrassment for the country of the foreign public official, as well as the country of the briber, in cases where the bribery was perpetrated or condoned by a political figure. In addition, where large companies are involved, enforcement actions by Parties could potentially affect the national economy of the relevant Parties. For this reason it is important that the Working Group remain diligent in canvassing this issue in future Phase 2 examinations, as well as following-up Parties’ progress where recommendations regarding implementation of Article 5 in this regard have been made to them.

d. Resources

285. The issue of specific training provided to law enforcement officials on foreign bribery offences was covered in detail in most of the Phase 2 reports. Equally important was the evaluation of whether Parties have devoted sufficient resources (both human and financial) to investigate and prosecute foreign bribery cases, in particular given the highly technical nature of such offences. A feature of many of the Phase 2 reports was the substantial lack of adequate resources allocated to fighting foreign bribery, including specific training of police officers, judges and prosecutors on economic and bribery offences.

286. In some Parties (e.g. Hungary and Bulgaria), strain on resources may further pose problems when complex cases involving foreign bribery arise. The Hungarian Central Investigation Office of the Public Prosecution Service (CIOPPS) is staffed with 15 public prosecutors, two auditing experts and one technical assistant. Although regular training is available to CIOPPS personnel, no specific training on the foreign bribery offence has been provided to date. The Bulgarian Bureau for Financial Intelligence (BFI) also lacks adequate resources to undertake complicated financial analyses.

287. In Greece, the Body for the Prosecution of Economic Crime (SDOE) has 1 000 officers and 300 administrative personnel. A share of the budget of the Ministry of Finance and Economy (MOFE) is allocated to the SDOE. While SDOE members are trained on theoretical issues they do not appear to have been trained on the practical aspects of bribery investigations. The Greek Police Academy and the National Security School provide training to the officers of the Internal Affairs Division of the Hellenic Police (IAD). The National School of Judicature in Thessaloniki provides theoretical and practical training to new judges and prosecutors.

60 Article 30(2), Code of Penal Procedure.
288. The “economic prosecution” function in Luxembourg appears to be understaffed and the situation within the office of the investigating magistrates is scarcely more favourable for effective prosecutions. Because of Luxembourg’s role as a financial centre, for many of these judges the cases were frequently highly complex. The Judicial Police Service faces similar difficulties. The Luxembourg authorities announced, in their follow-up oral report of October 2005, that a law was adopted in 2005 for increasing the number of magistrates by 21 over the next five years. In addition, magistrates have participated in international fora regarding corruption, and police officers will receive specific training on corruption in their initial training programme and in order to obtain a promotion. With respect to Iceland, the oral follow-up report of January 2005 indicated that the Economic Crime Unit (ECU) recently received a substantial budget allocation to enhance international co-operation and to increase staff. However, the Icelandic authorities conceded that despite these measures, the workload of the ECU is immense, and there is still a need for more staff as well as further training.

289. In France, a number of structures within the National Police Force and the Gendarmerie, at both the national and local levels, have a special role in investigating transnational corruption. Public prosecutors and investigating magistrates conducting investigations in cases of international corruption can call on the services of some 900 criminal police officers specialised in economic and financial crime. The training given at the École nationale de la magistrature, though improving, is still in many respects too general. However, the training of prosecutors is said to be better, half of them having practised in the private sector before joining the criminal justice system. France announced in providing its follow-up oral report in January 2005 that the Brigade centrale de lutte contre la corruption (Central Anti-Bribery Brigade) has been established, with a staff of eight agents. In March 2004, eight specialised interregional courts specialised in economic and financial crime were established. In addition, in 2004, 77 magistrate posts and 126 civil administrative staff posts were created.

290. In Germany, general resources available for prosecuting domestic corruption offences were assessed as sufficient for the prosecution of cases involving the bribery of foreign public officials at the time of Germany’s follow-up written report in June 2005. The Federal Senior Police Training Academy in Munster is responsible for the training of senior police officials at both the Land and federal level. The Deutsche Richterakademie, is a body responsible for federal-wide training of judges and prosecutors. All 16 Länder combined possess a total of 4 964 public prosecutors, who prosecute almost all criminal law violations including corruption offences. In Sweden, the level of resources for investigating and prosecuting foreign bribery cases appears adequate at this stage. In addition, the Phase 2 Report notes that the mechanism for assigning cases and sharing resources between the National Anti-Corruption Unit and the Swedish National Economic Crimes Bureau is flexible and efficient. Similarly, in the Slovak Republic, the Phase 2 Report remarks that the prosecution service appears to have adequate material resources, and that, according to a representative of the Office of the Special Prosecutor, the material resources are constantly improving.

291. Until 2003, in Italy there was no pre-allocated budget for criminal investigations prior to each year; the amount that was actually spent was entered into the government’s books at the end of each year. Significant resources were expended on criminal investigations under this system. In 2003 alone, an estimated EUR 300-345 million was spent on wiretapping. In 2004, this practice was changed to the more conventional approach of allocating a fixed amount at the beginning of each year.

292. In Mexico, police representatives mentioned the need for more resources, including adequate training and suitable technologies, especially for matters concerning transnational bribery. No specific training was provided on bribery of foreign public officials. Officials within the Federal Investigation Agency (Agencia Federal de Investigación, AFI), however, have received extensive training on domestic and international aspects of crime investigation. Mexico indicated, in its oral follow-up report of October
2005, that in 2004 the Attorney-General created the Special Prosecutor’s Office to Combat Corruption, and requested additional funding from the Minister of Finance.

293. Similarly, Norwegian police districts have experienced problems in the allocation of resources: although all police districts are now obliged to set up economic crime units, it was often the case that human and financial resources from these economic crime units were reallocated to other units whose work was felt to be more urgent. The Norwegian authorities announced, in their follow-up oral report in June 2005, that the Action Plan against Economic Crime, adopted in June 2004, requires the establishment of an Economic Crime Unit in each police district by July 2005. Each unit is required to be of adequate size and to be competent to handle large and complex economic crime cases.

294. In Switzerland, each canton is responsible for equipment and infrastructure, human resources and information systems. The police and judiciary of certain cantons have experienced problems of shortages of staff with sufficient technical skills in matters of transnational economic crime. The criminal investigation department of the Federal Office for Police had, out of a total staff of 450, 150 investigators, 15 of whom were specialised in bribery offences. With 24 teams of federal prosecutors, which were simultaneously responsible for investigating and prosecuting international or supracantonal offences (e.g. organised crime, money laundering and bribery offences) and for responding to requests for mutual legal assistance from third Parties in cases under federal jurisdiction for offences committed in Switzerland, the federal authorities were overloaded with cases to the extent that some proceedings had to be adjourned.

295. Concerning Belgium, the Phase 2 Report notes that the caseload and level of resources considerably influence decisions on whether to prosecute. Belgian prosecutors typically make intensive use of the resources at their disposal. For example, in the prosecutors’ office in Brussels, approximately 10 magistrates in the Financial Crimes Department handle about 10,000 cases each year. Examining magistrates and local prosecutors appear to feel the strain of inadequate resources, and in particular feel that there is a need for more training and continuing education programmes. In response to these problems, the Working Group recommended that Belgium carry out an adequate training policy for those involved in criminal proceedings (police, prosecutors and examining magistrates) for the foreign bribery offence and establish a specialised branch to handle economic and financial crime cases.

296. In the United Kingdom, police forces generally do not receive resources earmarked for specific offences or types of cases. Substantial recent increases in the Serious Fraud Office’s (SFO) budget have allowed it to reach its current staff of 244. However, the SFO Director has recently expressed concern about the SFO being spread too thin. Lack of resources for investigation and prosecution of foreign bribery cases was widely cited as a major barrier to the development of triable cases in the United Kingdom.

297. In the United States, allegations of criminal violations of the FCPA are generally investigated by the Federal Bureau of Investigation (FBI), under the supervision of the Fraud Section of the Department of Justice (DOJ). The FBI currently employs nearly 25,000 people, including more than 12,000 special agents spread out over 50 field offices in the United States and 20 foreign offices. Allegations of civil violations of the FCPA anti-bribery provisions are investigated by the DOJ and by the Securities and Exchange Commission (SEC) respectively.

e. Priority and budget allocation

298. Several Phase 2 reports suggested that the foreign bribery offence would not appear to have high law enforcement priority. This may partly be due to the newness of the offence. It may also be due to the emphasis in most Parties on combating domestic bribery. In this context, the Working Group has often encouraged members to place more priority on such cases, given the high level of resources that Parties must dedicate to investigating and prosecuting them, and given other perhaps equal or more important
priorities (e.g. domestic bribery). For instance, in Canada, the Royal Canadian Mounted Police use a
document called “PROOF Criteria and Weights: Economic Crime” to assist them in prioritising cases
involving economic crime. At the time of the Phase 2 examination, foreign bribery was not specifically
included in the document. However, Canada indicated in its oral follow-up report of March 2005 that the
document had been amended to include the foreign bribery offence.

299. With respect to Japan, questions were raised as to the level of priority given to foreign bribery
cases. For instance, the Phase 2 Report looks at the possible impact of the placement of the foreign bribery
offence in the Unfair Competition Prevention Law (UCPL), which is intended to combat unfair
competition in the national economy, and focuses on intellectual property offences. Moreover, the UCPL
did not have a high profile with prosecutors, and statistics indicated that it had been used very little for
prosecutions in general over the years. A Consultative Committee established by the Ministry of Economy,
Trade and Industry (METI) was to undertake a study of the appropriateness of including the foreign
bribery offence in the UCPL. The Working Group recommended that Japan report the findings of the study
to the Working Group. In addition, questions were raised in the Phase 2 Report regarding the incentive of
prosecutors to look for foreign bribery cases, including an absence of specific training on such offences,
and whether the criteria for non-prosecution in the Code of Criminal Procedure might be too broad. The
Working Group recommended that Japan, through its Supreme Public Prosecutors Office, undertake an
internal review of the reasons for the absence of “filed” investigations and prosecutions of foreign bribery
cases. In addition, in part because the Working Group found that Japan had not demonstrated sufficient
efforts to enforce the foreign bribery offence, the Working Group recommended another on-site evaluation
of Japan in one year.

300. The Phase 2 Report on the United States addresses the issue of prioritisation amongst foreign
bribery cases. There were no established priorities within the Fraud Section of the DOJ which determined
which cases they chose to pursue. Generally, the DOJ, in deciding to charge a company or individuals, will
weigh, above all other considerations, the sufficiency of the evidence and the likelihood of winning the
case. It follows that the principal standard for indictment applied by Fraud Section prosecutors across the
board is whether the prosecutor believes, on the basis of the evidence, that the defendants will be
convicted. The written follow-up report of the United States, provided in March 2005, confirms that any
FCPA allegation that comes to the attention of the Department of Justice or the Securities and Exchange
Commission, which upon investigation satisfies generally applicable criteria for prosecution (e.g.
sufficiency of evidence, likelihood of success at trial), will be prosecuted.

301. Another example is provided by England and Wales where the organisational structure of the
police, which is based on 43 separate local police forces, is heavily focused on local concerns; police
priorities are generally set by local police chiefs named and supervised by local boards. Positive changes
have been made to the treatment of foreign bribery in terms of its relative priority for the local police in the
most recent National Policing Plan.

302. In Italy, cases are usually assigned to prosecutors on a random basis. Once assigned to a case, a
prosecutor has total autonomy from the government and other prosecutors. He/she may be removed from
the case only in accordance with strict rules set down by the Consiglio Superiore della Magistratura
(CSM).

303. In Japan, the Supreme Public Prosecutor’s Office provides guidance or direction to prosecutors
regarding the foreign bribery offence. The situation is similar to Korea where the Supreme Public
Prosecutor’s Office has recently ordered its prosecutors to be more attentive to foreign bribery and report
cases to it.
304. Foreign bribery might also occur as part of a broader pattern of corrupt transactions. Several Phase 2 reports suggest that investigative and prosecutorial processes that could potentially involve foreign bribery aspects \[e.g.\] customs (smuggling of human beings, drugs and cigarettes) and anti-monopoly invariably have a low level of awareness of the foreign bribery offence, and hence do not report it to the appropriate authorities.

305. For instance, the Phase 2 Report on Bulgaria suggests that the understanding of risk areas and suspicious fact patterns is generally low across government agencies, and this seemed to be coupled with a tendency on the part of investigators to adopt a reactive approach and wait for leads rather than engage in deterrence or active detection. An important risk factor is that Bulgaria is situated on major routes for trafficking activities such as drugs, the illegal arms trade, stolen cars and human trafficking, all of which are activities that necessarily involve corrupt transactions and many of which cannot take place without the bribery of foreign public officials. In Iceland investigative agencies appear to direct their investigations exclusively at the offences in terms of their principal field of competence, and not at corruption as a possible related offence.

306. Two interesting examples are provided by France and Canada. In France, disclosure to the Public Prosecutor’s Office of proven or suspected acts of bribery can be made by public officials in the course of their normal duties or in the course of supervisory missions conferred on the body, organ or department under whose authority they are working. Several cases falling within the scope of the Convention which were under investigation at the time of the lead examiners’ on-site visit had originated as a result of a report by public officials.

307. Canadian authorities have launched several initiatives for the purpose of combating crime, including smuggling activities between the Canada/United States border. It is reported that organised crime is largely responsible for contraband smuggling between these two Parties, and employs highly sophisticated methods with huge resources and a potential for violence and corruption.

308. The Phase 2 reports of some Nordic Parties have provided examples of pro-active approaches. In Finland, other forms of corruption were also described that do not appear to involve bribery but provide an understanding of the corruption landscape in which Finnish businesses find themselves in certain Parties. In Norway, sources of allegations include financial institutions, international organisations, public administrations such as the customs or tax administration, companies that have an internal audit process and have discovered suspicious payments, employees, external companies and persons (such as competitors or customers), and media reports. The Norwegian Customs and Excise, for instance, co-operates extensively with the police and prosecution authorities, and reports regarding suspected criminal activity are made on a regular basis.

6. Statute of Limitations (Article 6 of Convention)

309. Statutes of limitation are statutory rules which refer to the period within which a criminal action can be brought. 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. Given that once the statute of limitations for the foreign bribery offence has expired the offence cannot be proceeded against, regardless of the weight of the evidence or the seriousness of the offence, the limitations period prescribed by a Party (if one is prescribed) is an overarching issue regarding the effective implementation of the Convention. It is therefore not surprising that the Working Group recommended in one Phase 1 Report (Denmark) and one Phase 2 Report (Italy) that the statute of limitations is to be reviewed on a horizontal basis.
310. The issue of the adequacy of statutes of limitations for the offence of foreign bribery was raised in all the Phase 2 reports. It emerged that statutes of limitations were entrenched in all the Parties’ criminal justice systems with the sole exceptions of two Parties with a common law system. The length of these statutes varies from country to country and often depends on the maximum penalty applicable to the particular offence. Time usually begins to run on the day on which the facts constituting the crime were committed. There are, however, serious crimes with no limitation periods (*e.g.* genocide and crimes against humanity).

311. In six Parties (Germany, Greece, Iceland, Italy, Korea and the United States) the statute of limitations for the foreign bribery offences at the time of their Phase 2 examinations was five years. In others (*e.g.* Japan and France) the limitations period was three years and the Working Group expressed concerns that such a threshold might be too short and represent a serious obstacle to the effective implementation of the Convention. Since its Phase 2 examination (June 2005), Japan has increased the statute of limitations for the foreign bribery offence to five years (for natural persons). France explained during its oral follow-up report in January 2005 that the statute of limitations would not begin running until the day when the last bribe payment was made, and would be interrupted by any procedural act. Furthermore, if related offences are prosecuted, any procedural act in relation to them would also interrupt the running of the statute for the foreign bribery offence.

312. Only Canada and the United Kingdom do not provide a statute of limitations for the offence of bribing a foreign public official. This situation allows these Parties ample time for the investigation and prosecution of complex cases requiring, for instance, the obtaining of mutual legal assistance from other Parties. In Switzerland, the limitations period for the bribery of foreign public officials is 15 years. The Working Group has recognised that such long time limits can take better account of the complexity of corruption cases.

313. In other Parties the limitation periods depend on whether the offence is basic or aggravated. In Bulgaria, the statute of limitations varies between ten years (for acts punishable by a deprivation of liberty for more than three years), five years (for acts punishable by a deprivation of liberty for more than one year) and two years (for all the remaining cases). Finland and Norway have limitations periods of ten years for aggravated bribery and five years for basic bribery. In Hungary, the statute of limitations is five years for aggravated bribery and three years for basic bribery. In Mexico, the offence is time-barred in three years for basic bribery and eight years in cases of aggravated bribery. In the Slovak Republic, the limitations periods have been amended so that for non-aggravated and aggravated foreign bribery they are now five and ten years respectively. The period is suspended if the accused is abroad or cannot be prosecuted because of a legal impediment. The period does not run if proceedings have been suspended because the accused has become a co-operating offender. It was felt that these amendments should adequately address the concerns of the Working Group expressed in Phase 1.

314. As with legal persons liable for the offence of foreign bribery, Finland and Germany have limitations periods of five years. The statute of limitations is three years in France and two years in Iceland. In Norway, the limitations period lapses in five years for basic bribery and ten years for aggravated bribery.

315. Some Parties have used different procedural approaches to deal with limitations periods. Hungary and Italy, for instance, apply two limitation periods to the offence of foreign bribery, one for the conclusion of an investigation and one for the conclusion of a prosecution. In particular, the period for investigations is limited to two years maximum. In Hungary, time begins running from the date of the first questioning of the suspect, whereas in Italy by filing *notitia criminis* in the register of the public prosecutor.
316. Other Parties provide for limitation periods for the enforcement of sanctions. In Finland and Iceland, a sentence of imprisonment shall lapse within five years if it is for at most one year and within ten years if it is for over one year and at most four years. The enforcement of a fine (for natural as well as legal persons) shall lapse five years after the decision becomes final. In Norway, for imprisonment sentences the limitations period depends on the length of the sentence imposed *in concreto* and it varies between five years and 20 years. A fine imposed is time-barred in three years and for fines exceeding NOK 3 000 (approximately EUR 380), the limitations period is five years.

317. The statute of limitations can be either interrupted or suspended where certain procedural steps are taken (e.g. the interrogation of the accused, MLA requests, search and seizure). The difference is that an interruption resets the limitations period and time runs anew from the end of the event causing the interruption. For instance, in France the statute can be interrupted by any act of procedure. On the other hand a suspension merely stops the running of time temporarily. The situation is different in Japan where the running of the limitations period is not suspended or interrupted by the initiation of an investigation unless the offender is outside Japan. Similarly, in the United States the period is not suspended by any act of investigation prior to the indictment. Thus, the Working Group recommended that the United States consider whether the statute of limitations applicable to the offence of bribing a foreign public official is adequate, and if necessary, take steps to increase the period appropriately. The United States informed the Working Group during its written follow-up report in March 2005 that the Department of Justice believes that the current period, which can be extended to eight years for the purpose of obtaining foreign evidence, is adequate, and thus there are no plans to request an amendment.

318. Some Parties also provide for “ultimate” limitation periods. This means that regardless of provisions for the interruption and/or suspension of the statute, there is an overall limit on the length of the period. In Bulgaria, in any case the statute of limitations shall not exceed by one-half the term provided under article 80 of the Criminal Code (*i.e.*, ten, five and two years). In Germany, the prosecution is barred by the absolute lapse, which is ten years for the domestic and foreign bribery offences. However, the running of the limitations period can be suspended (postponed) for as long as the perpetrator evades proceedings by staying abroad. In Greece, proceedings (including appeals) should be concluded within eight years of the commission of the crime. Italy has an “ultimate” limitations period of seven-and-a-half years for most foreign bribery offences. In the United States, the five-year threshold can be extended for up to three years, upon a request by a prosecutor and upon a finding by a court that additional time is needed to gather evidence located abroad.

319. To date, the Working Group has not identified a uniform or ideal statute of limitations for the offence of foreign bribery. Indeed, under the Phase 1 and Phase 2 evaluations, the Working Group was often concerned that a three-year (or lower) threshold of statute of limitations might be too short and represent a serious obstacle to the effective implementation of the Convention. On the other hand, there are reports where the Working Group has found “unremarkable” a five-year (or higher) threshold.

320. It should be noted, however, that due to the complexity of the cases, the difficulty in identifying perpetrators and the need for mutual legal assistance in most cases, investigations of foreign bribery can be expected to be long running. Reliance on intermediaries, secret commissions, false invoices, and, more generally, complex corporate mechanisms may render even more difficult the detection of transnational bribery.

321. In addition, some Parties (*e.g.* Belgium, Bulgaria, Greece and Italy) with an apparently adequate threshold (five years or more) have to face lengthy delays in the criminal justice process which may cause limitations periods to expire in foreign bribery cases. Delays in some justice systems are well-documented and the causes are multifarious. Complex investigations, lengthy trials, an overburdened judiciary and prosecutors’ office, and too many cases in judicial systems with mandatory prosecutions, all contribute to
the problem. As noted above, problems of delays may be further exacerbated in foreign bribery cases, since such cases are often complex and involve gathering evidence from foreign countries, thus adding to the length of proceedings.

322. On this issue, the lack of detailed statistics and fact-based research by many Parties on delays or on the number of cases that were unable to be prosecuted due to the expiry of the statute of limitations, impeded the Working Group’s ability to assess the adequacy of the statute of limitations for the investigation and prosecution of the offence of foreign bribery. Reviewing the impact in practice of the various legal provisions on the length of the limitations period was also problematic due to the low number of foreign bribery cases investigated and prosecuted so far. However, it is noted that the Slovak Republic provided statistics regarding the length of proceedings for domestic corruption, which indicated that from 2000 to 2004 the average length of proceedings for such cases, including active and passive domestic bribery, was under seven months. In addition, the German written follow-up report given in June 2005 indicates that the Federal Ministry of Justice is not aware of any foreign bribery case in which preliminary proceedings were terminated due to the expiry of the statute of limitations.

Conclusions

323. There is not enough statistical information regarding foreign bribery cases to make an accurate assessment of the impact of Parties’ statute of limitations periods on the effectiveness of foreign bribery investigations. Since it may be some time before a body of useful statistics is available in this respect, the Working Group might consider monitoring cases of domestic bribery for Parties, in particular where such limitations periods are the same (or longer) as for foreign bribery. However, any such analysis would need to be mindful that foreign bribery investigations normally rely on obtaining MLA, which can take many months (and sometimes years) to obtain. The analysis also needs to be mindful of the variations between Parties in respect of the following: 1. the starting point for the running of the limitations period; 2. the possible grounds for suspending or interrupting the period; and 3. whether an “ultimate” (overall) period applies regardless of suspensions and interruptions.

324. In addition, pursuant to the recommendation of the Working Group in the Phase 1 Report of Denmark and the Phase 2 Report of Italy, the Working Group has already identified this as an issue that warrants a horizontal review.

7. Money Laundering (Article 7 of Convention)

325. A survey of the Phase 2 reports on the issue of money laundering presents some challenges. All of the reports dealt with two major subjects: the offence of money laundering and the reporting of suspicious transactions. However, lead examiners have focused on different issues within each subject as the methodology of evaluation evolved through the examination round. Consequently, some reports discuss and contain statistics on certain issues while others do not. It is thus not always easy to identify common trends and cross-cutting challenges among the examined Parties.

326. At the most rudimentary level, it is clear that all of the examined Parties have criminalised money laundering in relation to foreign bribery to some degree. More importantly, all of the examined Parties appear to treat money laundering in relation to foreign bribery and domestic bribery in the same manner, as required by Article 7 of the Convention.61

61 Article 7 of the Convention states: “Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the
However, effective implementation of the Convention requires more than equal treatment of money laundering in domestic and foreign bribery. Since the Convention focuses on active bribery, it is particularly important to examine how Parties treat the proceeds of bribery derived by a briber. Though not technically required by the Convention to do so, several Parties prohibit the laundering of not only bribes but also proceeds of foreign bribery. Two exceptions are Japan and Korea, which only prohibit the laundering of bribes. At the time of its examination, Japan planned to extend its money laundering offence to cover proceeds. Korea did not have similar plans because it felt that its ability to confiscate proceeds from a briber is a sufficient substitute. However, as the lead examiners pointed out, since the laundering of proceeds is not an offence per se, financial institutions may refrain from reporting suspected laundering of bribery proceeds to regulatory authorities. Korea’s ability to detect foreign bribery through anti-money laundering measures could thus be diminished. Most recently, in the Phase 2 Report of Australia, it is noted that a bribe payment “does not appear to fit the notion of ‘proceeds of crime’”, but the Working Group made no recommendation to Australia in this regard.

The money laundering offence of at least some of the examined Parties disregards the location of the predicate offence, as required by the Convention. For instance, France, Germany, Greece, Hungary, Italy, the Slovak Republic and the United Kingdom cover predicate offences that are committed abroad, though there was no case law to demonstrate how this operates in practice. The reports contain less information on the conditions under which the offence applies. Iceland requires a conviction for the predicate offence in order to confiscate the proceeds, while in the United Kingdom, the conduct which constitutes the predicate offence must also be a crime in the United Kingdom. For Finland, the act must take place in a country which also has a foreign bribery offence. Sweden has a unique approach to covering money laundering in relation to foreign bribery offences that take place abroad. Although it has not yet been tested in the courts, the Swedish authorities state that the doctrine of “universal applicability” applies to certain predicate offences, including foreign bribery, thus ensuring that the “money receiving offences” apply where the predicate foreign bribery offence takes place abroad. According to the principle, certain crimes committed abroad constitute a crime in Sweden irrespective of whether the conduct is criminalised in the foreign country. In any case, given the absence of supporting case law, the Working Group recommended follow-up in this regard.

Though the Convention does not require that Parties establish the liability of legal persons for money laundering offences, the imposition of such liability by Parties could increase the effectiveness of implementation of Article 7 of the Convention. At the time of their Phase 2 examinations, only some Parties (e.g. Australia, Belgium, Canada, France, Germany, Greece, Norway, Sweden, Switzerland and the United States) had such liability. Other Parties, such as Italy, planned to rectify this deficiency by ratifying the Palermo UN Convention on Transnational Organised Crime.

The statutory sanctions for money laundering in the examined Parties appear to be prima facie adequate. The maximum punishment in most examined Parties (Australia, Belgium, Bulgaria, Canada, Finland, France, Germany, Greece, Hungary, Italy, Japan, Korea, Luxembourg, Norway, the Slovak Republic, Sweden, Switzerland, United Kingdom and United States) is imprisonment of five years. In addition, fines and confiscation are often available. In the case of Mexico, the minimum sentence of imprisonment is 5 years and the maximum 15 years for money laundering. In almost all Parties (Australia, Belgium, Bulgaria, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Mexico, Norway, the Slovak Republic, Sweden and Switzerland), the maximum penalty is increased where there are aggravating factors, such as where the offender launders money professionally, re-offends or is a member of an organised crime group. Less clear, however, is the adequacy of the sanctions that are applied in practice.

same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.”
So far, only five Parties have provided statistics on the sanctions imposed by their courts for money laundering (Australia, Belgium, Germany, the Slovak Republic and Sweden).

331. A system of detecting money laundering in relation to foreign bribery can further enhance effective implementation of the Convention. Though not expressly required by the Convention to do so, all examined Parties have established financial intelligence units (FIUs) to receive and analyse reports of suspicious financial transactions. In some instances, FIUs work closely with law enforcement. For instance, Korea’s FIU pro-actively seeks information from law enforcement agencies and financial institutions. Plans were underway to provide the FIU with direct on-line access to information kept by other law enforcement agencies. The FIU also met regularly with law enforcement, prosecutors and financial institutions to ensure the reporting system is cohesively implemented.

332. All examined Parties have broadly applied mandatory reporting requirements to their financial sectors. Most of the Phase 2 reports have gone further and inquired into reporting by designated non-financial businesses and professionals under the Financial Action Task Force (FATF) Revised 40 Recommendations. Apart from Korea, at the time of their Phase 2 examinations all Parties required at least some non-financial entities to report. In addition, many examined Parties had either extended reporting obligations to lawyers (e.g. Belgium Germany, Hungary, Mexico, Switzerland and the United Kingdom) or planned to do so (e.g. Italy, Japan, Luxembourg and Norway). The only exceptions expressly mentioned in the Phase 2 Reports were Bulgaria and Canada, the latter having repealed such a requirement in March 2003 because of a court challenge alleging that the requirement violated client-solicitor privilege. However, the oral follow-up report of Bulgaria provided in January 2005 indicated that the money laundering reporting obligations were extended to private lawyers and real estate professionals in 2003. In addition, Finland and France stated during their oral follow-up reports that the money laundering reporting obligations under those Parties’ laws now also apply to lawyers. Other Parties (e.g. Germany, Sweden and Switzerland) have attempted to balance reporting requirements with the protection of privilege by exempting lawyers from reporting information acquired while providing legal advice to a client or representing a client in court. With respect to Switzerland, a lawyer who acts as a financial intermediary has an obligation to report and cannot invoke professional secrecy. Whether these measures impact on the effectiveness of the reporting regime is not known.

333. In any event, a better measure in evaluating the effectiveness of the Convention is whether suspicious transaction reporting systems have led to the discovery of foreign bribery and related money laundering cases. If one assumes that foreign bribery is a prevalent phenomenon, and that the crime frequently involves money laundering (of the bribe or the proceeds of bribery), then one could reasonably expect reporting systems to detect foreign bribery cases regularly.

334. In reality, the statistics in this regard have been somewhat disappointing. Suspicious transaction reports (STRs) have not led to bribery investigations in most of the examined Parties. Between 2003 and 2004, STRs in Germany resulted in seven bribery investigations, and STRs in Mexico in 2003 resulted in two bribery investigations (none of which had led to prosecutions by the time of the Phase 2 examinations). Between 2001 and 2003, Greece received three STRs related to foreign bribery, although additional investigation eliminated the suspicions. It also received 15 STRs concerning domestic bribery.

six of which resulted in criminal proceedings. Luxembourg had 10 STRs involving bribery between 2000 and 2002, none of which resulted in criminal proceedings. At the time of its on-site visit, France had opened six preliminary inquiries or judicial investigations potentially involving foreign bribery as a result of STRs. In Belgium, STRs had resulted in the forwarding of 12 corruption cases for investigation, of which six to eight potentially involved the bribery of foreign public officials. Three of those proceedings had been terminated and the others were at the preliminary investigation or preliminary hearing stage at the time of the Phase 2 examination. Indeed the Phase 2 Report on Belgium commented favourably on the role of Belgium’s FIU in detecting foreign bribery. An overall review of the role in the various Parties of their FIUs in detecting and reporting foreign bribery indicates that in retrospect the Working Group was perhaps overly critical when it singled out France’s FIU for playing a limited role in “bringing business” to the criminal justice system. However, given that France was one of the earlier Parties to be examined under the Phase 2, the Working Group did not realise at the time that its record in this area was not exceptional.

Why are so few foreign bribery cases identified through STRs? It is probably not because too few STRs are being filed or, following the same logic, because too few entities are required to report. It is difficult to conclude whether the number of STRs for a particular country is too high or too low, given the myriad of factors that affect the number (e.g. the size of the country’s economy and its financial sector) and the absence of data from other Parties. Nonetheless, except for the smallest Parties, the sheer number of STRs in the examined Parties already ranges from hundreds to tens of thousands annually and is steadily increasing. Since the number of STRs is so disproportionate to the number of foreign bribery cases detected through STRs, under-reporting is probably not the problem.

One could argue that foreign bribery cases are escaping detection because FIUs are overwhelmed by a massive volume of STRs which they do not have the resources to analyse properly. But there is scant support for this theory in the Phase 2 reports. Only the reports on Hungary and Luxembourg (and Mexico to a smaller extent) identified problems with the resources of FIUs. Korea stated that its FIU had enough resources, but not if the number of STRs continued to grow. Mexico has since reported that due to the restructuring of its FIU in 2004, it now has adequate means to fulfil its tasks. However, for the majority of the examined Parties, the Phase 2 reports do not voice concerns over the resources of FIUs.

There is also some evidence that in many Parties FIUs have analysed and forwarded numerous STRs to law enforcement for further investigation. Beginning with Belgium, statistics indicate that 90% of the money laundering cases dealt with by the police originate from reports sent by the FIU, and since 1993, over 5 000 (or two-thirds of the STRs received by the FIU) were referred to prosecutors for action. As mentioned above STRs have led to 12 (domestic and foreign) corruption investigations since 2003. Japan’s FIU forwarded 55-73% of the STRs that it had received to law enforcement since 2000. The corresponding statistic in 2002 and 2003 for Switzerland, the United Kingdom and Greece were 77.5% (about 450 cases annually), 20-30% and 3.1% (50 cases) respectively. The figure for Korea was 26.3% (603 cases) in the 27 months up to January 2004. Bulgaria forwarded 90-92% of STRs to its law enforcement, while France’s FIU forwarded 673 STRs to law enforcement between 2000 and 2002. Italy’s FIU forwarded 20 000 STRs to its judicial authorities since 2001, though only 3% of the reports resulted in criminal proceedings.

It is difficult to say conclusively whether STRs are generating too many or too few investigations, absent data from more Parties. What is clear, however, is that FIUs have at least identified substantial numbers of STRs that are worthy of further investigation by law enforcement in those Parties. Unfortunately, extremely few of these involve foreign bribery. With respect to the Slovak Republic and Sweden, the ratio between STRs and referrals to law enforcement is not as high. In the Slovak Republic, in 2005 the FIU received 818 STRs, and as of June 2005, 102 had been forwarded to law enforcement authorities and 60 resulted in preliminary investigations. In Sweden, of 9 832 STRs received by the FIU in 2002, 2 257 led to “further measures”. In 2004, of 9 929 STRs received by the FIU, 134 operative reports were made to the prosecutorial authorities and 21 resulted in preliminary investigations. The Phase 2
Reports on the Slovak Republic and Sweden do not indicate that any of the STRs forwarded to law enforcement involved foreign bribery.

339. Could the problem be that the reporting entities have not adequately identified transactions involving laundering of bribes and proceeds of bribery? The Phase 2 reports do not contain the necessary data to draw such a conclusion. But if this is the case, then guidelines and typologies on money laundering (descriptions of methods and trends regarding money laundering to assist financial institutions and other reporting entities in identifying suspicious transactions), particularly if they relate to foreign bribery, could possibly ameliorate the problem. The FIUs of most Parties (Australia, Belgium, Canada, Germany, Greece, Italy, Korea, the Slovak Republic, Sweden, Switzerland, the United Kingdom and the United States) already provide typologies, but few refer specifically to the bribery of foreign public officials. Belgium and the United States are exceptions. Concerning Belgium, the FIU has prepared typologies that specifically include situations where the proceeds of bribing foreign public officials have been laundered. The United States has issued guidelines requiring financial institutions to stop or refrain from doing business with senior political officials unless the latter demonstrate the legality of what they are doing. Financial institutions must scrutinise the opening of accounts for such officials, their immediate families or close associates who have the authority to conduct business on behalf of those officials. Banks must also be proactive in informed compliance with respect to these types of accounts. Unfortunately, the Phase 2 Report on the United States does not describe the number of foreign bribery cases that have been detected because of STRs. Absent such statistics, typologies like those prepared by the United States may in theory be useful, but their impact in practice remains to be seen.

340. With respect to Mexico, following the Phase 2 examination the following three important steps have been taken to improve the quality of STRs: 1. typologies were distributed by supervisory entities in February 2006; 2. guidelines on how to detect unusual and suspicious operations were provided to supervisory entities; and 3. a number of meetings have been organised to identify risk areas with representatives of the relevant financial sectors. However, information has not been provided about whether any of these measures specifically address the bribery of foreign public officials. The Phase 2 Report on Korea states that the Korean FIU planned to distribute a new typologies book that would discuss bribery cases, if any had occurred.

341. Along the same vein, increased feedback from FIUs to reporting entities may allow the latter to fine tune their reporting procedures, produce better reports and catch more money laundering transactions. At present, the amount of feedback may be inadequate in some examined Parties (e.g. Bulgaria, Hungary, Japan and the United Kingdom). The situation in the other examined Parties is unclear, except for four Parties (Australia, Germany, the Slovak Republic and Sweden) in which the outlook was more positive at the time of their Phase 2 examinations. In Australia, law enforcement agencies regularly provide feedback to the FIU, which in turn provides feedback to cash dealers, including through regular newsletters and the FIU’s Annual Report. The German FIU provides feedback to reporting entities under the Money Laundering Act including through a regular newsletter, an annual report and online information. In the Slovak Republic, reporting entities indicated that they receive some feedback, whereas the general impression of the lead examiners for Sweden was that there has been a high level of co-operation and communication between the reporting entities and the FIU.

Conclusions

342. To conclude, the overriding concern is that anti-money laundering measures in the examined Parties have uncovered few foreign bribery and related money laundering cases. The Phase 2 reports have identified areas for improvement in the reporting systems and money laundering offences of the examined Parties. However, the deficiencies that have been identified may not explain the low number of foreign bribery cases that have been detected. Moreover, these deficiencies could be theoretical.
because there have been few foreign bribery cases to demonstrate the problems. The lack of cases also raises questions because anti-money laundering measures have generated investigations of other types of crimes. The reason could be that the reporting entities, the FIUs or both, do not yet have the knowledge or capability to detect the laundering of bribes and proceeds of bribery. Perhaps the number of known cases merely indicates that the incidence of foreign bribery and related money laundering crimes is much lower than other crimes. Or maybe by its nature, money laundering in relation to foreign bribery (unlike other crimes) is inherently less susceptible to detection by suspicious transaction reporting. The Phase 2 reports do not contain the necessary data to conclusively answer these questions. However, given the importance of anti-money laundering systems for detecting and deterring the bribery of foreign public officials, the Working Group could follow-up this issue with an assessment of why these systems have not to date proved effective for achieving these purposes.

8. Accounting and Auditing (Article 8 of Convention and Paragraph V of Revised Recommendation)

a. Accounting requirements, liability and sanctions

343. The Convention and Revised Recommendation both emphasise the importance of accounting rules in the fight against foreign bribery. In addition, in the Phase 1 Report on Switzerland, the Working Group already recommended that the issue of accounting standards be examined horizontally at a later stage. The Phase 2 reports to date indicate that the rules applicable to the maintenance of books and records by companies have been improving in most if not all Parties as a result of the adoption of international standards and reactions to recent accounting scandals. A few relatively recent Phase 2 reports have noted that all publicly traded companies have been or will be required to present their accounts according to International Financial Reporting Standards (IFRS) or other internationally accepted accounting principles, and these requirements undoubtedly apply to additional Parties examined earlier. For example, Australian accounting standards were made fully equivalent to IFRS standards in 2004. Although the application of IFRS may only be mandatory for listed companies, as in the case of the EU regulation on the application of international accounting standards, it can have a positive effect on accounting standards as a whole. In Hungary, for example, the Ministry of Finance expects that the newly-formed Hungarian Accounting Standards Board will work to achieve full convergence of Hungarian accounting standards with IFRS within six to eight years. In Germany, the Institute of Auditors and the German Accounting Standards Committee have incorporated international standards into their own general accounting standards.

344. While such general trends are undoubtedly positive, analysis of the Phase 2 reports indicates that few Parties appear to have express provisions prohibiting the fraudulent accounting practices defined in Article 8.1 of the Convention. Reports have noted that a number of Parties, (such as Canada, Hungary and Norway), apply only more general rules and do not expressly prohibit the activities in Article 8. The evaluations have not generally been able fully to test whether such general rules cover all of the prohibitions in practice and not all reports expressly address the issue of coverage of all of the Article 8.1 infractions, but in a number of cases (Australia, France, Greece, Korea, Luxembourg, Norway, the Slovak Republic, Sweden and Switzerland) positive evaluations have been made in this regard. For instance, during the on-site visit to Sweden, discussions with professional accountants and public agencies supervising them satisfied the lead examiners that the accounting and auditing rules are adequate for the purpose of preventing the bribery of foreign public officials. In addition, in a foreign bribery case for which a conviction had been obtained in the court of first instance, one of the offenders was also convicted of the aggravated bookkeeping crime under the Swedish Penal Code, as some of the relevant transactions had been incorrectly recorded and lacked necessary supporting information. While the Convention does not require explicit coverage of the infractions in Article 8.1, an implicit approach raises cross-cutting issues both about the certainty of coverage and about the degree of awareness of the prohibitions amongst companies and the relevant professions.
345. Accounting obligations with regard to affiliated foreign subsidiaries have also been subject to comment in a few reports, with varying rules being noted in this area. In the United States, a United States issuer parent company is obliged to enforce the FCPA books and records provisions in foreign subsidiaries that it controls. Applicable policy guidance provides for a rebuttable presumption of control where there is an ownership interest over 20%. The German authorities indicated that it would not be possible to introduce a statutory obligation for the foreign subsidiaries of German companies to apply German accounting standards due to the excessive extraterritorial effects of such a measure, but that, in practice, where consolidation is required, parent companies in Germany tend to require that their foreign subsidiaries use the same accounting standards as the parent in order to facilitate the preparation of the accounts.

346. A number of other reports also address the rules governing foreign subsidiaries. Norway requires, with a few exceptions, that parent companies provide consolidated accounts if a parent company has a controlling interest in another company, and foreign subsidiaries must follow the same accounting methodology as the parent (unless foreign laws require otherwise). Consolidated accounts are required in Korea where a company has 30% ownership and substantial influence over another company, or 50% or more ownership. Mexico similarly applies a test principally based on percentage ownership or control. Concerns have been expressed about certain exemptions to consolidation obligations, such as exemptions for privately owned corporations (Canada and the United States), or under laws implementing the European Union Seventh Company Law directive or other international standards which appeared to exclude foreign subsidiaries (Finland), or subsidiaries where the parent exercises economic control or decision-making authority but owns less than 50% of the subsidiary’s shares (Germany). The application of accounting requirements to subsidiaries and obligations relating to consolidation of accounts is thus another possible cross-cutting issue; as the Phase 2 Report on Germany notes, this issue has been under review in the European Union.

347. All Parties have criminal liability for certain fraudulent accounting violations and generally also have additional provisions providing for administrative or disciplinary sanctions. However, the offences are framed in different ways and can be directed at different parties. It appears that in many Parties, fraudulent intent is required although the issue is not always addressed. In the United States, liability for failure to maintain books and records is independent of the bribery offence and does not require proof of intent; accounting violations have provided an independent basis for liability of a parent corporation for a bribe paid by a subsidiary where the knowledge of the parent was not established. The report on Germany noted that the criminalisation of reckless falsifications of accounting documents was under discussion.

348. Significant concerns have been expressed about a number of issues with regard to accounting requirements and the related fraudulent accounting offences, including the following: 1. existence of materiality thresholds that would not necessarily be met by all accounting violations relating to foreign bribery (Australia, Belgium, Italy, and Japan); 2. non-application or limited application to unlisted companies (including very large companies) or sizeable small and medium-sized enterprises (Italy and the United States); 3. requirements of damage to shareholders or creditors (Italy and Japan); and 4. application of the fraudulent accounting offence under the Criminal Code limited to cases of insolvency (Germany) or to violations of specific laws (Belgium). More general concerns about uncertain rules have been expressed with regard to two Parties (Hungary and the United Kingdom). A number of Parties directly sanction only management and/or boards of directors. In such cases, the liability of accountants, auditors and others can typically only arise through principles of complicity.

63 Note that the fraudulent accounting offences under the Commercial Code, Stock Corporation Act, Act on GmbHs, Act on Cooperatives and the Disclosure Act, do not contain the insolvency requirement.
The application of fraudulent accounting offences to legal persons is frequently unclear. Many Phase 2 reports do not squarely address the issue but some reports note that legal persons can be liable for the offence (Greece, Iceland, Japan and Korea) and two reports note that they cannot (Finland and Switzerland). A related issue that appears to be addressed in few reports is practice with regard to the disclosure of material contingent liabilities as required by paragraph V.A. (ii) of the Revised Recommendation. As noted in Commentary 29, an immediate consequence of the Convention was that companies that are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under the Convention, including under its Articles 3 and 8. The application of this principle obviously depends critically in each Party not only on applicable accounting principles, but also on the existence of meaningful financial sanctions for legal persons, both for foreign bribery and for Article 8 accounting offences.

Under Article 8.2 of the Convention, sanctions for accounting violations for the purpose of bribing foreign public officials or hiding such bribery are required to be effective, proportionate and dissuasive. Parties generally sanction their fraudulent accounting offences with a combination of imprisonment and fines. However, it is difficult to draw general conclusions in this area because of the brevity and variability of treatment of the issue of sanctions in this respect in the Phase 2 reports, and the limited practice with regard to foreign bribery. Issues identified or concerns expressed in this area include insufficient or ineffective sanctions, such as low maximum fines or a frequent use of suspended sentences for accounting-related offences in practice (Australia, France, Italy, Korea and the Slovak Republic); weak enforcement (Australia, Belgium, Hungary, Korea, Luxembourg and the Slovak Republic); and the unavailability or insufficiency of statistics, which made evaluation impossible or suggested the need to improve efforts in this area (Germany and the United Kingdom).

**Conclusions**

The Phase 2 examinations have to a large extent focussed on the effectiveness of Parties’ fraudulent accounting offences at capturing accounting fraud for the purpose of bribing foreign public officials or of hiding such bribery. The Working Group has identified significant concerns in this respect in the Phase 2 examinations of several Parties, including the application of materiality thresholds and the non-application or limited application of fraudulent accounting offences to unlisted companies (including very large unlisted companies which predominate in certain economies). Given that foreign bribery is a difficult offence to detect, since it is committed in secret and involves two satisfied parties, the ability to detect it through associated offences that are easier to detect, such as fraudulent accounting, is essential to the effective implementation of the Convention. The Working Group might therefore consider a medium- to long-term horizontal analysis of the main obstacles to detecting foreign bribery through accounting offences, as well as their deterrence value.

In addition, consistent with the recommendations of the Working Group in the Phase 1 Report of Switzerland, a horizontal examination of Parties’ accounting standards may still be expedient.

**External audit requirements**

The rules applicable to determining which entities are required to obtain annual external audits also appear to vary widely, which also raises cross-cutting issues. Many Parties (Australia, Bulgaria, France, Germany, Greece, Hungary, Iceland, Korea, Mexico, the Slovak Republic, Switzerland and the United Kingdom) require external audits for companies over certain size or importance thresholds, which should help ensure that all companies of economic significance or that carry out substantial transactions are subject to an external audit. The exact nature of the thresholds varies from Party to Party. Some Parties (Canada, Italy and the United States) do not necessarily require non-listed companies or privately-held companies to have an external audit, regardless of their size, which can exempt very large companies.
354. The applicable rules with regard to auditor qualifications, independence and audit quality assurance have generally been improving. In some Parties, deficiencies in these areas had already prompted ongoing legislative reform that was noted during the Phase 2 process. For example, reform of Swiss law was expected to specify the duties of auditing bodies and reinforce their independence and change the oversight mechanism from self-regulation to a system of government supervision under a national supervisory authority. In the Mexico report, the examining team welcomed plans to establish a new independent oversight board to evaluate compliance and promote quality control. The proposed 8th Directive on Company Law in the European Union also addresses, *inter alia*, numerous issues relating to statutory audits including public oversight, external quality assurance, auditor independence, codes of ethics, auditing standards, disciplinary sanctions, and the appointment and dismissal of statutory auditors. In other Parties that were examined earlier, such as the United States, similar changes have been adopted since the Phase 2 examination. Generally, a trend toward better rules on qualifications, independence and quality control is discernable.

355. Relatively few reports examine disciplinary sanctions, but it appears that professional oversight and disciplinary sanctions have not always been sufficient. In Luxembourg, chartered accountants and company auditors interviewed by the examining team effectively said that disciplinary sanctions had never been imposed. However, the Norway report describes a system of active and effective regulatory oversight with significant sanctions. Regular on-site inspections of auditors are undertaken by the Banking, Insurance and Securities Commission using accounting and auditing experts. Such inspections have regularly led to sanctions, including the withdrawal of an auditor’s licence. In addition, in France, the Supreme Council responsible for overseeing the audit profession (*Haut conseil du commissariat aux comptes*) was established pursuant to the Law of Financial Security (1 August 2003) for the purpose of strengthening the independence of auditors and guarding against conflicts of interest and collusion between auditors and the companies they audit.

c. **Reporting of suspicions of foreign bribery by auditors**

356. Accountants and auditors are often considered to be well placed to detect evidence of possible foreign bribery through review of accounting documents and methods. However, auditors do not always see themselves as having an important role in detecting bribery as they do not necessarily see this as a normal function of the auditing profession. The Phase 2 reports have generally reviewed the reporting obligations of external auditors in some detail in order to assess compliance with paragraph V of the Revised Recommendation. Indeed, four Phase 2 reports (Canada, Japan, Korea and Mexico) identify the reporting of the foreign bribery offence by auditors to the competent authorities as a “general issue for many Parties”. There have, however, been very few cases of foreign bribery to date detected through the actions of these professions.

357. Relatively few Parties (France, Greece, Sweden and the United States) have imposed a legal requirement on auditors to report suspicions of crime to authorities outside the company, as is contemplated by paragraph V.B. (iii) of the Revised Recommendation. In France, under article L. 820-7 of the Commercial Code, auditors must report criminal activities about which they become aware to prosecutorial authorities and failure to do so is punishable with a prison sentence of five years and a fine of EUR 75 000. Under the United States Securities Exchange Act an auditor of an issuer has an obligation to report suspected illegal acts to the management of the company, to escalate the matter to the board of directors if appropriate action is not taken, and to report his or her conclusions to the SEC in the event that the illegality is material to the financial statements of the company and would result in a modification to the auditor’s report, and the board of directors fails to act.

358. In Sweden, pursuant to the Companies Act, an auditor is required to report to the Board of Directors suspicions of foreign bribery perpetrated by a member of the Board of Directors or the Managing
Director, and within two weeks of making the report, the auditor is required to resign from his or her post and report to the prosecutorial authorities. Where the auditor may assume that the board of Directors would not take any preventive measures, no notification to the Board of Directors is necessary, and he or she shall resign from the post and report directly to the prosecutor. Resignation and notification of the prosecutor are not required where the economic damage from the foreign bribery has been compensated and other prejudicial effects have been remedied, or the bribery is of minor significance. Although the Companies Act does not require the reporting of crimes perpetrated by an employee, auditing professionals stated that they would report such offences to the Board of Directors due to other reporting obligations under the Companies Act (e.g. the obligation to report all possible damages). The Working Group recommended that Sweden require auditors to report indications of possible illegal acts of bribery to the Board of Directors regardless of who within the company structure perpetrated the offence. In addition, the Working Group recommended that Sweden consider requiring auditors to report such indications to the competent authorities regardless of 1. who within the company structure perpetrated the offence, 2. whether the economic damage or other prejudicial effects have been remedied, and 3. whether the offence is considered of minor significance.

359. Some Parties, such as Norway, have indicated that auditors are permitted (but not required) to report suspicions of crimes to outside authorities notwithstanding confidentiality requirements. In other cases, such as in Mexico, the audit professions do not share the government's interpretation of the law to the effect that disclosure is mandated under a general provision applicable to all citizens. Similarly, auditors in the Slovak Republic narrowly interpreted their reporting obligations despite laws that appeared to require the reporting of suspicions to law enforcement agencies. In any event, outside disclosure is recognised as being unlikely in the absence of a clear legal obligation because of the impact on the client relationship and the generally cautious attitude of auditors in this area. Merely permissive or uncertain regimes appear likely to remain untested.

360. For many Parties (Belgium, Canada, Finland, Germany, Hungary, Iceland and Korea), reporting by auditors to outside authorities appears to be prohibited or is excluded in practice by applicable confidentiality obligations in the law or in professional rules. The representative institutions of the auditing profession generally support this rule, as exemplified by international standards of auditing developed by the auditing profession, such as the International Standards of Auditing (ISA) developed by the International Federation of Accountants (IFAC). As revised in 2004, ISA 240 does not itself require any reporting by auditors to regulatory and enforcement authorities unless national law so provides. More generally, many reports note that the auditing profession does not favour reporting requirements. Thus, legislation would be the only realistic mechanism to create such an obligation.

361. With regard to reporting by auditors about suspicions of bribery to management and monitoring bodies within the company, the Revised Recommendation [paragraph V.B. (iii)] establishes a more demanding standard, recommending that Parties require the reporting of "all indications of a possible illegal act of bribery" to management in the first instance and then, as appropriate, to corporate monitoring bodies. Parties have varying rules in this area as well, many of which are more restrictive than the Revised Recommendation. Many Parties (Australia, Belgium, Canada, France, Germany, Greece, Hungary, Iceland, the Slovak Republic and the United States) include materiality requirements that require reporting only of a serious legal violation or one that has an impact on the company, its financial health or its financial statements. Some Parties (Finland, Germany, Hungary and Iceland) appear to limit the obligation to the

64 See ISA 240 – The Auditor’s Responsibility to Consider Fraud and Error in an Audit of Financial Statements § 68 (stating that an auditor’s professional duty of confidentiality “ordinarily precludes reporting fraud and error to a party outside the client entity”, but that the duty may be overridden by national law).
reporting of illegal acts perpetrated by specific organs or persons within the company, such as management or boards of directors, rather than applying it to all possible illegal acts of bribery perpetrated on behalf of the company. Some Parties (Canada, Finland and Germany) appear to require an actual crime rather than mere suspicions, whereas the Revised Recommendation recommends requiring reports regarding all "indications of a possible act" of bribery. Iceland appears to limit reporting obligations to the annual meeting as opposed to requiring the immediate reporting of suspicions to management. The reports do not systematically address implementation of these various aspects of the Revised Recommendation. However, each of these types of restrictions raises significant cross-cutting issues for the Working Group, especially in light of the limited actual reporting of foreign bribery observed to date. One Party (Finland) has reported, since its Phase 2 examination, that it had not yet implemented a recommendation to remedy its law in this area by requiring adequate internal reporting within the company.

362. Rules on reporting within the company are also not always clear about the parties or organs to whom reporting is required by the auditor. As noted, the Revised Recommendation recommends that Parties require a report by the auditor to management in the first instance and then, as appropriate to corporate monitoring bodies.

363. An important development in this area is the relatively recent extension of broader money laundering reporting obligations to auditors. Thus, for example, in the European Union, a 2001 directive required member states to extend money laundering prevention obligations to auditors, external accountants and tax consultants, but implementing legislation in member states was not required until mid-2003. As revised in 2003, the FATF 40 Recommendations similarly extend to accountants and auditors. Together with the inclusion of foreign bribery as a predicate offence and, at least in some cases, the expansion of the money laundering offence to include self-laundering, the recent changes in the rules for preventing money laundering should substantially increase the number of reports by auditors of suspicions of foreign bribery. Ensuring awareness about foreign bribery as a predicate offence amongst relevant institutions and entities is an important cross-cutting issue.

Conclusions

364. Paragraph V of the Revised Recommendation states that member countries “should consider” requiring auditors to report indications of a possible illegal act of bribery to the competent authorities. Very few Parties have imposed a legal requirement in this regard, while some Parties permit such reporting under their law, and many Parties prohibit such reporting. Where reporting is permitted as opposed to required, it is not reliable or effective, in large part because auditors are naturally strongly influenced by their duties of confidentiality, which they perceive as conflicting with any legal permission to disclose. Furthermore, the International Standards of Auditing (i.e. ISA 240), which do not require any reporting by auditors to regulatory and enforcement authorities unless national law so provides, reinforce non-reporting by auditors to the competent authorities in the absence of a legal obligation to do so. The Working Group might therefore want to consider whether it would be expedient to amend the Revised Recommendation to require Parties to report suspicions to the competent authorities. Consideration of such a proposal could take place in the context of the horizontal review proposed by the Working Group in four Phase 2 reports.

9. Internal Company Controls (Paragraph V. C. of Revised Recommendation)

365. Private sector efforts to combat corruption, when effective, are a powerful tool for curbing the supply side of foreign bribery. Corporate codes of conduct and their enforcement through compliance

programmes enhance the effectiveness of a government’s overall anti-corruption strategy. This section reviews the extent to which the criminalisation of foreign bribery in the Parties covered by this Study has spurred the development of corporate integrity systems. While awareness raising about anti-bribery laws and their enforcement significantly affects a company’s response, this section also looks at other factors that may influence whether a company adopts preventive organisational measures: listing requirements abroad and correlatively, a company’s liability for acts of its foreign subsidiaries; the perception of the cost of corruption in terms of adversely affecting a company’s image or its share price; or conversely, the benefits of being perceived by the public as socially responsible; as well as initiatives by business associations and civil society.

366. Whether internal control measures are effective in curbing foreign bribery in practice must be viewed in light of data relating to detection and enforcement as well as information showing the public’s perception of bribe-giving by local firms doing business abroad. Some of these considerations are treated in other parts of this Mid-Term Study. This section in particular focuses on Parties’ efforts to encourage integrity systems as recommended under paragraph V.C. of the 1997 Revised Recommendation, the characteristics of which are: 1. adequate internal company controls including standards of conduct; 2. compliance programmes; 3. “public notice” of a company’s internal control system in a company’s annual report; 4. independent monitoring bodies; and 5. corporate reporting mechanisms and whistleblower protection.

a. Adequate internal company controls including standards of conduct

367. An overview of company codes of conduct reviewed during the Phase 2 process reveals that large companies generally have well-developed and well-implemented integrity systems. This is mainly attributable to the impact of cross-border trade on the way a multinational manages legal risks. Anti-bribery laws are thus one among many concerns large companies consider in designing integrity systems. As large companies increasingly extend their global reach, codes of conduct have assumed growing importance. Conversely, SMEs, even when they represent the majority of exporting businesses in a market, tended to be uninformed about a country’s anti-bribery law and therefore unresponsive in terms of preventive measures. Even in Parties where SMEs are aware of anti-bribery legislation, they tend to be unresponsive due to their size, limited resources, organisational capacity or because of a perceived competitive disadvantage. Further, contrary to many multinationals, most SMEs are non-listed and consequently not constrained to adopt the internal control and reporting mechanisms required of large foreign issuers in highly regulated markets. A notable exception is the United States where non-issuer SMEs are subject to the FCPA (but not its books and recordkeeping requirements). The absence of integrity programmes in SMEs in the vast majority of Parties covered by this Study, many of which

66 The conclusions that may be drawn from this study should be viewed in light of certain variables inherent in the horizontal review process such as (i) the sensitivity/focus of the on-site examining team to such issues during the examination process and their experience level in light of the fact that the Phase 2 process under review has spanned a three-and-a-half year period (1 May 2002-31 December 2005); (ii) to what extent the sampling of businesses participating in informal consultations during the on-site visit was representative of that country’s business environment, (iii) the level of awareness of the different actors in a country under Phase 2 review (e.g. government, business, civil society) which affects the response of the business community to that country’s anti-bribery laws, (iv) the extent to which companies in a country are listed on foreign exchanges where self-regulation through internal control mechanisms is regulated, (v) the “newness” of a country’s anti-bribery law, and (vi) the overall impact of globalisation and of “long arm” legislation affecting companies doing business abroad such as the FCPA and the Sarbanes Oxley Act on standards of conduct and “best practices”, particularly in respect of large multinationals.

67 In six jurisdictions in particular, SMEs constitute the vast majority of the corporate constituency: Belgium, Greece (99%), Iceland, Italy, Korea (99.7%) and Switzerland (90%).
operate in environments where bribery is likely to occur, makes SMEs particularly vulnerable to the risks of foreign bribery. In eight Parties (Belgium, Bulgaria, Canada, France, Iceland, Japan, Luxembourg and Mexico), recommendations were made to encourage the adoption or development of internal control mechanisms. In three Parties (France, Germany and the United States), recommendations were made to encourage internal controls specifically in SMEs.

368. Although most large companies have codes of conduct, few address foreign bribery or refer to the OECD Convention or the Guidelines for Multinational Enterprises, which themselves refer to the Convention. Those companies that explicitly condemn foreign bribery tend either to operate in corruption-prone industries and/or have a United States parent that imposes a group-wide integrity programme. In the latter respect, foreign subsidiaries benefited from the experience of their United States parent which, in response to many years of experience under the United States FCPA, had developed robust compliance programmes. On the other hand, it appeared that United States-based companies tended to apply a “holistic” approach to subsidiaries abroad, imposing uniform standards rather than country-specific ones with the result that their efficacy in practice is questionable. An encouraging practice of four major United Kingdom oil and extractive companies that met with the examining team during the United Kingdom’s Phase 2 examination was to translate their corporate guidelines on the United Kingdom anti-bribery provisions into different languages for distribution to their subsidiaries abroad.

369. Apart from companies operating in sensitive markets or subject to the United States FCPA, few companies dealt in detail with the issue of foreign bribery in their codes of conduct, such as defining acts of foreign bribery or drawing the line between acceptable and unacceptable payments. For example, only a handful of codes of conduct reviewed by the examining teams stressed the need for rigorous selection of agents and intermediaries in commercial transactions (e.g. Belgium, France, Japan, Mexico, Sweden and the United States). With respect to Belgium, the code of conduct of one large Belgian company provides several factors that must be taken into account when selecting an agent or investment partner, such as the reputation and business network of the proposed agent. The company’s code of conduct also provides that agents’ commissions must be commensurate with the value of the services rendered, may not be made to agents in Parties deemed “unco-operative” under FATF guidelines, and that non-compliance with this requirement could be sanctioned with a reprimand or dismissal. A major Australian company in the extractive industry stressed in its code of conduct that its policy against financial inducements be clearly communicated to and accepted by agents.

370. An important initiative has been introduced by Italy, however, whose law on administrative liability of legal persons (Legislative Decree 231/2000) incites companies to adopt organisational models along the lines of guidelines drawn up by business associations and approved by the Ministry of Justice. Such models include provisions prohibiting illicit payments to foreign officials directly or through intermediaries and recommend reporting, control and sanction mechanisms. In its guidelines for an organisational model, Confindustria, one of Italy’s largest business organisations, has provided a case study on corruption including examples of acts of corruption. Importantly, it stresses prevention, by, inter alia, controlling financial flows and collaborators outside the company. In addition, the Italian Ministry of Justice has, due to the defence of an effective “organisational model” under the Legislative Decree, taken a pro-active approach to assisting companies in establishing effective corporate compliance measures, as the

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68 For example, partial responses to a recent survey sent to the top 100 Australian companies in 2005 showed that 71 per cent had introduced codes of conduct.

69 Only about one half of the respondents of a Transparency International survey on corporate governance had multi-lingual codes of conduct. The survey also showed that companies did not monitor as diligently the activities of overseas operations compared to their United States base where enforcement of compliance programmes was greater.
Ministry of Justice has the authority to approve codes of conduct that have been drafted by business associations.

371. While industry’s response to anti-bribery laws is encouraging in some areas, the 1997 Revised Recommendation elicits governments’ direct involvement in promoting internal company controls against foreign bribery. Almost all of the Parties covered by this Study adopted a voluntary approach allowing companies to decide whether and how to institute internal controls. Only Greece makes the adoption of codes of conduct and policies on business integrity mandatory under Law 3016/2002. A review of the Phase 2 reports shows that government initiatives to encourage internal company controls have been uneven. The Phase 2 reports on some Parties (Belgium, Bulgaria, Finland, Hungary, Korea, Luxembourg, and Norway) indicate the absence of government initiatives or industry partnerships to promote the development and adoption of internal control systems. Moreover, in certain Parties (Finland, Korea, Luxembourg, and Norway), private initiatives were also lacking.

372. In the remaining Parties, Government encouraged the development and adoption of internal controls in various ways and with different degrees of involvement. In France, significant steps have been taken since the Phase 2 examination to promote responsible corporate behaviour. For instance, an inter-ministerial body, the Central Department for Corruption Prevention (SCPC), under the supervision of the Ministry of Justice, has entered into partnership agreements with large companies to enhance prevention, notably in the arms, construction and hotel industries. In addition, the French Government has, through France’s largest business organisation (MEDEF), actively encouraged French enterprises to set up internal control mechanisms for detecting bribery. The follow-up oral reports of four other Parties (Iceland, Mexico, Norway and the United States) indicate that these Parties have also taken important steps to encourage responsible corporate behaviour, through, for example, the issuance of guidelines.

373. Taking a formalised approach, the United States and Italy encourage internal controls by creating a strong incentive in the law. In the United States having an effective compliance system in place before the commission of an offence is a mitigating factor for sentencing, which has contributed to the widespread adoption of compliance programmes by publicly traded companies.\(^\text{70}\) The FCPA also promotes the adoption of compliance systems by imposing such systems as a condition of court-ordered settlement along with annual certifications and periodic reviews. Since the Phase 2 examination of the United States, the United States Secretary of Commerce sent a letter to 162 of the largest exporters encouraging them to adopt corporate awareness and compliance programmes. In Italy, an effective “organisational model” is an exonerating factor under Decree 231/2001 on the administrative liability of legal persons. Also, at the time of the Phase 2 Report on Canada, the Ontario Securities Commission was considering requiring issuers to establish, maintain and certify internal controls. Additionally, the Italian stock exchange has adopted a quasi-voluntary “comply or explain” approach concerning the establishment of internal control mechanisms. The United Kingdom stock exchange has adopted a similar approach for listed companies with respect to the effectiveness of internal controls under the United Kingdom Combined Code on Corporate Governance which provides guidance on, \textit{inter alia}, the elements of a sound system of internal control.

\(^{70}\) Another factor that influences how U.S. companies respond to the FCPA derives from general company law: a company is liable for any acts of its directors, officers or employees if such act is within the scope of their duties and for the benefit of the company. Also, the vicarious liability of a company for foreign bribery committed by third parties such as agents has caused U.S. firms to be especially vigilant in selecting their business partners and representatives. Moreover, a parent is liable under the FCPA for the acts of foreign subsidiaries over which it exerts effective control.
374. With respect to Australia, the Australian Stock Exchange requires listed companies to disclose in
their annual report the extent to which they follow the best practice recommendations under the guidelines
of the Exchange on good governance. Similarly, at the time of Sweden’s Phase 2 examination, the Swedish
Stock Exchange was expected to require all listed companies to adopt the Code of Corporate Governance
drawn up by the Swedish Commission on Business Confidence (although the Code does not directly
address foreign bribery).

375. The broad, permissive wording of paragraph V.C. of the Revised Recommendation may explain
its piecemeal implementation by Parties. In seven Parties (Belgium, Bulgaria, Finland, Hungary, Korea,
Luxembourg, and the Slovak Republic), little or no guidance was provided to the business community
concerning internal preventive measures against foreign bribery per se. Those Parties showing a strong
response by the business community in terms of prevention also showed direct government involvement
through regulatory means (e.g. Italy and the United States) or close links between the government and
private sector business associations (e.g. Germany, where a government-chartered commission specifically
addressed foreign bribery in the Corporate Governance Code of Conduct). Government or private
initiatives had addressed bribery in the majority of the Parties covered by this Study (Australia, Bulgaria,
Canada, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Mexico, Sweden, Switzerland, the
United Kingdom and the United States), but only some of these had targeted foreign bribery (Australia,
Germany, Italy, Japan, Sweden and the United States). This suggests that the majority of companies doing
business abroad, whether large, medium or small, have not identified foreign bribery as a preventable risk,
nor have they adopted a corporate policy on foreign bribery. To improve awareness and prevention,
recommendations were made to nearly half of the Parties covered by this Study to promote the adoption
and/or development of internal company controls in respect of foreign bribery and in conformity with the
1997 Revised Recommendation.

376. The Phase 2 reports indicate that government and industry partnerships have a greater role to play
in formulating “best practices”. In four Parties in particular (Belgium, Iceland, Luxembourg and Mexico),
recommendations were made for Parties to co-operate more closely with the private sector to promote best
practices in the area of internal controls specifically addressing transnational bribery. The approach of
Japan’s METI, for example, is particularly relevant. In 2003, METI created a Consultative Committee
composed of representatives of the private sector and civil society to advise METI on measures to
effectively prevent foreign bribery. In 2004, METI issued Guidelines to support a voluntary and
precautionary approach in companies doing business abroad, encouraging the establishment of compliance
programmes and effective organisational structures as well as increased scrutiny of local agents. In
Sweden, the Swedish Partnership for Global Responsibility (Global Ansvar), an initiative taken by the
Prime Minister in 2002, encourages companies to adhere to the OECD Guidelines for Multinational
Enterprises and the UN Global Compact. In addition, the Swedish Anti-Corruption Institute, a private
business organisation, encourages companies to develop anti-bribery instruments. The Norwegian
Government’s Action Plan against Economic Crime, adopted in June 2004, includes a proposal to establish
a consultative body to liaise between the public and private sectors regarding ways to combat economic
crime.

377. Business associations and industry federations have also made a valuable contribution to
promoting best practices and have a potentially greater part to play in view of their role as a sounding
board for industry. As with other private initiatives, business groups tend to be most active in Parties where
there is a high level of government involvement. Industry federations addressing foreign bribery through
recommendations, codes of conduct or informative material have been particularly active in Germany [e.g.
the Federation of German Industry (BDI), German Chapter of the International Chamber of Commerce
(ICC), the German Association of Chambers of Commerce (DIHK) and the Value Management Council]
and Italy [e.g. Confindustria, Confcommercio and Confiapi (for SMEs)], for example. In Japan, the Japan
Foreign Trade Council promotes the 2002 Model Compliance Organisation which encourages Japanese companies to provide help-lines, training and educational programmes.

378. Civil society, too, has made an important contribution in promoting integrity systems. Transparency International-United Kingdom, with the support of the Department for International Development (DFID), organised an initiative on “Business Principles on Countering Bribery” and a seminar on “Preventing Corruption in the Official Arms Trade” with the participation of six defence companies. The Bulgarian Corporate Governance Initiative, a NGO coalition, has been active in promoting best practices. Recognising the benefits of private sector experience, a Phase 2 recommendation was made to Iceland that guidance from private sector organisations on how to deal with the solicitation of bribes would be useful.

b. Compliance programmes

379. Integrity systems are only effective if compliance mechanisms exist to enforce them. An effective compliance programme is a formidable means of prevention and deterrence. Indeed, compliance mechanisms showing strong commitment by management, training and consistent enforcement, ensure adhesion by warning employees that criminal action may result from foreign bribery. However, while the criminalisation of foreign bribery and the risk of prosecution have encouraged the adoption of internal company controls by large companies in particular, their implementation and enforcement through compliance systems is less common; effectively neutralising the impact of anti-bribery laws on corporate behaviour. Yet even where compliance systems exist, some systems that looked good on paper were not implemented in practice for a number of reasons: lack of training and education, lack of guidance in situations requiring judgment on the part of an employee whether to bribe to win a contract, dysfunctional systems where management can override internal policy, or lack of reporting due to the absence of internal alert systems or fear of retaliation.

380. Parties that favour a system of self-regulation coupled with strong law enforcement show greater commitment to the implementation and enforcement of compliance programmes by companies. This is attributable as much to a heightened perception of bribery as a “risk factor” with high collateral costs as it is to actual prosecutions. In the United States, where the DOJ and the SEC are strongly committed to enforcing the FCPA, corporate-wide compliance programmes are an integral part of good corporate housekeeping. As a result, the FCPA’s deterrent effect in terms of heavy fines and prison terms and the collateral damage associated with adverse publicity and litigation costs has bolstered the effectiveness of compliance programmes as a preventive measure for large companies. In addition, the importance of being socially responsible is increasingly gaining corporate attention as a result of promotional efforts of governments such as Canada’s Department of Foreign Affairs and International Trade (DFAIT) Trade Commissioner Service (which specifically points to the anti-foreign bribery law) and its Investment Trade Policy Division, as well as Sweden’s Partnership for Global Responsibility. This has not been the case for most SMEs, however, where size and resources affect how legal risk is managed. Drawing upon its long-held experience in prevention under the FCPA, the Working Group on Bribery recommended that the United States develop compliance programmes tailored to the needs of SMEs doing business abroad. In its oral follow-up report of December 2004, the United States indicated that the Department of Commerce and the Department of Justice have been actively participating in privately sponsored seminars at which the FCPA and compliance measures have been discussed.

381. Where the threat of prosecution is perceived to be low because of weak enforcement or ineffective sanctions, compliance systems tend to be less widespread. In addition, a correlation can be seen between the liability of legal persons for foreign bribery and the development of internal company controls, showing greater attention to internal preventive measures where criminal liability of legal persons is imposed and where the threat of prosecution is perceived to be higher. The United States provides a
particularly good example where the liability of a corporation for the acts of its agents (inside or outside the corporate entity) coupled with strong enforcement and potentially stiff sanctions has prompted companies to adopt effective preventive measures. However, while a United States parent is liable for foreign subsidiaries under its effective control, many Parties view foreign subsidiaries as technically falling outside the scope of their anti-bribery laws. In practice, the existence or absence of case law has a significant impact on the way companies responded to anti-bribery legislation. Italy’s approach is noteworthy in that Legislative Decree 231/2001 provides a full defence to the administrative liability of a legal person if an “acceptable organisational model” is adopted and “effectively implemented” before the commission of the offence. Such an organisational model is a mitigating factor if it is adopted and made effective after the commission of the act but before trial.

382. Some Phase 2 reports discussed the characteristics of compliance systems where these existed (Australia, Belgium, France, Germany, Italy, Japan, Sweden, the United Kingdom and the United States), such as the monitoring of internal controls by an internal audit committee, training on anti-bribery provisions, written undertakings by employees that they will honour the corporate code of conduct, systematic screening of foreign partners and agents or a policy prohibiting discretionary payments. In the latter respect, the risk that companies may attempt to cover up illicit payments under the veil of legitimacy by labelling them small facilitation payments was rarely addressed by governments or the private sector in respect of compliance. In the United States, companies are able to utilise the Department of Justice Opinion Procedure in order to request an opinion stating whether, on the facts as presented, it would take enforcement action. In any case, some in-house counsel expressed concern about delineating the boundary between acceptable and unacceptable payments, with respect to the exceptions under the FCPA for facilitation payments and reasonable and bona fide payments. The Working Group recommended that the United States consider developing specific guidance in relation to the facilitation payments exception, and providing appropriate guidance on the defence of reasonable and bona fide payments.

383. When guidelines were issued, these did not adequately draw the line between acceptable and unacceptable payments making this a particularly thorny issue. Recommendations were made to four other Parties to issue interpretative guidance on what constitutes small facilitation payments (Australia, Canada, Japan and Korea). With respect to Australia, which provides a defence for facilitation payments similar to the one under the FCPA, a publication (pamphlet) of the Attorney-General’s Department (AGD) as well as a guidance document on the AGD website provided some unclear information about the defence. The AGD amended the pamphlet after the on-site visit and undertook to amend the document on the website. The Working Group recommended that the amendment to the latter document be made as soon as possible.

384. Another Party (Norway) was encouraged by the Working Group to communicate to its business community that under its new law, facilitation payments were no longer allowed. An information folder prepared by the Norwegian Ministry of Foreign Affairs and the Ministry of Development specifically targets such payments, stating that they are prohibited by law. A similar statement was published by the Norwegian Confederation of Business and Industry and the Inter-Ministerial Project Group on Combating Corruption and Money Laundering. In the absence of clear directives, one major company from the United States responded to the issue of facilitation payments by imposing a world-wide policy that makes all discretionary payments subject to express approval, thereby reducing the scope for misjudgement by local employees.

71. These opinions do not serve as binding precedents, and are strictly limited to the facts of the specific proposed transaction.
Conclusions

385. An issue that has not to date been addressed systematically in the Phase 2 examinations is the use of compliance programmes to encourage the voluntary disclosure of the bribery of foreign public officials. It might be useful to comment on best practices in this area in the Phase 2 reports in order that Parties may exchange information and benefit from each other’s experiences.

c. ‘Public notice’ of a company’s internal control system in a company’s annual report

386. The 1997 Revised Recommendation states that “Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms including those which contribute to preventing bribery.” However, the Phase 2 reports discussed in this Study showed that only nine Parties (Australia, Canada, Finland, Germany, Greece, Hungary, Japan, Sweden and the United Kingdom) actively encouraged their corporate constituencies to make public such information. These Parties had promoted the Guidelines for Multinational Enterprises which recommends in its section VI on Combating Bribery that enterprises should disclose the management systems the company has adopted to honour its commitment to fight bribery and extortion. Notwithstanding, few companies appeared to follow this recommendation. In the United Kingdom, for example, despite the promotion of the Guidelines by the National Contact Point, only a small percentage of major companies listed on its stock exchange actually referred to the Guidelines in their annual report.

d. Independent monitoring bodies

387. One of the recurring themes of compliance programmes was the commitment of senior management to a firm’s ethical standards and a “culture of compliance”. Unsurprisingly, a major deficiency in compliance systems was management’s ability to override a company’s internal safeguards, suggesting the need for independent monitoring bodies. Nonetheless, discussion concerning oversight by independent monitoring bodies of compliance programmes is notably absent in the Phase 2 reports, except regarding Italy, whose Legislative Decree 231/2001 encourages entities to set up an autonomous body to supervise, enforce and update its organisational model. As an incentive, the Legislative Decree provides a full defence to administrative liability if an entity can show, among other things, that the independent body had “sufficiently supervised” the operation of the organisational model.

e. Corporate reporting mechanisms and whistleblower protection

388. In a number of the Parties covered by this Study (Australia, France, Italy, Japan, Korea, Mexico, Norway, Sweden and the United Kingdom), companies indicated that they provided reporting channels for employees often under the guarantee of confidentiality (see also discussion on detection and whistleblower protections under B.2.). To some extent, developments in this regard could be linked to the implementation of whistleblowing mechanisms in response to the requirements under the United States Sarbanes-Oxley Act (SOX), which applies to foreign companies with United States listings. In France, a mechanism has been introduced to encourage reporting on a confidential basis, but such practice is not yet widespread in French companies. A few French companies have also successfully introduced internal mechanisms such as ethics committees or internal audits which guarantee confidentiality to employees who report criminal

72 The Federal Ministry of Economics and Labour re-edited a leaflet, by popular demand, on the OECD Guidelines for Multinational Enterprises, which addresses foreign bribery. It was widely distributed by the Foreign Office and the Federal Ministry of Economic Co-operation and Development as well as the Association of German Chambers of Industry and Commerce (DIHK), the Confederation of Germany Employer Associations, and certain NGOs (e.g. Germanwatch).
behaviour. Multiple reporting channels such as internal bodies, outside counsel or the Internet were also used in some large companies but such systems were generally designed to resolve reports of wrongdoing internally. Indeed, most companies did not authorise external reporting, viewing the negative publicity and the possibility of lawsuits resulting from external disclosure as a significant business risk.

389. A 2005 survey of Australia’s 100 top companies indicated that more than half of these companies offer whistleblower protection. Most of the codes of conduct reviewed by the examining team encouraged reporting, and half of these offered specific safeguards, such as anonymous reporting, dedicated hotlines, and guarantees against retaliation. With respect to Sweden, two of the four Swedish companies that met with the examination team had codes of conduct providing whistleblower protection procedures. Two trade union representatives stated at the on-site visit that Swedish companies do not generally provide whistleblowing procedures, but believed that general labour law and collective agreements provided adequate protection. It is also worth noting that the government-appointed Commission on Business Confidence decided against including whistleblower provisions in its Code of Corporate Governance.

390. The Phase 2 reports indicate that companies do not generally offer whistleblower protection to their employees, nor did Parties encourage companies to protect employees that blow the whistle as recommended under the 1997 Revised Recommendation (paragraph V.C. iv). On the other hand, parallel initiatives were undertaken by some civil society organisations. In the United Kingdom in particular, NGOs are active in promoting measures to encourage and protect whistleblowers. While whistleblower protection was a foremost concern of trade unions especially in light of the absence of whistleblower protection under the law, no specific initiatives by trade unions were identified in the Phase 2 reports, suggesting that trade unions have a potentially greater role to play in this area.

391. The willingness of employees to report suspicions of corruption is influenced not only by company policy but also by the availability of protection under the law. However, only the Slovak Republic provides comprehensive whistleblower protection for employees in the private sector. Although whistleblower laws are addressed more fully below (see discussion under B.2. on detection and whistleblower protections), the United Kingdom’s Public Interest Disclosure Act (PIDA) is noteworthy in respect of internal controls because it creates an incentive for companies to set up internal procedures including hotlines by allowing management to address whistleblower complaints internally in the first instance while at the same time giving employees an incentive to blow the whistle in good faith. Company employees may also report externally to prescribed regulatory bodies, which include bodies with law enforcement responsibilities (e.g. the Financial Services Authority) or to other law or the media as a last resort, if, for instance, the matter was already raised unsuccessfully with the employer or regulator, there is a serious risk of victimisation for reporting internally in the first instance, or the disclosure relates to an exceptionally serious matter.

10. Mutual Legal Assistance and Extradition (Articles 9 and 10 of Convention and Paragraph VII of Revised Recommendation)

392. The significance of mutual legal assistance (MLA) under the Convention is two-fold. First, Parties to the Convention are obliged to provide prompt and effective legal assistance to other Parties to the

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73 Of related interest is Article 9 of the 1999 Council of Europe Civil Law Convention on Corruption, which states that “each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities”.

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fullest extent possible under their laws, treaties and arrangements (Article 9).\textsuperscript{74} Second, in order to effectively prosecute foreign bribery, Parties themselves must be able to seek and use evidence from abroad efficiently. Paragraph VII of the Revised Recommendation also provides that members should place their efforts to guarantee the effectiveness of creating MLA frameworks regardless of their specificities.

393. The Working Group has always recognised the vital role of judicial co-operation in securing evidence of transnational economic crime and, in particular, the bribery of foreign public officials. Despite the high level of efforts made by some Parties in responding to MLA and extradition requests from other Parties,\textsuperscript{75} some concerns remain that judicial co-operation might not be provided within an appropriate timeframe to enable effective prosecutions of foreign bribery cases. An effective scheme for providing and obtaining extradition and timely responses to MLA requests are decisive factors for the investigation and the prosecution of foreign bribery offences.

394. Some Parties (\textit{e.g.} Greece, Hungary and Mexico) have extradition relations with most of their trade and investment partners. France may refuse to execute a request for assistance from a foreign country if the application jeopardises France’s “essential interests”. According to a circular (the \textit{circulaire-mémento}) on international MLA issued by the Minister of Justice in April 2004, such interests may be of an economic or social nature. However, the circular states that such grounds for refusing assistance should “very rarely” arise, and indeed have never been used as a basis for not executing international rogatory commissions (IRCs) relating to a business-related or financial offence.

395. Similarly, in Luxembourg article 3 of the Act of 8 August 2000 on International MLA in Criminal Matters states that “[the] Prosecutor General may refuse MLA if the request for assistance is liable to prejudice the sovereignty, security, public policy or other essential interests of the Grand Duchy of Luxembourg (…)

\textsuperscript{76} It appears, however, that no IRCs were refused on grounds of the discretionary prosecution principle or proportionality. The Phase 2 examinations have not systematically looked at

\textsuperscript{74} Article 9.1 of the Convention states that “each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, 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 this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person”. 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. Pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

\textsuperscript{75} 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 this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official". 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. 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.

\textsuperscript{76} Article 4 provides that a demand for assistance will also be refused if, without the need for an examination of the substance, it is foreseeable that the means to be employed are not suitable to the objective of the request, or go beyond what is necessary to achieve it.
whether these kinds of grounds for refusing to provide MLA exist in the Parties, and therefore it is possible that other Parties also provide such grounds.

396. Almost all the examined Parties have provisions for prompt legal assistance among parties to the Convention. In many of the foreign bribery cases in which there has been a conviction, MLA was obtained from another Party. For instance, in Italy requests to countries in the European Union under the Schengen Convention are often executed with little delay. On the other hand, non-EU countries usually take longer to respond, if they respond at all. Italian representatives of law enforcement have encountered difficulties in seeking assistance from non-European Union countries because the procedures differ amongst countries. In Belgium representatives of the Central Office for Corruption Repression (OCRC) were dissatisfied with the length of time that certain major financial centres take to execute IRC’s.

397. Among the examined Parties, Bulgaria has established a record of generally responding to requests for MLA within three to four months and in some cases as little as one month following receipt of a request. While Switzerland generally easily agrees to co-operate in criminal matters, the length of procedures can sometimes reduce their effectiveness. Although the appeals process has been greatly simplified in recent years, several Swiss magistrates continued to be concerned about significant delays interfering with the provision of effective MLA. The Working Group therefore recommended that Switzerland continue its efforts to streamline the process of appeals with respect to MLA requests.

398. In the United Kingdom, the Crime (International Co-operation) Act 2003 provides for increased direct transmission of requests and return of evidence. An important modification brought by the new law is the establishment of certain agencies to receive requests pertaining to their activity. The Extradition Act 2003 has introduced new rules which streamline the extradition procedures.

399. Only one examined country (Finland) does not consider the Convention to be a legal basis for extradition in respect of the offence of bribing a foreign public official. The non-treaty practice will apply in respect of requests for extradition from Parties to the Convention where there is no applicable treaty. This very high threshold raised concerns, in particular in cases where the offence was committed abroad and all or most of the evidence was available in a foreign jurisdiction.

400. Another issue that gave rise to concerns was the extreme difficulty in obtaining effective MLA from non-Parties. Given that most foreign bribery cases take place in non-Parties, this represented a major obstacle to the effective implementation of the Convention.

401. For instance, the United States authorities indicated that the chief difficulty in investigating and prosecuting foreign bribery cases was the lack of co-operation in obtaining evidence located outside the United States. In some instances, to overcome a perceived lack of mutuality or the absence of a mutual legal assistance treaty, the Department of Justice has developed so-called “Lockheed Agreements”, or mutual legal assistance agreements (MLAAs), which are case-specific. Nevertheless, although some non-Party countries have provided access to witnesses and extradited defendants, other non-Party countries, citing lack of mutuality, have not provided evidence for use in FCPA prosecutions.

402. During the Phase 2 examination of Mexico, one high-level Mexican official cited lack of evidence from abroad as the main reason for the non-prosecution of offences with links to Mexico and

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77 Where there is no applicable treaty and extradition is requested for the purpose of enforcing a sentence, it is necessary to consider the adequacy of the evidence. Similarly, where there is no applicable treaty and extradition is requested for the purpose of trying the person concerned, the Finnish authorities are required to undertake an investigation and become involved in the actual weighing of evidence.
expressed the need to improve existing mechanisms for obtaining information from abroad. In France, the difficulty of securing evidence in unco-operative non-Party countries or in non-Party countries in which the bribery of foreign public officials is not an offence was indicated as one of the major obstacles facing magistrates in effectively prosecuting the offence of bribing foreign public officials.

403. Delays have been experienced in obtaining evidence from certain Parties and other countries. This situation can impede the successful investigation and prosecution of transnational bribery. The Working Group has often recommended Parties to envisage measures that would reduce the time taken to process international applications for MLA requests issued or received by making more human and financial resources available.

404. In this respect, Germany has reported difficulties in obtaining evidence from other countries including from Parties to the Convention. Similarly, Norway had experienced problems of lengthy replies and procedural complications when requesting MLA.

405. Some of the delays in providing MLA might be due to the formalism which still plagues the process of transmitting requests and returning documents, although the need for formalism may be disappearing. For instance, France still no longer requires that investigating magistrates have their applications for MLA transmitted, via the public prosecutor, by the *procureur général* of the appeal court whose jurisdiction they come under, and that the latter return the enforcing documents. Moreover, the four requests for extradition received by France since 1 July 2001, arising from instances of bribery of foreign public officials, were all being processed at the time of the Phase 2 examination.78

406. The situation in Belgium is particularly complex. Pursuant to the Mutual Legal Assistance Act, requests for MLA from foreign authorities (except for requests under treaty for the direct exchange of documents between judicial authorities) must be sent by examining magistrates through diplomatic channels, via the Royal Prosecutor, the General Prosecutor, the Belgian Ministry of Justice and the Ministry of Justice of the requested state and that state’s judicial authorities. The requested documents must be returned by the same route. Since the recipient state normally needs to undertake in-depth investigations where the request relates to a matter of financial complexity, the requested information is rarely obtained in less than several months. Similar formalities apply to obtaining MLA from Belgium. To respond to the latter problem, the new Act on International Mutual Legal Assistance in Criminal Matters eliminates the step of referring requests to the Ministry of Justice in relation to requests by European Union countries with which Belgium has no MLA agreement. However, the problem remains in relation to requests from countries outside the European Union. Indeed, Belgium receives approximately 1 200 requests for MLA each year, and according to a study by the Council of the European Union, between 1998 and 1999, twenty-five requests involved bribery cases.

407. The review of the effectiveness of the systems was also hampered by the lack of statistical information on MLA and extradition requests by Parties. For example, although the United Kingdom Central Authority (UKCA) deals with approximately 5 000 MLA requests, the UKCA databases do not compile statistics on MLA requests in a manner that permits a meaningful analysis.

408. Some examined Parties present a different situation: in 2003, one examined country (Switzerland) received 1 218 requests for assistance (relating to all types of offences), without counting

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78 The 1959 European Convention on Mutual Legal Assistance in Criminal Matters nevertheless provides, in emergency situations, for the possibility of direct transmission from investigating magistrate to investigating magistrate, although documents have to be returned via the Public Prosecutor’s Office in the routine way.
those transmitted directly to cantonal enforcement authorities under treaty arrangements. Another Party (Luxembourg) receives between 350 and 400 IRCs each year. Eighty-six per cent of these come from “Schengen area” countries. In 2002-2003, 19 requests referred to bribery. Greece has handled more than 15,000 MLA requests and more than 380 extradition requests since 2000, none of which involved foreign bribery. Statistics compiled by Australia indicate that only three MLA requests were refused between 1999 and 2004.79 The oral follow-up report of Mexico given in October 2005 indicates that in 21 requests for MLA involving 12 countries, none has been denied.

409. In almost all the examined Parties, bank secrecy did not appear to be an obstacle to effective MLA. In some examined Parties (e.g. Greece) law enforcement agencies may access bank data subject to bank confidentiality under the direction of a prosecutor. In Belgium, no request for MLA may be refused on grounds of bank secrecy. With respect to several Parties, delays in providing access to bank records were an issue. For instance, although one Party (Bulgaria) had recently amended its law to add a provision which explicitly lifts bank secrecy obligations in the context of MLA requests made pursuant to an international agreement and that contain a signed confidentiality clause, court delays in rendering decisions concerning the lifting of bank secrecy were reported in the course of the Phase 2 examination. Similarly, in Mexico because requests to access banking information through MLA could not be made directly to the bank(s), delays in receiving bank information were commonplace at the time of the Phase 2 examination, and varied anywhere from a few months to two years, depending on the type of information requested and its availability. Mexico’s oral follow-up report indicated that in September 2005, the Senate approved a bill that amends the Banking Law in order to clarify and simplify the procedure for obtaining financial information protected by trust and bank secrecy provisions. A legislative amendment was also made in Sweden to provide an exemption from bank secrecy “in matters concerning legal assistance relating to examinations in conjunction with preliminary investigations in criminal matters or search of premises and seizure”.

410. Concerning Belgium, the search and seizure of financial records in response to MLA requests has taken between three and six months. This is due to the necessity to obtain an enforcement order from the advisory chamber of the court of first instance of the place in Belgium where the search and seizure is to be performed, which means that the requesting country needs to produce a separate letter rogatory for each district involved.

411. In most of the foreign bribery cases in which there has been a conviction, MLA was obtained from another Party. In the United States, for instance, when the Department of Justice becomes aware of credible information indicating that a foreign company has violated another country’s foreign bribery offence, it will usually provide that information to foreign law enforcement agencies. This is done through a variety of channels, including spontaneous transmissions under bilateral or multilateral assistance treaties or through law enforcement contacts abroad. In one examined Party (Korea) where three foreign bribery cases had recently been adjudicated at the time of the Phase 2 examination, documentary evidence was obtained from the United States.

Conclusions

412. The Phase 2 reports do not systematically address two issues that may be important for future work: 1. whether a Party requires a treaty in order to be able to provide MLA, and what affect this has

79 In Australia, one of the refusals for MLA concerned witness testimony that could not be compelled because the matter was only under preliminary investigation in the requesting country. The other two refusals concerned non-criminal matters and discussions with the requesting countries resulted in withdrawal of the requests.
on the Party in terms of implementing its obligations under the Convention; and 2. the evidentiary threshold which must be met in some Parties in order for them to be able to provide MLA (keeping in mind that since not all Parties have evidentiary thresholds this is not an issue for every Party).

Moreover, a third MLA-related issue, appears to have even more impact on the implementation of the Convention by Parties—whether non-Parties, in particular countries at high risk for bribe solicitation, are able or willing to provide effective MLA for foreign bribery offences upon the request of Parties. The unavailability of MLA from the country in which the foreign bribe transaction takes place may be the single most important reason for terminating an investigation. A Party might not even initiate an investigation believing that the country in which the bribery transaction took place will not co-operate. Indeed, the challenge of obtaining MLA from non-Parties might be one of the biggest obstacles to the effective implementation of the Convention. The Working Group might therefore decide to undertake an analysis of what can be done by the Working Group to address this overriding problem. This might involve consideration of how the OECD outreach activities (i.e. work with non-OECD members) could identify and address obstacles faced by non-Parties in providing effective MLA for the foreign bribery offence.

11. Tax Treatment of Bribe Payments

a. Legislation on non-tax deductibility of bribe payments

Paragraph IV of the Revised Recommendation urges the prompt implementation of the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials. The 1996 Recommendation requires that those Parties that do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. It further provides that such action may be facilitated by the trend to treat bribes to foreign officials as illegal. In addition, the Commentaries on the Convention confirm that full participation in the OECD Working Group on Bribery in International Business Transactions entails acceptance of both the Revised Recommendation and the 1996 Recommendation.

Among the 21 Parties examined at the time of this Mid-Term Study, the majority do not permit the tax deductibility of bribe payments to foreign public officials. There are 12 Parties examined under Phase 2 (Australia, Canada, France, Germany, Hungary, Iceland, Luxembourg, Mexico, Norway, Sweden, Switzerland and the United States) that have legislative provisions in place expressly prohibiting such deductions. The effect of the express prohibition has, for the most part, increased the visibility of the tax treatment of bribes and enhanced the ability for greater detection. The United States has for many years had extensive tax provisions concerning the non-tax deductibility of bribes paid by United States companies as well as foreign subsidiaries of United States companies. Its legislation also addresses the issue of the payment of bribes by controlled foreign corporations. The express prohibition of non-tax deductibility can send a strong message to companies, increasing their awareness of the foreign bribery offence. In Norway, for example, the deductibility of bribes was expressly prohibited in 1995. Representatives from large Norwegian companies, who participated in the Phase 2 evaluation, confirmed that they are now very cautious about tracking all company disbursements when conducting business abroad. In Sweden, it was apparent during the on-site panel discussions that the exclusion of bribes from deductible expenses in tax legislation was very well-known in the private sector and the tax administration, the latter having an obligation to detect and report suspicious deductions.

Of the remaining nine Parties that did not have an express prohibition at the time of their Phase 2 examinations (Belgium, Bulgaria, Finland, Greece, Italy, Korea, Japan, the Slovak Republic and the United Kingdom), most pointed to the application of other domestic legislative provisions to demonstrate that the deductibility of bribe payments was, in effect, prohibited. In the United Kingdom, this approach was
considered effective, with its legal regime denying tax deductibility for any payment the making of which constitutes the commission of a criminal offence in the United Kingdom. The prohibition also applies to payments that take place wholly outside the jurisdiction of the United Kingdom. Similarly, in Italy “in determining income, […] costs and expenses resulting from facts, actions or activities which may be qualified as criminal are not deductible”. In the Slovak Republic, the lead examiners recognised that bribe payments are not tax deductible under Slovak tax law, despite the absence of an express prohibition in the tax statute. Nevertheless, as of 1 January 2006, an amendment to the Income Tax Act entered into force in the Slovak Republic to expressly deny the deductibility of “bribes or other undue advantages provided to another person directly or indirectly”. There were concerns however, about the effectiveness of applicable laws in Belgium, Bulgaria, Finland, Greece, Korea and Japan, prompting the Working Group to recommend that each Party consider clarifying its law by introducing an express denial of deductibility of all bribe payments to foreign public officials. With respect to Finland, the Act on the Taxation of Business Profits and Income from Professional Activities was amended on 1 January 2006 to expressly deny the deductibility of “bribes and benefits being bribes by nature”.

417. In Bulgaria, for example, its legislation lists a few simple allowable deductions including donations to educational and healthcare institutions, religious faith societies, and scholarships to students, which may be deducted from the financial accounting results. All the categories of deductions are quite specific, and there is no broadly worded category of deductions such as social or entertainment expenses, under which it might be relatively easy to hide bribe payments. Greek tax law states a general principle that any expenditure not directly related to the business of the enterprise is non-deductible. The law also includes a list of deductible items. The concern raised with this approach is that, although bribe payments are not included in the lists as deductible, there are categories of expenses which could conceivably be used to hide bribe payments. Greek officials identified the vulnerable categories of allowable deductions for enterprises as salaries, administrative expenses, travel expenses, royalties and know-how acquisition expenses.

418. In Korea, legislation enables deductions for losses or expenses which are incurred in connection with the business of a corporation and which are generally accepted as normal or directly related to profit-making activities. Korean authorities have stated that bribe payments to foreign public officials are not deductible because they do not constitute “expenses or losses that are related to business and commonly recognised as ordinary and normal.” No case law was provided in support of this position. At the time of the Phase 2 examination it appeared that the Korean authorities had not specifically directed their tax examiners to deny deductions for bribe payments, nor had they made information to this effect publicly available. In these circumstances, the Working Group expressed concern that the absence of an express denial of the tax deductibility of bribe payments, and the broad wording of the provision in the tax law describing allowable expenses, could result in the allowability of tax deductions for bribe payments. Following the Phase 2 examination, the Korean authorities informed the Working Group that in February 1996 the National Tax Service (NTS) of Korean issued an administrative ruling in February 1996 which prohibits a deduction for money or valuables given as bribe payments, and that the NTS has consistently performed its duties according to this ruling.

419. In all of the cases where deductions for bribe payments to foreign public officials were not expressly prohibited in the tax law, the Working Group recommended that Parties introduce an express provision to ensure that the deductibility of bribes was prohibited. Bulgaria observed that the established principles of its legal system would not permit the express denial of deductibility, nor of a definition of a bribe in its tax legislation.

80 The Slovak amendment further states that the non tax-deductibility of a bribe also applies where the granting of such a bribe is usually tolerated in the relevant State.
420. In the case of Japan, the Working Group was not sufficiently satisfied that Japan was in full compliance with the 1996 Recommendation. Japanese tax legislation does not expressly deny the tax-deductibility of bribe payments to foreign public officials. In Phase 1 the Japanese authorities explained that bribes were not tax deductible because they constituted “entertainment and social” expenses, which were not tax deductible under article 61-4 of the Special Taxation Measures Law. In support of this position, Japanese authorities have cited a ruling of the Hiroshima High Court which denied the tax deductibility of a payment on the basis that it constituted “entertainment and social” expenses, although they warned that this case did not constitute a legal precedent, because it had not been finalised. The lead examiners however, formed the view that “entertainment and social expenses” not only included bribe payments made by corporations to foreign public officials, but that the expenses are tax deductible up to a certain limit for companies up to a certain size and consolidated groups up to a certain limit based on the capital of the parent company. Indeed, following the Phase 1 examination the allowable deduction for ‘entertainment and social’ expenses was increased. A further issue sought to be addressed by the lead examiners was apparent uncertainty as to whether bribe payments made by individuals to foreign public officials could be deductible without limit. In order to rectify all these concerns, the Working Group recommended that Japan enact legislation or amend its regulations as a matter of priority to effectively prohibit the tax deductibility of any bribe payments to foreign public officials made by any individuals or companies of any size.

421. In Belgium, two different legal regimes apply to the tax-deductibility of “secret commissions” that enterprises pay to maintain or obtain export markets by virtue of tax laws and decrees. It was observed by the lead examiners that, in the absence of a general prohibition on the tax deductibility of secret commissions, and with the autonomy of tax law vis-à-vis criminal law, Belgian tax authorities may decide that the payment of a secret commission, in some circumstances, constitutes a simple professional expense, and may be deducted for income tax purposes. Belgium was called upon to address this matter by adopting adequate tax measures that will make non-deductible any improper advantage in the context of international business transactions.

422. In some Parties, whilst there was no question that a prohibition on the non-tax deductibility of bribes to foreign public officials existed, its application did not always extend to all provinces, territories or related jurisdictions:

- In Canada, at the time of the Phase 2 examination, all provinces, except Québec, denied the tax deductibility of illegal payments, including bribes. The Canadian authorities reported, in their oral follow-up report given in March 2005, that Quebec subsequently amended its Income Tax Act (i.e. in 2003) to prohibit the tax deductibility of illegal payments.

- In France, concerns were raised that the prohibition on tax deductibility for bribes did not extend to its overseas territories, and other territories having special status. Accordingly, the Working Group recommended that French authorities carry out the requisite consultations with those French territories that enjoy autonomous tax status, in order to ensure the enactment of fiscal provisions in compliance with paragraph IV of the Revised Recommendation. Similarly, because the ban on the deduction for tax purposes of bribes offered in relation to export contracts did not apply to French territories, the Working Group recommended that French authorities evaluate the effectiveness of existing mechanisms at the disposal of the tax administration to identify, and reject as deductible, bribe payments for export contracts. In its oral follow-up report, given in January 2005, France indicated that consultations with the overseas territories were undertaken, and as a result Mayotte and New Caledonia adopted a law prohibiting the tax deductibility of bribes.
• In the United Kingdom, while deductibility of bribe payments is clearly prohibited within the United Kingdom, most of the Crown Dependencies and Overseas Territories are not in compliance with the 1996 Recommendation on tax deductibility. The lead examiners encouraged the United Kingdom authorities to take appropriate measures to enable and assist the Overseas Territories to align their legal regimes with the principles of the Convention and Revised Recommendation. The text of the Phase 2 Report on the United Kingdom clarifies that one of the concerns of the lead examiners was the absence of an express denial of tax deductibility of bribe payments in the Crown Dependencies, and the need to clarify that such bribes are not tax deductible.

423. Moreover, in Australia, the Income Tax Act (ITA) expressly provides the following two exceptions to the prohibition against tax deductions for bribes to foreign public officials: 1. where the conduct in question is lawful in the foreign public official’s country; and 2. for facilitation payments. The first exception is consistent with the defence under the foreign bribery offence in the Commonwealth Criminal Code. However, the availability of the deduction for facilitation payments is not entirely consistent with the defence for facilitation payments under the foreign bribery offence, in that it does not provide the following safeguards: 1. the requirement that the payment is “minor”; and 2. the requirement that as soon as practicable after the payment is made, the person makes a record in compliance with the record-keeping requirements necessary to obtain a defence for facilitation payments under the Commonwealth Criminal Code. The Australian authorities believed that the absence of these safeguards was not important, since in their opinion only “minor” payments would be provided for “routine government actions”, and the normal record-keeping requirements under the ITA are sufficiently demanding. The Working Group chose to follow up the application of the tax deduction for facilitation payments, and also recommended that the bribery awareness guidelines provide advice on how to determine whether a particular payment to a foreign public official comes under one of the defences.

Conclusions

424. Given that the Phase 2 reports do not systematically assess whether Parties with defences for facilitation payments permit a tax deduction for such payments, the Working Group might include this issue in any future work on facilitation payments.

425. In addition, in view that nine Parties do not expressly prohibit under their laws tax deductions for bribe payments to foreign public officials, and that for most of these Parties the Working Group was concerned that the non-tax deductibility of bribe payments needs to be clarified, the Working Group might decide to consider whether the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (1996 Recommendation) needs to be amended to require an express prohibition. The Working Group could also consider whether in some instances (e.g. where a Party has a simplified tax code that does not provide any non-allowable expenses, but only provides categories of allowable expenses under which bribe payments could not be disguised), an express prohibition under the tax law might be counterproductive to other important tax policy goals of that Party.

b. Awareness, training, and conduct of investigations

426. In order to support measures for the detection of suspicious transactions, a clear need was identified in the Phase 2 process to raise awareness of tax auditors and relevant officials concerning the non-tax deductibility of bribes, and the allowable expenses under which bribe payments could be hidden. There was recognition, even in Parties where the deductibility of foreign bribes was expressly prohibited, that the potential still remained for certain categories of allowable expenses to be used to disguise bribe payments. Representatives of the Italian Tax Administration, for example, indicated that service and consultancy expenses are among the categories of allowable expenses that could be used to disguise bribe
payments. In an effort to raise the awareness of its officials, Italian authorities have provided translated copies of the OECD Bribery Awareness Handbook for Tax Examiners to Tax Administration officials as well as to the Guardia di Finanza.

427. The governments of Norway and the Slovak Republic have also translated the handbook for their officials. In the United Kingdom, detailed guidance on the non-tax deductibility of bribes has been issued in the Business Income Manual, and the government has also previously offered some training in this regard. At the time of its Phase 2 examination, the Finnish Government indicated that it would expressly state that bribes were non-tax deductible in the next version of an information booklet for the Ministry of Finance. Various national and regional working groups, conferences and training programmes have assisted officials in Germany to address the relevant legal provisions on the non-tax deductibility of bribes. In relation to Bulgaria, Hungary, Japan, Korea, Luxembourg and Switzerland however, the Working Group recommended that the authorities should issue guidelines or instructions to clarify and raise awareness of the application of the law on non-tax deductibility and, in relation to Hungary, Japan and Korea in particular, undertake training of officials. Korea has informed the Working Group that since Phase 2 it has provided tax examiners with guidelines or instructions in this regard and has used the OECD Bribery Awareness Handbook for Tax Examiners in its training activities.81

428. Specific issues were also identified in the Phase 2 examinations, which have general significance regarding compliance with paragraph IV of the Revised Recommendation:

- In Germany, in relation to tax audits for large companies, it was recommend that Germany take steps to reduce the time-lag for performing these tax audits, in order that any detection of foreign bribery offences is made within the statute of limitations period for criminal prosecutions. The lead examiners observed that because the statute of limitations for the foreign bribery offence is five years, tax examiners will not be in a position to detect foreign bribe transactions involving these companies within the relevant period as long as the time lag continues. In a related issue, the Working Group recommended that Germany evaluate whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases.

- In Hungary it was considered that the time limit for reopening a tax case (five years) may be too short for the effective implementation of the 1996 Recommendation, especially taking into account the complexity of foreign bribery investigations and prosecutions and the frequent need to obtain mutual legal assistance. The Working Group recommended that Hungary review the operation of the time limit for the reopening of a tax case.

- Another issue in Hungary was identified by officials from its Tax Administration who believed that a previous conviction is required in order to deny the deductibility of a bribe at the time the deduction is first claimed. The Working Group recommended that Hungary take all necessary measures to ensure that no conviction for foreign bribery is required to deny the deductibility of a suspected bribe.

- In the United Kingdom, the one-year period open to the tax administration for investigating tax returns may be insufficient to adequately allow for the detection of criminal activities, such as bribe payments to foreign public officials, particularly with the large number of companies incorporated in the United Kingdom, and the complexity of corporate tax returns. Accordingly, the Working Group recommended that the United Kingdom ensure sufficient time and resources

81 In addition, in 2005, an anti-corruption training programme was conducted in Korea 42 times for a total of 2,476 tax officials.
are available to tax authorities to review tax information and allow for the detection of possible
criminal conduct. Following the Phase 2 examination, the United Kingdom pointed out that the
time limit is 20 years for conducting an inquiry where there has been fraudulent or negligent
conduct, and that the time limit can be extended indefinitely once an inquiry has been opened.

- In Italy, with respect to measures for preventing and detecting foreign bribery, the Working
  Group recommended that Italy pay particular attention to information arising as a result of tax
  amnesty programmes in order to prevent the misuse of these programmes for the dissimulation of
  bribes. This issue has not been consistently raised in other Phase 2 examinations so far
  undertaken, although similar programmes may have been introduced by other Parties. It may be
  that this issue requires further analysis as the Phase 2 examination process continues.

- In Switzerland, concerns were expressed during the Phase 2 examination that certain tax
  authorities were insufficiently resourced thereby limiting their ability to detect the existence of
  improper deductions. The investigative powers were also considered to be too limited with regard
  to some tax evasion matters. In addition, the Working Group recommended that Switzerland
  review its disclosure rules to ensure that officials discovering suspicious facts report them to the
  competent judicial authorities.

c. Exchange of information for tax purposes

429. Another issue for ongoing assessment is the exchange of information between Parties to combat
non-compliance with tax laws. Article 26 of the OECD Model Tax Convention provides the most widely
accepted legal basis for bilateral exchange of information for tax purposes. It creates an obligation to
exchange information that is foreseeably relevant to the correct application of a tax convention as well as
for purposes of the administration and enforcement of domestic tax laws. It is apparent that not all
members intend to amend their existing tax treaties pursuant to Commentary 12-3 on Article 26 (optional)
to allow the sharing of tax information by tax authorities, with other law enforcement agencies and judicial
authorities on certain high priority matters, including corruption. This is an area that could be analysed
further as the Phase 2 examinations progress.

d. Reporting aspects

430. The tax authorities in a majority of examined Parties (Bulgaria, France, Germany, Greece,
Hungary, Italy, Japan, Korea, Luxembourg, Mexico, Norway and parts of Switzerland) have a duty under
the law to report suspicions of foreign bribery to law enforcement agencies in their Parties. In many of
these Parties (Bulgaria, France, Greece, Hungary, Italy, Japan, Korea, Luxembourg, Mexico and parts of
Switzerland), the duty derives from a general statutory duty on all public officials to report crimes. Only
one examined Party (Germany) has a statutory duty to report that is targeted at tax officials. Norway and
Sweden do not provide an explicit sanctionable obligation under the law for the public administration to
report crimes. However, Norway had issued guidelines to the tax authorities obliging them to do so, and in
Sweden most of the public officials who participated in the on-site visit believed82 that they were subject to
a reporting obligation. Moreover, the Swedish tax administration representatives stated that the Secrecy
Act does not prevent tax inspectors from reporting any crime to prosecutors, and according to the Tax
Assessment Regulation, tax inspectors are in fact required to report suspicions of, inter alia, bribery of
foreign public officials.

82 Some believed the obligation stemmed from the Constitution whereas others thought it was contained in
“general laws”.

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431. In some of these Parties, however, the duty to report is qualified. Norwegian tax officials are only required to report “serious” cases of corruption where there is “just cause” for suspicion. Similarly, French tax officials need only report suspicions that they believe to be “sufficiently well-established” and “constitute a sufficiently serious breach” of the law (These qualifications are derived from the case law.). In essence, these Parties require their tax officials to assess the evidence before deciding whether to report the case to law enforcement. On the other hand, with respect to Luxembourg the problem begins within the Tax Administration. Under Luxembourg law, tax secrecy applies not only to third parties but also among the different administrations of the Tax Administration. This means that a tax official who detects a transaction contravening the law, is not authorised to report this finding to the administration concerned, unless co-operation is permitted under the law. However, even where permitted by law, the sharing of such information is optional.

432. The majority of the remaining examined Parties (Finland, Iceland, the United Kingdom and the United States) permit (but do not require) tax officials to report foreign bribery to law enforcement. In some cases (Finland and Iceland), however, the entitlement to report is not clearly worded or does not derive from legislation. This lack of unambiguous guidance raised concerns that tax officials may not regularly exercise their discretion to report crimes, particularly where the official has a general duty to keep tax information confidential. In Finland, tax officials are permitted to “omit to report” a case of tax fraud to the competent authorities where deemed to be “petty”, and there is no statutory obligation to report suspicions of foreign bribery. The Working Group therefore recommended that Finland establish clear guidelines obligating tax inspectors to report suspicions of foreign bribery to the investigative authorities. In providing its follow-up oral report in January 2005, Finland was reminded about the concerns during the Phase 2 on-site visit of the Finnish FIU that tax inspectors do not have the authority to report non-tax fraud cases to law enforcement authorities. The chair of the Working Group commented that Finland’s laws might need to clarify the reporting obligations of Finnish public officials.

433. In Australia, tax auditors are not required to report suspicions of foreign bribery directly to the law enforcement authorities. Instead the Commissioner of Taxation has a discretionary power to disclose information to law enforcement authorities if satisfied that the information is relevant to: 1. establishing whether a “serious” offence has been committed; or 2. the making of a proceeds of crime order. The responsibility of making disclosures that satisfy these criteria has been placed with the Serious Non-Compliance Business Line (SNC), and internal guidelines only state that tax auditors “should” make such disclosures to the SNC. The Working Group recommended that the Bribery Awareness Audit Guidelines include a requirement that tax auditors report all information regarding foreign bribery to the SNC.

434. Canada is the only examined country that prevents its tax officials from reporting suspicions of foreign bribery to law enforcement. The prohibition is intended to protect the privacy interests of taxpayers. The prohibition applies only to spontaneous reporting; it does not apply if tax officials are required to disclose information in the course of criminal proceedings. Following the Phase 2 examination, the Canadian tax authorities explained that for a limited number of offences related to drugs, the proceeds of drug offences, criminal organisations and terrorism, if an investigation includes one of these offences and a foreign bribery offence, this process (may) be available to obtain tax information.

435. The awareness of a duty or discretion to report, and the efforts made to raise such awareness, also vary across Parties. In some Parties (e.g. Iceland and the United States), tax authorities always exercise their discretion to report suspicions of crime as a matter of practice. In others (e.g. Luxembourg), tax officials gave no clear indication that they would report suspicions of crimes despite a statutory duty to do so. In Australia, the Australian Tax Office (ATO) held the view that the “payment of foreign bribes is not a significant occurrence in Australia”, and that therefore “the claiming of tax deductions for such payments has not been identified as a risk worthy of specific targeting in the ATO’s Compliance Programme 2004-
2005”. Thus the Working Group recommended that the ATO consider revising its Compliance Programme to specifically include bribe payments to foreign public officials in their risk profile.

436. How does this spectrum of reporting duties and levels of awareness impact the fight against foreign bribery? This question is difficult to answer definitively because of the lack of data on foreign bribery cases that have been reported by tax officials. Tax authorities in the 21 examined Parties have reported four foreign bribery cases to law enforcement (twice in Finland and twice in Germany). None of the Parties provided statistics on domestic bribery cases that have been reported by their tax authorities. At the same time, there was no evidence that tax authorities had failed to report other (non-bribery) crimes that they had detected. Some Parties (e.g. Italy, Japan, Norway and the United Kingdom) provided statistics that showed that their tax authorities have reported crimes (but not necessarily bribery) to law enforcement. This suggests that the low number of foreign bribery cases unearthed by tax authorities is a problem with detection rather than reporting. Unless tax authorities begin to uncover foreign bribery cases, the impact of their reporting duties on the fight against foreign bribery cannot be assessed conclusively.

Conclusions

437. Given the important role that tax authorities could play in the detection (and deterrence) of foreign bribery, the Working Group might decide to consider whether the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (1996 Recommendation) needs to be amended to encourage Parties to require their tax authorities to report foreign bribery to the law enforcement authorities. Work in this regard could also include consideration of the level of proof that should trigger such a report.

12. Prevention, Detection and Combating of Foreign Bribery through Systems for Official Development Assistance and Official Export Credit Support

a. Introduction

438. This part of the Mid-Term Study looks at how systems for official development assistance (ODA) and official export credit support are used by the Parties to the Convention to detect and deter foreign bribery through the following measures: 1. deterrence measures such as informing applicants about the legal consequences of foreign bribery, and providing anti-foreign bribery undertakings/declarations, 2. reporting instances of foreign bribery to the competent authorities, and 3. denial, suspension or termination of contracting opportunities. The imposition of such civil and administrative sanctions upon conviction for the bribery of foreign public officials is dealt with earlier in this Study (see: A.2.k.iv on sanctions for legal persons).

439. This part of the study does not look at disqualification or termination as a sanction upon conviction per se, but rather as part of due diligence in determining whether to contract with an applicant convicted of foreign bribery, and as grounds for the termination of the relevant contract. Indeed, given that Parties’ laws have not, with one known exception, provided for such disqualification or termination upon conviction...

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83 The issues related to official development assistance and official export credit support are also covered to some extent in other chapters of this review (see: A.2.k on sanctions for legal persons, B.1.b on awareness among related agencies, and B.2.b on reporting by public officials).

84 In the United States, a mere indictment for an FCPA violation is grounds for suspension. Such action, which is authorised under guidelines issued by the Office of Management and Budget, was used in practice in relation to a company charged (and later acquitted) in the early 1990s under the FCPA. Furthermore, once an agency bars or suspends a company from federal non-procurement or procurement activities, other agencies are also required by the Code of Federal Regulations, to exclude the company.
conviction for a foreign bribery offence, the policy approach taken by official export credit support and ODA agencies in dealing with companies convicted of foreign bribery takes on additional significance. Furthermore, the awareness of ODA and export credit officials of the Convention and the foreign bribery offence is dealt with later (see: B.1.b. on awareness among related agencies), as well as awareness raising targeted at the private sector by export credit and ODA agencies.

440. Pursuant to the Revised Recommendation, the authority for the Working Group to monitor Parties’ measures for deterring, preventing and combating foreign bribery through the use of ODA and official export credit support is provided for in several places. Paragraph 1 provides the general Recommendation for taking effective measures to deter, prevent and combat foreign bribery, and this has been widely interpreted to cover many anti-foreign bribery measures, such as the reporting of foreign bribery by public officials, including officials responsible for providing ODA and official export credit support, to the law enforcement authorities. Paragraph II v) of the Revised Recommendation specifies areas where “concrete and meaningful steps” to deter, prevent and combat foreign bribery are recommended, including “public subsidies, licenses, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases”.

441. In addition, paragraph VI of the Revised Recommendation addresses two issues relevant to ODA contracting. First, under subparagraph ii) it is stated that member countries laws should permit the suspension from competition for public contracts enterprises determined to have committed foreign bribery, and where a country’s national law provides for public procurement sanctions for domestic bribery, such sanctions should be applied equally in cases of foreign bribery. Second, subparagraph iii) states that “in accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement…”

442. As the Phase 1 reports did not cover the role of ODA and official export credit support systems in the fight against foreign bribery, this was new territory for the Phase 2 examination process, which was intended to broaden its focus of monitoring to more fully encompass non-criminal anti-foreign bribery measures. This is reflected in the evolving treatment of the issues in the Phase 2 reports. The earlier Phase 2 reports either do not address the topic of official export credit support at all or discuss the issue superficially (Bulgaria, Finland, Germany, Iceland, and the United States), while the latter reports take a progressively closer look. Moreover, except for anti-bribery declarations/undertakings, even the reports that address the role of official export credit support systems in fighting foreign bribery do not systematically address the same measures for doing so. With respect to ODA systems, the very first reports do not include a section specifically dedicated to ODA. In addition, ODA is generally addressed more fully for the Parties that are comparatively large ODA providers (e.g. Australia, Canada and Sweden).

85 The full text of this Recommendation reads as follows: “In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts”. The Recommendation adds in a footnote that “this paragraph summarises the DAC Recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation”.

b. Official Development Assistance

443. Official Development Assistance (ODA) is administered in two ways—bilaterally and multilaterally. Bilateral assistance essentially involves the provision of funds to a co-operation partner, for example a country or a NGO, under a project agreement with the partner. In order to administer this kind of assistance, either the co-operation partner hires a consultant to carry out the services, or the ODA agency contracts directly with a consultant, often an individual or company from the agency’s own country. Multilateral assistance involves the provision of funds to multilateral organisations (i.e. international and regional development banks). Such contributions can be made in various forms, including Trust Fund Financing, parallel or co-financing, or for the purpose of replenishing soft loan windows. In some cases, multilateral assistance is “tied”, which means that the recipient organisation is obligated to hire a consultant from the donor country to carry out the services. Given that some forms of ODA involve contracting with companies that perform international transactions, Parties’ ODA systems are a good way to disseminate information about the risks of foreign bribery to them, as well as to detect foreign bribery perpetrated by applicants and contractors. In addition, ODA agencies can play a role in deterring foreign bribery through the denial and termination of ODA contracts with consultants.

444. Implementation of the 1996 OECD Development Assistance Committee (DAC) Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement, which was later integrated into the Revised Recommendation, is not subject to formal monitoring and evaluation by the DAC. However, the DAC undertakes various activities, for instance through the DAC Network on Governance (GOVNET), to disseminate good donor practices and lessons learned, including in the field of anti-corruption.

Conclusions

445. The Working Group might want to explore means for further co-ordinating the work of the Working Group and the Development Assistance Committee (DAC) on foreign bribery in aid-funded procurement.

i. Deterrence Measures including Anti-Bribery Undertakings and Declarations

446. In many Parties (Canada, France, Greece, Italy, Germany, Luxembourg, Norway, Sweden [for one of its two ODA agencies], Switzerland and the United Kingdom), anti-corruption provisions are included in ODA contracts, as stipulated in paragraph VI iii) of the Revised Recommendation. On the contrary, Iceland and Korea did not include such clauses in their ODA contracts at the time of their Phase 2 examinations. Since then, Korea informed the Working Group in its oral follow-up report of December 2005 that the Economic Development Co-operation Fund (EDCF, Korea’s ODA loan programme), introduced anti-corruption provisions into its programme in October 2001. Pursuant to internal regulations, contract suppliers are now required to sign a declaration to the effect that they have not engaged and will not engage in bribery in the EDCF transaction. Moreover, the Korea International Co-operation Agency has required all bidders for ODA contracts to submit a “Bidders Oath to Fulfil the Integrity Pact”, which states that bidders shall not offer any bribe, entertainment, or other illegitimate benefits to relevant officials in the process of concluding and executing the contract.

447. Concerning Sweden, one of its ODA agencies includes specific clauses in its bilateral funding contracts prohibiting the bribery of foreign public officials in relation to the contract (i.e. the contract states that it may be terminated if the consultant/contractor has engaged in “corrupt or fraudulent practices” in

competing for or in executing the contract). Its “Standard Conditions for Short-and Long-Term Consulting Services Contracts, and “Contract for Consulting Services” between the co-operation partner and the consultant do not expressly refer to corruption, but refer to the laws and regulations of the relevant country. Sweden’s other ODA agency refers in its “Subscription and Shareholders’ Agreement” and “Loan Agreement” to the “Code of Best Practice”, which states that the ODA agency “shall utilise the framework established by international organisations such as (but not limited to)...the OECD Convention...” Although the Phase 2 Report points out that the language of these provisions does not expressly refer to the bribery of foreign public officials, the Working Group did not make any recommendations in this respect.

448. Australia was recommended to amend the standard contract of its ODA agency to clarify that the contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition. With respect to Sweden, the Working Group recommended that its ODA agencies review their standard contracts to ensure that they specifically prohibit the bribery of foreign public officials related to contracts. Italy is preparing texts that will specifically deal with the risks of corruption in public procurement, and contain an analytical description of procedures to be followed in the call for tenders, particularly in developing countries. In France, the practice of paying “extraordinary commercial expenses” is subject to penalties. Overall, the Phase 2 reports do not systematically address the issue of anti-corruption clauses in ODA contracts, or the monitoring of agents’ commissions. There is therefore little scope at this stage to provide a comprehensive analysis of this topic.

ii. Reporting to the competent authorities

449. The Working Group notes that in the Phase 2 Report on Korea disclosure of suspicions of bribery in ODA contracting to the competent authorities is “an issue for many Parties”. The ODA agencies of three Parties have not established an obligation for ODA employees to report foreign bribery detected in relation to ODA contracting to the competent authorities (France, Luxembourg and Korea). The Working Group therefore recommended that they adopt such obligations. By the time of providing its oral follow-up report in January 2005, France had begun the process of amending the Code of Criminal Procedure to extend the reporting obligation therein to officials of its ODA agency. In Sweden, one of its ODA agencies requires the reporting of “corruption”, which according to its anti-corruption regulation, requires that there has been damage or loss. In addition, the anti-corruption regulation requires reports to be made through a reporting chain and does not identify at what level or in what circumstances a suspicion must be reported to the law enforcement authorities in Sweden and/or abroad. The Working Group recommended that amendments to the anti-corruption regulation clarify that “corruption” includes foreign bribery and does not require identification of loss or damage, and that the ODA agency take steps to ensure the availability of an effective system for reporting suspicions of foreign bribery to the law enforcement authorities.

450. In two Parties (the United Kingdom and Switzerland), ODA staff have an obligation to report suspicions of bribery to management or an internal body pursuant to their internal regulations, by-laws or policies. The recipient of the suspicion then has the discretion to forward the information to the law

88 “Extraordinary commercial expenses” comprise any commission not mentioned in the main contract or not at least figuring in an independent contract drawn up in due form which refers to the main contract, any commission which does not reward some effective, legitimate service, any commission paid in a tax haven, or any commission paid to a beneficiary who is not clearly identified or to a company which has all the appearances of a shell company.

89 Sweden’s other ODA agency does not have a formal reporting obligation, and the representative of that agency involved in the on-site visit believed that foreign bribery committed by a partner would result in a “spot visit” and the making of a report to the legal department of the local Swedish embassy.
enforcement authorities. The Working Group expressed concern about the functioning and limits of this kind of reporting obligation.

451. In Japan since ODA officials are not considered Japanese government officials, they are not subject to the same reporting obligation as public servants. However, both ODA agencies in Japan confirmed that their employees are subject to a by-law that provides a reporting obligation similar to the one for public officials under the Code of Criminal Procedure. However, since officials from these two agencies did not seem aware of this obligation at the on-site visit (although the officials from one of the agencies believed that they were subject to a moral obligation to make a report), the Working Group recommended that Japan consider establishing procedures requiring employees of the ODA agencies to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials.

452. In two Parties (Italy and Mexico), ODA staff have a statutory obligation to report suspicions of crimes to the law enforcement authorities, as do all public officials. However, since problems of awareness of the obligation were highlighted for these two Parties, the Working Group recommended that they remind ODA officials of their reporting obligation.

453. Concerning Australia, there was some confusion regarding the awareness among ODA officials of the reporting obligation at the on-site visit. However, later on the Australian officials confirmed that pursuant to the ODA agency’s Fraud Control Policy, indications of foreign bribery are subject to a reporting obligation. Given that the Fraud Control policy does not expressly include foreign bribery in the definition of “fraud” (although it includes “bribery, corruption or abuse of office”), and does not require that reports be made to law enforcement authorities (reports are to be made to the Director of Performance Review and Audit), the Working Group recommended that Australia take steps to ensure that staff of the ODA agency are aware that the Fraud Control Policy is intended to include such requirements.

Conclusions

454. In view of the number of recommendations in the Phase 2 reports addressing the lack of or problems regarding reporting obligations of ODA officials, and that this has been identified in the Phase 2 Report on Korea as “an issue for many Parties”, the Working Group might want to consider whether the frequency of problems is a reflection of the absence of guidance in this regard in the Revised Recommendation. In particular, with respect to ODA contracting, the Revised Recommendation (i.e. Recommendation VI iii) only addresses the use of anti-corruption provisions in bilateral aid-funded procurement.

iii. Denial, suspension and termination of contracting opportunities

455. In the United States, the ODA agency does not deal with contractors who are not conversant with the law against transnational bribery. (The Phase 2 report does not specify how the agency ensures this.) In Japan, in addition to the existing system of sanctions against persons engaged in corrupt or fraudulent practices under a contract funded by an ODA agency loan, the ODA agency has in practice taken measures to avoid dealing with a company linked with domestic bribery allegations: the Ministry of Foreign Affairs requested the company to abstain from bidding on ODA projects for three months. The Working Group will nevertheless follow-up the policies of ODA agencies in Japan on dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official, to determine whether these policies are a sufficient deterrence.

456. On the other hand, with respect to Canada and France, the Working Group recommended that the policies of their ODA agencies on dealing with applicants convicted of foreign bribery needed to be re-
evaluated. In Canada, the recommendation reflected, in part the policy of its ODA agency to not automatically disqualify companies convicted of foreign bribery in relation to a contract with the ODA agency, unless a forensic audit shows that the specific funds provided by the ODA agency for the project were used to bribe the foreign public official. In France, the recommendation arose largely from the need for the French ODA agency to ensure that specific training be provided to staff members on the various actions that can be taken in response to foreign bribery. France had not addressed this recommendation by the time of giving its oral follow-up report in January 2005.

457. Australia’s ODA agency has the discretion to not enter into a bilateral aid-funded procurement contract with any applicant. Although Australia does not have a policy regarding applicants convicted of foreign bribery, it routinely consults the World Bank and Asian Development Bank blacklists when considering applicants. The Working Group recommended that Australia consider establishing a policy for denying access to ODA contracting opportunities for applicants convicted of foreign bribery, in appropriate cases, as well as including provisions for the termination of bilateral aid-funded contracts in appropriate cases where contractors are convicted of foreign bribery after the contract has been entered.

458. Although neither paragraph VI iii) of the Revised Recommendation nor the DAC Recommendation call for the disqualification or termination of an ODA contract when evidence of foreign bribery arises before or after the contract is entered, some Parties nevertheless introduced the possibility to stop disbursements or terminate the agreement (Germany, Italy and Norway), and seek recovery of previously disbursed funds that have been misused (Germany). The German ODA agency undertakes corruption checks when monitoring the projects it finances. In Japan, a company for which there had been allegations regarding domestic bribery was requested by the Ministry of Foreign Affairs to not bid on ODA-related projects for three months, even though the bribery allegations did not involve ODA operations. On the contrary, in Luxembourg, the anti-corruption clause applies only to bribery attempts prior to awarding the contract, and there is no provision for cancelling the contract and penalising the firm involved if it is found, after the contract is awarded, that undue influence was exerted on the contracting authority.

Conclusions

459. In view of the important deterrent effect of disqualification and termination of ODA contracting on foreign bribery, the Working Group could ensure that this issue is systematically raised in every Phase 2 examination, including Parties’ policies concerning natural and legal persons who have been debarred by the World Bank or other multilateral development banks. The Working Group could also consider whether the directive in the Revised Recommendation (i.e. to require anti-corruption provisions in bilateral aid-funded procurement) is strong enough to encourage Parties to take such actions.

c. Official Export Credit Support

460. In addition to monitoring prevention and deterrence measures in relation to official export credit support, the Working Group has also monitored to some extent the 2000 Action Statement on Bribery and Officially Supported Export Credits of the OECD Working Party on Export Credits and Credit Guarantees (ECG). Pursuant to the Action Statement, members of the ECG agree to several important measures for

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90 Among the 21 Parties reviewed in this study, Bulgaria and Iceland are not members of the ECG. The provisions of the Revised Recommendation are broader than the ones of the Action Statement. Therefore, the Working Group noted that meeting the standards under the Action Statement does not necessarily imply that the standards under the 1997 Revised Recommendation have also been met (Canada). Conversely, a recommendation concerning export credit should not be interpreted as a suggestion that the
combating foreign bribery. The Working Group has so far focused its monitoring in this respect on the following three points of agreement: 1. that each applicant and/or exporter shall be invited to provide an undertaking/declaration that “neither they, nor anyone acting on their behalf, have been engaged or will engage in bribery in the transactions”; 2. credit, cover or other support shall be refused if there is “sufficient evidence” that foreign bribery was “involved in the award of the export contract”; and 3. “appropriate action, such as denial of payment or indemnification, refund of sums provided and/or referral of evidence of such bribery to the appropriate national authorities” shall be taken if the involvement of a beneficiary in foreign bribery is “proved” following the approval of credit, cover or other support.

461. The ECG also monitors implementation of the Action Statement; however only for ECG Member countries through a self-assessment process. To date, this has involved compiling and analysing information about members’ practices through an ongoing survey, which canvases members about measures to deter foreign bribery, actions taken when foreign bribery is detected before and after support has been provided, past experiences and further measures or actions. The information in the surveys has considerably facilitated the Working Group in reviewing Parties’ implementation of the Action Statement in the course of the Phase 2 examinations. The ECG is currently involved in discussions to strengthen the Action Statement, and hopes to finalise the revisions in the first half of 2006.

462. Official export credit support is generally provided through a contract of insurance or indemnity, the provision of a guarantee, or the making of a loan. Since export credit agencies deal with companies involved in international business transactions, and often in countries at high risk for bribery solicitation, export credit officials are well-positioned to raise the awareness of the private sector of the risks of foreign bribery and the Convention, and to detect foreign bribery in transactions for which official export credit support has been provided. Moreover export credit agencies can play an important role in deterring foreign bribery, by disqualifying applicants from contracting with them, and by terminating contracts, where foreign bribery is determined to have occurred in connection with the contract.

**Conclusions**

463. The Working Group might want to explore means for further co-ordinating the work of the Working Group and the OECD Working Party on Export Credits and Credit Guarantees (ECG) on foreign bribery and officially supported export credits.

i. Deterrence Measures including anti-bribery undertakings and declarations

464. Since the Phase 2 reports began looking routinely at whether applicants for official export credit support are required to provide anti-foreign bribery undertakings/declarations in the second half of 2003, the Phase 2 reports dealing with this issue have noted that all of the Parties require applicants to sign a declaration/undertaking in which they state that they have not and will not engage in bribery in the export policies of the national export credit agency do not meet the standards set out in the Action Statement (Canada and Japan).

91 The following is a list of OECD member countries who are both members of the ECG and have official export credit support agencies: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.
transaction for which support is solicited. No deficiency in this respect was noticed. However, the extent of the declaration varies, as well as the required signatories (insured party, exporter and/or borrower).

465. In addition to the anti-bribery declarations/undertakings and the provision of information to applicants requesting support about the legal consequences of foreign bribery (mentioned below in B.1.b on awareness among related agencies), a number of export credit support agencies take other pro-active measures to deter (and in some cases detect) bribery. One specific measure consists of requesting details on agents’ commissions (Australia, France, and the United Kingdom), since it is widely recognised that agents represent a potentially convenient channel for bribery in international business transactions. In Australia, information about agents’ commissions is required to be included in the export contract, and the export credit agency will only support commissions that are deemed reasonable. The Australian export credit authorities explained that commissions of up to 5% are generally considered acceptable, amounts between 5%-10% trigger various checks, and those exceeding 10% receive even greater scrutiny, and could only be supported following due diligence involving the agency’s managing director. The Working Group notes in the Phase 2 Report on Australia that the relationship between the level of agents’ commissions and increased due diligence by export credit agencies is a horizontal issue (i.e. in this case a general issue that affects many Parties).

466. In Mexico, Bancomext inserted a special clause stating that any company receiving financial support shall refrain from bribing public officials in the country where its products are sold. A violation of this clause is sufficient cause for denial of financial support or the cancellation of a standing loan. However, it was noted that in Mexico the export credit agency does not require any details on agents’ commissions. The Working Group recommended that Mexico encourage its export credit agency to require such details when providing support. A particular concern was raised in the report on the United Kingdom, since previously, the United Kingdom export credit agency required information from applicants for insurance coverage on the use of agents or other intermediaries with a view to establishing that no improper payments had been made to procure contracts. This requirement was significantly weakened after the on-site visit, and is flagged for follow-up in the recommendations of the Working Group. The Phase 2 report on the United Kingdom does not, however, specify what kind of information was previously required, or how these requirements have been modified since the on-site visit. Since the Phase 2 examination of the United Kingdom, the government published in March 2006 its Final Responses to the Export Credits Guarantee Department’s (ECGD) consultation on the changes made to its anti-bribery and corruption procedures in December 2004. One of the main outcomes of the consultation, which will come into effect on 1 July 2006, is that United Kingdom exporters and investors applying for ECGD support will be requested to provide the identities of agents or other intermediaries involved in the award of a contract. Concerning the Slovak Republic, the Working Group recommended that its export credit agency require disclosure of agents’ commissions. The topic of agents was not addressed in the other Phase 2 reports.

467. The need for guidelines on how to avoid entering into a relationship with persons having bribed foreign public officials and detect such bribery was expressed in several reports. In Norway, the export credit agency felt it had very little power to determine whether the companies were involved in corrupt practices, as the credits are often granted to banking institutions rather than companies directly, and suggested that additional information and training may be necessary within the export credit agency to raise the capacity to detect corruption. Representatives of the Norwegian export credit agency appeared unsure as to what channels were available to them to find out whether a company had been sanctioned for acts of bribery, or whether business secrecy would be an obstacle. As no such case had yet arisen, there was no concrete experience to build on. To remedy this lack of clarity, the Norwegian Ministry of Trade

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92 i.e. Australia, Canada, France, Germany, Greece, Hungary, Italy, Korea, Luxembourg, Mexico, Norway, Sweden, Switzerland, and the United Kingdom.
and Industry and the export credit agency are in the process of elaborating guidelines that specifically aim at preventing corruption.

468. Similarly, at the time of the on-site visit, the Swiss export credit agency was considering establishing a screening mechanism that would enable its staff to be more vigilant regarding applications relating to high-value projects in countries or sectors of activity (construction, public works, etc.) that are particularly sensitive to bribery. In Mexico, scrutiny is not given to requests for export credit guarantees from companies that operate in areas where corruption is known to be prevalent. It was noted that the detection of bribery could be improved in Mexico if the export credit agency staff were provided with the same level of training and methodology that has been successfully used in the area of money laundering, where cases have been detected.

ii. Reporting to the competent authorities

469. Most Phase 2 reports place emphasis on the importance for export credit agencies to report their suspicions of bribery to the law enforcement authorities, regardless of when the suspicion arises (i.e. before or after support/contract has been granted). Since export credit agencies are not authorised or equipped to investigate possible bribery offences, it is critical that such cases are referred to the competent authorities for assessment. In cases where export credit agency officials are not considered public officials under the relevant national law, there might not be a clear reporting obligation. For example, in Japan export credit officials from the Japan Bank for Co-operation (JBIC)\(^{93}\) and the Nippon Export and Investment Insurance Agency (NEXI) are not considered government officials. At the on-site visit, JBIC officials believed that they were subject to a moral obligation to report suspicions of bribery perpetrated by applicants for export credit support. Later in the examination process, the Japanese authorities explained that JBIC and NEXI officials are subject to by-laws that provide the same obligation to report criminal activities as the “accusation” requirement for Japanese government officials under the Code of Criminal Procedure.

470. Similarly, in Australia, employees of the Export Finance and Insurance Corporation (EFIC) are not considered public servants, and thus are not subject to the Public Service Act or the Australian Public Service Code of Conduct. Instead, EFIC employees are subject to a Fraud Control Programme, which requires EFIC employees to report cases of fraud to management. However, the definition of “fraud” under the Programme does not clearly cover foreign bribery. In any case, EFIC officials felt that it is within their internal policy to inform the competent authorities of suspicions of bribery, either before or after export credit support is approved. The Working Group felt that the obligation to report foreign bribery by EFIC staff was not clear enough in law or policy, and thus recommended that the Australian authorities consider strengthening the reporting obligations contained in EFIC rules.

471. The export credit agency officials in some Parties have no reporting obligations (France, Luxembourg, Norway and one of Sweden’s export credit agencies). The Working Group therefore recommended that they adopt such obligations. In the case of France, by the time of giving its oral follow-up report in January 2005, work had begun on extending the reporting obligation under the Code of Criminal Procedure to the staff of the export credit agency. Similarly, Norway indicated in its oral follow-up report in June 2005 that ethical guidelines clarifying the obligation on Norwegian public officials to report suspicions of bribery would be finalised in late 2005. In Sweden, one of the two export credit agencies does not impose an obligation on export credit employees to report suspicions of bribery that arise

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93 Japan has two agencies responsible for export credit support, the Nippon Export and Investment Insurance Agency (NEXI) and the Japan Bank for International Co-operation (JBIC), the latter which also provides ODA. JBIC officials are not considered Japanese government officials.
in the course of performing their official duties. However, agency representatives felt that an employee would inevitably report suspicions informally to his or her superior.

472. In other Parties, export credit officials have an obligation to report suspicions of bribery to their hierarchical superiors or an internal body pursuant to their internal regulations, by-laws or policies. It is then up to the recipient of the suspicion to decide whether or not to inform the law enforcement authorities (Canada, Hungary, Sweden and Switzerland). Concerns were expressed in two of the Phase 2 reports regarding the functioning and limits of the obligation (Switzerland and the United Kingdom), and in one report regarding its application in practice (Canada). With respect to Sweden, the code of conduct of one of the export credit agencies obligates employees to report corruption to the agency lawyer or the human resources department. In the Phase 2 Report of Canada, the disclosure of foreign bribery offences to the law enforcement authorities by official export credit agencies is identified by the Working Group as “a general issue for many Parties”.

473. In other cases, export credit officials have an obligation to report suspicions of bribery directly to the law enforcement authorities pursuant to their internal regulations, by-laws or policies (Greece, Korea, the United Kingdom and Japan). However, as mentioned above, during the on-site visit to Japan export credit officials from JBIC seemed not to be aware of these by-laws. The Working Group therefore recommended that Japan consider establishing procedures requiring employees of the Japanese export credit agencies to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials.

474. Finally, two Parties (Italy and Mexico) provide the same legal requirement for export credit staff to report suspicions of crimes to the law enforcement authorities, as all public officials. However, problems of awareness of the obligation were highlighted in these two Parties, and the Working Group recommended that these two Parties remind public officials (including export credit and ODA officials) of their reporting obligation.

Conclusions

475. Given that the Phase 2 Report on Canada identifies the disclosure of foreign bribery offences to the law enforcement authorities by export credit agencies as “a general issue for many Parties”, and, moreover, several Phase 2 reports provide recommendations regarding the introduction of an obligation for export credit agency staff to report indications of foreign bribery to the law enforcement authorities, as well as to remind staff of the obligation to report where one already exists, the Working Group might consider whether this might reflect the lack of clarity on this issue in the Revised Recommendation, and whether the ECG Action Statement is clear on this issue. In particular it is noted that the Action Statement only provides an obligation to refer evidence of foreign bribery to the appropriate national authorities if involvement of a beneficiary in such bribery is “proved” after export credit support has been approved. This raises two questions for Parties implementing this particular aspect of the Action Statement. First, what is required for foreign bribery to be “proved”? Second, what is the obligation when foreign bribery is detected before export credit support has been approved? However, enhancement of the Action Statement is currently under negotiation in the OECD Export Credit Group and these perceived weaknesses could be addressed.

iii. Denial, suspension or termination of contracting opportunities

476. As described above, Parties’ laws rarely provide for the temporary or permanent exclusion from public benefits, such as participation in export credit support, as an additional sanction upon conviction for bribery offences. However, a number of export credit agencies nevertheless apply due diligence towards applicants that have been involved in bribery cases in the past.
477. For instance, in addition to the standard declaration described above, the Italian export credit agency has a detailed declaration requirement, whereby the applicant must certify that 1. the applicant, its directors and its employees have not been convicted of foreign bribery or any criminal offences against the public administration; 2. the applicant has never been blacklisted by the World Bank or any other international body; and 3. the applicant is not aware of any criminal offence attributable to other third parties in relation to the subject transaction. Although some export credit agencies ask for a declaration of no past involvement in bribery (Italy and Luxembourg), the consequence of such a requirement is not clearly indicated in the reports.

478. The Working Group recommended that Canada and France encourage their export credit agencies to establish policies to evaluate the eligibility of enterprises that have been convicted of foreign bribery in the past. The Working Group also recommended that the United Kingdom revisit its existing policies. Similarly, the Working Group recommended that Mexico consider establishing a list of companies that have been involved in bribery, including companies involved in transnational bribery, and circulating such a list to all federal agencies to inform them of the potential risk of dealing with these companies (this latter recommendation is based on an initiative in the area of public procurement). In its oral follow-up report in October 2005, Mexico informed the Working Group that the Ministry of Public Administration publishes a list of companies that have been disqualified from public procurement contracting for breaching the Procurement and Public Works Laws. However, it has not been indicated whether the bribery of foreign public officials is clearly a ground for breaching this statute.

479. Although foreign bribery does not appear to have been detected (or reported) by export agencies in any of the Parties so far examined under Phase 2, at least based on the information provided in the course of their Phase 2 examinations, in theory most of them may deny support where foreign bribery is detected before export credit support has been approved. The main difference between Parties relates to the level of evidence required in order to take such action. Nine reports indicate that the denial of support is possible. In two Parties, a “suspicion” of bribery may trigger a denial (Australia and Italy). In three other Parties, a suspicion would lead to inquiries by the export credit agency (Greece and the United Kingdom) or notification of the law enforcement authorities (Hungary), and once investigations reveal sufficient evidence, support is withheld. “Sufficient evidence” also triggers the denial of support in Korea and Japan. In three Parties, a legal judgement for foreign bribery would also trigger the withholding of support (Greece, Japan and the United Kingdom). In Sweden, a suspicion would lead to inquiries by the agency, and as long as a suspicion remains, such inquiries would continue. Sufficient evidence triggers denial of support. Moreover, the denial of support in Sweden is transaction-specific, such that a client who has engaged in foreign bribery in one transaction is not disentitled to support for other transactions. In Australia, since there is no formal requirement that support must automatically be refused or withdrawn where there has been a conviction of foreign bribery, the Working Group recommended that Australia consider introducing formal rules in this respect.

480. The question of what amounts to “sufficient evidence” is unclear. Only one Party issued internal guidelines to assist the export credit staff in taking decisions (Hungary), pursuant to which the sufficient evidence standard is always met if criminal proceedings have been commenced against the person participating in the transaction. In the case of Greece, when asked what amounts to “suspicions” and “sufficient evidence” of bribery, the export credit officials stated that these concepts are “very fluid” and

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94 The Phase 2 report on Italy does not specify what is meant by a “criminal offence attributable to other third parties”. When the coverage relates to Buyer’s Credit Transactions, both the insured bank and the exporter must provide these declarations.

95 The other reports do not address the question. The Canadian report does not specify the conditions to deny support.
likely require the commencement of a preliminary investigation by law enforcement authorities. The lead examiners for Greece commented that the export credit policy against bribery could be more effective if the export credit agency provided guidelines to staff. Other Phase 2 reports do not give details in this respect (Japan, Korea, and the United Kingdom). Finally, the Swiss report indicates that “failure to comply with legal provisions, in particular the provisions covering the offence of bribing a foreign public official, is an explicit reason for denying or withdrawing a guarantee…”.

481. The Phase 2 reports of several Parties indicate that the withdrawal of support after export credit support is approved is possible. In Australia, support may be withdrawn for a contract where there is a “suspicion” of bribery. Three Parties require “sufficient evidence” that the transaction is tainted by bribery or a conviction of bribery in order to withdraw support and require the reimbursement of the funds (Greece, Japan, and the United Kingdom). In five Parties, only a conviction for bribery may trigger a denial of support (France, Hungary, Italy, Luxembourg, and Mexico). In Sweden, support is withdrawn only where there has been a conviction of the crime in a Swedish court or a foreign court whose legitimacy is recognised by the export credit agency. Hungary specifies that the conviction must be issued by one of its national courts. In France, Hungary and Luxembourg, the client companies undertake to inform the export credit agency, without delay, of any criminal action against them for bribery. In Switzerland, “failure to comply with the legal requirement” triggers the denial of support, and in Norway denial of support applies to companies “found in breach of anti-corruption rules”. These two conditions have not been defined. Similarly, in Germany and Korea “proof” of bribery is necessary.

482. Again, questions were raised as to what amounts to sufficient evidence. In Norway, export credit staff appeared unsure of how and when such sanctions should occur in practice; they admitted a lack of clarity in the export credit rules as to when the contract could be suspended (i.e., whether it could be suspended upon charges being laid, conviction in the court of first instance, or following the expiry of the period for an appeal). As no such case had yet arisen, there were no concrete examples to share. To remedy this lack of clarity, the Ministry of Trade and Industry and the export credit agency were in the process of elaborating guidelines.

483. Moreover, the concept of “proof” is also liable to uncertainty. In the case of Korea, when there is a report of foreign bribery, the export credit agencies do not have the authority to audit client companies. The Working Group recommended that Korea consider ensuring that government and government-funded agencies that provide contracting opportunities to Korean companies, such as export credit agencies, have the authority to audit companies suspected or convicted of bribing foreign public officials to determine whether funds obtained from the agency have been used as part or all of the bribe (cf. Revised Recommendation, paragraph V.B.i). Following the Phase 2 examination, Korea explained that since export credit agencies in Korea lack investigative authority, it is more efficient that the law enforcement bodies conduct prompt investigations of companies suspected or convicted of foreign bribery rather than have the export credit agencies audit them. The Japanese export credit agencies indicated that in practice, even in the presence of a conviction for bribery, they would continue to deal with the convicted company because

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96 Two Parties also indicated that criminal proceedings against a company could trigger the suspension of support (Italy and Luxembourg).

97 In Italy, denial could also be available before a final conviction is pronounced, if sufficient evidence of bribery exists and a civil court invalidates the contract.

98 In France, this obligation is contained in the general conditions governing insurance of market prospection policies, (another form of public support for export credits managed by the Department for External Economic Relations of the Ministry of Economy). In Hungary and Luxembourg, it is part of the anti-corruption declaration required from the company. In France, failure to comply with this provision results in automatic cancellation of the contract.
officially they have no authority to reject insurance under such circumstances. They added that they might request the establishment of an internal compliance programme, but a concrete policy has not been established in this regard.

484. In Greece, the export credit agency has quasi-investigative powers, but in the absence of practice the extent of these powers is unclear. The Greek export credit agency has the authority to audit companies to determine whether funds provided by the agency have been used for a bribe. Yet, it is unclear whether and when the export credit agency would exercise this power. Indeed the agency has never done so, and provides no training to its staff on how to detect such “suspicions” or gather “sufficient evidence”. Nor was it clear whether the Greek export credit agency had instructed its staff to check for ongoing investigations or convictions against a client before and after approving support.

Conclusions

485. There is a clear theme throughout all the Phase 2 reports that address the denial, suspension or termination of export credit support where there are indications of foreign bribery regarding uncertainty about the level of evidence to take such action. Although this uncertainty might be due to the lack of reference to this matter in the Revised Recommendation, it could also stem from the treatment of it in the ECG Action Statement. In particular, Parties might be unclear about what is meant to be covered by “sufficient evidence” in relation to the denial of support, and that foreign bribery is “proved” in relation to cases where support has been approved. Future work by the Working Group could address this uncertainty. In addition, enhancement of the Action Statement is currently under negotiation in the OECD Export Credit Group and these perceived weaknesses could be addressed.

486. Furthermore, the Working Group could systematically raise in the course of its Phase 2 examinations, Parties’ policies on providing official export credit support to individuals and legal persons who have been debarred by the World Bank and other multilateral development banks.
B. AWARENESS AND DETECTION

1. Awareness (Paragraph I of Revised Recommendation)

487. In the area of public awareness, activities and programmes designed to inform the general public and the business sector about corruption have been created and implemented in nearly every Party examined. Across most Parties, it was reported that the awareness of the general public about corruption was high. Generally speaking, it was observed that as this awareness increased, tolerance of corruption decreased. Some reports highlighted the role of the press in raising awareness among the general public, noting that media coverage of cases and allegations of corruption was very thorough. In other cases, the number of articles and dispatches reporting corruption had increased. Civil society organisations can also play a key role in educating and informing the general public on corruption issues. Some Parties benefit from a long-standing tradition of civil society activism and from fruitful co-operation between governmental and non-governmental organisations, both of which seem to contribute to enhance awareness about corruption (Korea).

488. In most Parties, key government agencies, including ministries of justice, trade or foreign affairs had a fairly good awareness of the offence of foreign bribery and the implementing legislation of the Convention. It was found that in the business community, representatives of large companies, both public and private, also had an acceptable awareness of the offence of foreign bribery and the Convention. Overall, large companies have codes of conduct or codes of ethics in place that address corruption. These codes serve the dual purpose of awareness-raising as well as prevention. Such codes usually explicitly or implicitly forbid offering or accepting bribes, although many lack specific reference to foreign bribery, national legislation concerning foreign bribery and the Convention. In Parties where codes already existed previous to the adoption of the Convention and implementing legislation, appropriate changes that take new requirements into account have been made (Norway). Large corporations that operate internationally reported that codes of conduct strive to establish uniform, group-wide standards, rather than norms tailored for each country (Switzerland). Many large companies also reported having compliance programmes that include regular and thorough training, workshops, and e-learning. Efforts to heighten awareness among employees assigned to foreign duty stations have also been undertaken, but still require improvement. Large corporations were also more likely to be active in communicating publicly their positions with respect to bribery, to their employees, to their clients and potential clients, and to the general public, via public declarations of policies of zero tolerance towards bribery.

489. A number of challenges related to public awareness cited in the Phase 2 reports were common to nearly all Parties. Among the most salient of these challenges are low levels of awareness in critical areas, including SMEs; law enforcement authorities; and accounting and auditing professionals. Other problem areas identified in some Parties included inconsistent levels of awareness among agencies indirectly involved in the implementation of the Convention and related legislation; misinformed perceptions about foreign bribery; and insufficient levels of co-ordination of efforts to raise awareness.
a. Awareness in critical areas

i. Small and medium-sized enterprises

490. Unlike the private sector community in large companies, SMEs generally demonstrated a low level of awareness of the offence of foreign bribery and the Convention. In some cases, it was difficult to assess their awareness first hand as they are not always well-represented at on-site visits. SMEs typically comprise an extremely important part of reviewed Parties’ economies and a large proportion of export activity. In many Parties, SMEs are very active internationally. SMEs can be considered a particularly vulnerable business category in terms of potential exposure to foreign bribery, since they often have less experience and fewer resources to become well-informed and updated on the offence of transnational bribery and relevant legislation. A representative of one country’s branch of the International Chamber of Commerce commented that it was particularly difficult for SMEs to be kept informed of international legal instruments like the Convention and to cope with solicitation for bribes in foreign countries.

491. SMEs lag behind large companies in the creation and implementation of codes of conduct and compliance programmes that serve, among other purposes, to educate management and staff on issues of what constitutes an offence and what to do if confronted with a situation involving foreign bribery. A lawyer in attendance at an on-site visit who represents SMEs reported that most of his clients were unaware of the offences and the relevant national legislation. This low level of awareness may be in part attributable to an overall attitude of indifference or belief that foreign bribery is only a concern for large, multinational corporations dealing with large transactions.

492. Despite the overall unfamiliarity of SMEs with the Convention and its transposition into domestic law in the Parties examined, there were notable efforts to raise awareness among SMEs about foreign bribery is some Parties. Informational meetings have been organised and materials specifically covering foreign bribery have been disseminated to SMEs. In France, the Employers’ Federation, the Centre for Foreign Trade, and the Council of Investors in Africa are working together and making inroads to reach senior management of SMEs. In its follow-up report of January 2005, France reported the creation of information material and training programmes designed for SMEs in the context of the 2008 and 2012 Olympic Games, which will involve public tenders where French SMEs are likely to make bids. The Australian Chamber of Commerce and Industry has developed information materials on the foreign bribery offence targeting SMEs active in geographic areas perceived to be corruption-prone including African countries, China and Indonesia. The United States Agency for International Development (USAID) provided training to SMEs operating internationally who are potential suppliers where the agency had observed the absence of a compliance programme. One large Mexican company has actively informed its suppliers and clients, mainly SMEs, about the Convention and its objectives and encouraged them to formulate codes of conduct.

493. Adaptation of awareness-raising activities and instruments commonly found in large companies (e.g. codes of conduct and compliance programmes) to meet the needs and budgets of SMEs and other efforts to increase awareness among SMEs were recommended to several Parties. Since Bulgaria’s Phase 2 examination, the Bulgarian Small and Medium-Sized Trade and Promotion Agency has undertaken measures to advise SMEs of the risks of foreign bribery and disseminated information about the Convention on its website, as reported in its follow-up report in January 2005. Canada reported in March 2005 that outreach to SMEs in the extractive industries with a specific foreign bribery component was being planned. In June 2005, it was reported that a folder was being developed by the Norwegian Ministry of Foreign Affairs and Ministry of Development to better inform SMEs operating abroad about foreign bribery.
ii. Law enforcement authorities

494. The investigation and prosecution of foreign bribery involves complex issues related to legal persons, international evidence gathering, and the analysis of international transactions recorded in books and records, among others. As such, awareness of these issues, generated and maintained through adequate awareness-raising and training activities, targeted to police, prosecutors and other law enforcement officials are important elements to help ensure the effectiveness of investigations and prosecutions of the foreign bribery offence.

495. Levels of awareness among police and prosecutors on bribery generally, and foreign bribery specifically varied across the Parties. Some Parties have made commendable efforts in raising awareness among law enforcement officials. Swiss cantonal directors of justice and police, in conjunction with federal authorities, provide special courses and advanced training that focus on corruption and economic crime, complete with modules dealing with bribery of foreign public officials. The Greek Police Academy added foreign bribery to its training curriculum in 2004, and training for new police officers in Finland and Luxembourg now covers the Convention (as raised in their respective oral follow-up reports). In Germany, training courses for public administration staff, police, prosecutors and judges across Germany and in the Länder now regularly covers foreign bribery.

496. Other awareness-raising measures have been undertaken. However, they may not be entirely adequate and further training may be required. In some Parties, (Italy and Korea) police training covers foreign bribery, but it is not clear whether individual police officials have an adequate level of awareness of the foreign bribery offence. More in-depth and refresher courses may be appropriate. In one Party (Japan), prosecutors were aware of the offence and implementing legislation, but training on bribery methods and investigation techniques had not been provided.

497. In many Parties, awareness-raising activities and training on bribery or corruption for law enforcement authorities failed to address foreign bribery specifically. For example, in Japan, police receive training on financial or “intellectual” crimes in general but no specific training on the foreign bribery offence. At the time of its Phase 2 examination, authorities responsible for training senior police officers in Germany considered that investigation of foreign bribery was similar enough to investigation of domestic bribery that it warranted no special additional training. Since then, Germany has implemented training courses, which address foreign bribery, for police officers and for staff in public administration, judges, and public prosecutors, as reported in its written follow-up report of December 2005.

498. Given the complex nature of the offence of bribing a foreign public official, continuing education and awareness raising specific to the foreign bribery offence throughout the career of law enforcement officials is necessary.

iii. Accounting and auditing professionals

499. It is crucial that accounting and auditing professionals have sufficient awareness of the foreign bribery offence and the rules regarding the reporting of suspicions of foreign bribery. However, training, internal controls and guidelines for certain categories of professionals have been largely inexistent or fail to address corruption or foreign bribery specifically. This has resulted in low awareness among these groups in many Parties. Given the important role of auditing and accounting in preventing and detecting violations of anti-bribery legislation, this lack of awareness may bear serious consequences for the effective implementation of the Convention.

500. In some Parties, professional associations of accountants and auditors do not engage in any activities to inform their members about the Convention, domestic legislation or the foreign bribery
offence. Some Parties report having training programmes, guidelines and ethical codes for these professional groups; however, these instruments fall short of being comprehensive measures to address transnational bribery.

501. Where training programmes do exist, they focus mainly on accounting and auditing rules, often to the exclusion of instruction on the detection of bribery or other economic crimes. Various codes of ethics exist (or are planned) for auditors and accountants, but they generally refer to integrity and objectivity in general terms and do not make specific mention foreign bribery or the Convention.

502. Some Parties have held workshops and developed informational material for accounting professionals on topics ranging from money laundering and corruption, professional ethics and transparency. Information specifically covering the Convention has been disseminated to members of professional accountants’ associations in Mexico; however, no specific training on the transnational bribery offence has been provided.

503. Encouraging progress was reported in the United States where some professional bodies are working towards harmonisation of international accounting standards. There may also be potential for progress in the wake of high media profile corruption scandals, where accounting and auditing professionals, among others, are discovering the lessons learned and will likely tend towards increased scrutiny and stringency in professional standards.

504. Overall, where professionals had some awareness of the anti-bribery provisions of the law, recommendations were made to increase this awareness by introducing more rigorous audit procedures, and by ensuring effective sanctions for non-compliance with reporting obligations. Where serious sanctions are imposed on individual accountants for breach of professional rules, their publication should be standard practice so as to raise awareness within the profession.

505. Where some training and awareness-raising activities for accountants and auditors were already in place, recommendations included expanding activities to include the detection and prevention of bribes specifically. For Parties where no activities or programmes were reported, recommendations were made to consider holding special training sessions focused on economic crimes like bribery, in the framework of professional education and training.

506. It should be noted that progress in this area is scattered. Some positions expressed during Phase 2 examinations illustrate that important challenges still remain. One representative of an institute of certified public auditors (Greece) was of the opinion that awareness-raising efforts among professionals were not worthwhile because it was not clear whether accounting and auditing were effective means of preventing and detecting foreign bribery. Authorities in one Party (Luxembourg) felt that going beyond the introduction of legal provisions to criminalise bribery of foreign public officials and instituting awareness campaigns for professionals would be disproportionate, given the perceived low level of corruption in the country.

b. Awareness among related agencies

507. There are inconsistent levels of awareness among agencies or entities indirectly involved in the implementation of the Convention and related legislation, including tax and customs authorities, official export credit support agencies, official development assistance agencies, public procurement officials and diplomatic missions.

508. Awareness of the Convention and the foreign bribery offence is important among tax authorities and revenue departments, as they can be excellent sources of information on the offence of bribing foreign public officials. Some Parties have held seminars and conferences for tax inspectors covering issues
including the non-tax deductibility of bribe payments. Training courses for tax inspectors that specifically target the bribery of foreign officials are in preparation in one Party (Germany) and specialised manuals on detecting foreign bribery for tax officials and investigators have been developed in Luxembourg, as reported in October 2005, and in Germany, as reported in December 2005. However, in some Parties (e.g. Bulgaria) tax authorities have been provided with no guidelines or training on the identification of bribe payments and did not demonstrate a clear understanding of anti-bribery components of tax law.

509. Given the potential links between bribery of foreign public officials and cross-border trafficking, customs officials should be aware of the foreign bribery offence and the relevant national legislation. This awareness varied across Parties. While customs agencies in some Parties (e.g. Italy) have staff training and codes of conduct that address the offence of foreign bribery specifically, agencies in other Parties (Bulgaria and Japan) provide no such training nor informational material to customs officials and seemed unaware of the potential role of customs agencies in the implementation of the Convention. One exception is France where a report by the customs service led to an investigation under the Convention. In Norway, Customs and Excise officials have an “implicit” obligation to report suspicions of foreign bribery to the law enforcement authorities although this is at the discretion of the Chief of the Customs District. It is noteworthy that Norway’s Customs Service co-operates extensively with the police and prosecution and that reports are made about suspected criminal activity regularly.

510. Official export credit support agencies deal with companies that participate in the international market and as such, could play an important role in raising awareness of the Convention and in discovering foreign bribery cases. The extent to which staff of export credit agencies themselves had been provided with training or other awareness-raising activities about foreign bribery or the Convention is not clear. Where representatives of export credit agencies did demonstrate awareness of the Convention, they expressed uncertainty of how and when national legislation (e.g. sanctions) would apply. They also considered that they had little power to find out whether companies had engaged in corrupt practices, and suggested that additional information and training would be necessary to raise their capacity to detect corruption (Norway).

511. In terms of the work carried out by export credit support agencies, many Parties’ agencies build awareness by systematically informing applicants about the legal provisions on domestic and foreign bribery and requiring them to declare that the contracts were not obtained through actions outlawed in these provisions. Applicants are asked to declare that they have not and will not engage in bribery in the export transactions using a variety of mechanisms, including integrity pacts and declarations (France, Germany, Greece, Hungary, Italy, Korea, Norway and Switzerland).

512. Not unlike export credit support agencies, official development assistance (ODA) agencies are also well-placed to detect foreign bribery related to the use of the funds they provide, particularly since ODA is often delivered in Parties perceived to be especially prone to corruption. In many Parties (France, Greece, Italy, Germany, Norway and Switzerland), anti-bribery clauses are included in contracts funded by development aid, as stipulated in the OECD Development Assistance Committee’s 1996 Recommendation. However, in some Parties (Greece) no additional awareness-raising activities seem to be implemented. Notably, the Norwegian Agency for Development Co-operation (NORAD) in co-ordination with the Ministry of Foreign Affairs works to increase awareness, not only among Norwegian civil servants involved in ODA, but also in partner countries that receive ODA.

513. Diplomatic missions abroad have an important role to play in enhancing the awareness of enterprises that seek advice when considering investment or exporting abroad. They can also be an important source of advice and support to enterprises faced with solicitation of bribes, when tendering for international contracts, for example. In the case of the United States, diplomatic and commercial personnel receive training and clear instructions on the actions to be taken with respect to allegations of violations of
the FCPA, other cases of foreign bribery, and should a company or subsidiary report solicitation for a bribe. Switzerland explains that its diplomatic missions receive instructions on how to proceed in cases where a company or subsidiary reports having been solicited for a bribe. Other Parties organise awareness-raising seminars about the Convention (Greece) and issue regular informational circulars to embassy staff (Canada, Greece and Japan). As reported in their written follow-up report in June 2005, the United States has developed training programmes for commercial and economic officers posted abroad. However, in some Parties no specific training is provided and awareness appeared to be poor.

c. Perceptions about foreign bribery

i. Emphasis on domestic bribery compared to foreign bribery

514. In many Parties, domestic corruption is the focus of both intense media attention and concerted government emphasis. Governments’ efforts to raise awareness around domestic corruption were noted in a number of Phase 2 reports. In these same Parties however, awareness of the foreign bribery offence was often lacking. In short, some governments place far greater emphasis on domestic bribery than foreign bribery. A number of perceptions expressed in reports about the existence of or the potential for foreign bribery may contribute to explaining this trend.

515. In some Parties, there is a perception of being sheltered from the risk of foreign bribery (e.g. Iceland and Luxembourg). One Party’s officials stated that extensive public awareness-raising activities about the Convention have not been undertaken because foreign bribery does not pose a significant threat in their society (Finland). Others may concede a risk, but only at a small scale. It is the view of business representatives that the relative small size and wealth of Hungarian companies limited the scope of foreign bribery as a problem. It may simply be a matter of policy: in Greece, an official described the government’s policy to give domestic bribery greater priority over foreign bribery. At the time of the Phase 2 examination, German authorities considered that domestic bribery and foreign bribery were sufficiently similar such that existing resources and attention dedicated to domestic bribery were sufficient for both and that efforts to raise awareness specifically on the offence of bribing foreign public officials would be unnecessary. Since then, action has been taken to develop and implement foreign bribery-specific awareness-raising activities.

516. In most cases, low priority or the lack of emphasis on foreign bribery in a Party is clearly evident in a lack of adequate training programmes, information campaigns, informative material, and other awareness-raising activities in general.

ii. A passive stance

517. In several Parties, officials reported that there was a lack of knowledge about the offence of bribing a foreign public official due to the fact that no offence had yet occurred in the Party (Bulgaria, Hungary and Iceland). In Iceland, authorities indicated that “as the courts have never had to examine any suspicions or issues concerning bribery of foreign public officials, a comprehensive policy concerning specific measures to combat such offences has not been laid down as yet.” Another official stated that “[the directorate of tax investigations] will increasingly focus on bribery matters in the future, when there is deemed to exist a reason to do so.”

518. In fact, the reverse proposition may be true: the lack of awareness and understanding of the offence may help explain the absence of cases. In Parties where officials lack training on what constitutes the bribery of a foreign public official, guidance on detecting warning signs of the offence, and a clear understanding of the application of the implementing legislation of the Convention, they are less likely to be able to detect and prosecute offences. It would be difficult for investigators to discover a bribery
offence if they do not know about the legal definition of the offence, how bribes can be hidden, or the means to detect bribes.

519. Still other views can detract from a clear awareness of the problem of foreign bribery. In Belgium, several of those interviewed at the on-site visit remarked that Belgian companies were mostly small companies and that many had become subsidiaries of foreign groups. As subsidiaries, some companies wait for the headquarters-based management to initiate and implement action related to anti-corruption policies. In Mexico, while there was focus on the foreign bribery offence, more emphasis was placed on protection against bribery from foreign businesspeople, rather than responding to the risk that nationals themselves might bribe officials of another country. The Mexican authorities point out that this is understandable, given that to date the Mexican economy has been subject to much more ingoing rather than outgoing foreign investment. In any case, Mexico announced, in its October 2005 oral follow-up, its strong commitment to the implementation of the Convention, and in that spirit reported that significant actions have been taken to increase awareness among companies investing abroad, notably through Bancomext and the Mexican diplomatic and international commercial delegations. Moreover, Mexico reports having taken steps to strengthen its prosecutors’ abilities to effectively fight the bribery of foreign public officials, through, for example, the organisation of training courses and measures to increase their awareness.

d. Co-ordination of awareness-raising efforts

520. Awareness-raising efforts in many Parties have benefited from the creation of a single, co-ordinating agency for anti-bribery efforts. The scope of work and the degree to which agencies oversee or manage efforts vary from Party to Party. For example, France’s Central Department for Corruption Prevention, an inter-ministerial body under the supervision of the Minister of Justice, has helped secure the establishment of ethical committees and managers in French companies, a measure that will help increase awareness in the private sector. This Central Department has also concluded partnership agreements with some companies that ensure special training for personnel most heavily exposed to risks of corruption. While it remains to be seen, these enterprises may in turn raise awareness about their efforts to prevent corruption among managers, employees, and customers. A law approved on 16 January 2003 in Italy has established a High Commissioner for the Prevention and Fight against Corruption, whose tasks are to include supervision and monitoring of the work of the public administration, with special emphasis on bribery. However, it is not clear whether the tasks of the High Commissioner will extend to the bribery of foreign public officials.

521. The prevention, detection and prosecution of bribery involve many agencies in various ways. Where no central anti-corruption agency exists, co-ordination of the various institutions dealing with the various aspects of anti-bribery work or specific procedures to ensure co-operation may be lacking. For instance, in Iceland, informal co-operation is satisfactory despite the absence of a central agency. However, the various agencies involved in anti-bribery work have expressed a desire for general guidelines on how to detect foreign bribery and what course of action to take. Similarly, in the United States where many different agencies disseminate information about the national legislation on foreign bribery, the status of the sources of information is not always clear. Those seeking to understand the legislation and its application might be better served if the information were regrouped and consolidated into a single, guidance document. In another example, in Hungary, the fight against corruption has been characterised by the creation of multiple governmental institutions whose jurisdiction is not always apparent and whose lifespan is frequently short. This raises concerns about the follow-up through and implementation of programmes. Partitioned resources and shifting responsibilities among various institutions may hinder awareness-raising efforts and anti-bribery efforts in general.

Conclusions
522. Discussions on the level of awareness of the Convention and the foreign bribery offence in national law of the various players in the anti-foreign bribery system comprises a lengthy part of the on-site visits and the Phase 2 reports. The nature of the information obtained is not necessarily uniform. In addition, the issue of awareness has given rise to a large proportion of the recommendations of the Working Group. For the sake of clarity and an economic use of resources, the Working Group might therefore want to consider establishing a clear minimum standard on what awareness-raising measures should be taken by a Party, and address these at the on-site visit and in the Phase 2 reports in a concise and systematic manner.

2. Detection and Whistleblower Protection (Paragraph I of Revised Recommendation)

523. Effective detection depends on reliable reporting mechanisms that efficiently channel allegations of foreign bribery to the investigative authorities. While possible sources for detection are broad-ranging from competitors, employees, subcontractors or joint venture partners to public officials, diplomatic missions and journalists—because of the concealed nature of the offence, common sources for detection tend to be whistleblowers, public and financial institutions, civil society and the accounting and auditing professions. The detection and reporting role of tax authorities, financial institutions, accountants and auditors are treated under separate headings in this Mid-Term Study. This section looks at the role played by the public administration in general and public officials in particular, as well as the role played by whistleblowers in the private sector and by civil society including the media. In addition, this section looks at barriers to reporting and the mechanisms Parties may have employed to facilitate reporting such as alternative channels and whistleblower or witness protection.

a. Detection in the public administration

524. The public administration plays a key role in detecting and reporting foreign bribery. However, in many Parties, specialised agencies with supervisory and investigatory functions tend to focus on crimes within their sphere of competence rather than on corruption as a related offence. As a result, a concern was raised in several Phase 2 reports that the bribery component of a large number of business-related offences risked being overlooked because of administrative deficiencies, lack of specialised knowledge or resources. To remedy such a deficiency, a recommendation was made to a number of Parties to remind public officials of their obligation to report foreign bribery, as a means to improve detection capabilities (Australia, Belgium, France, Iceland, Italy, Luxembourg and the Slovak Republic).

525. Because foreign bribery can be detected across a broad range of activities, inter-agency communication is important. Indeed, effective detection schemes would appear to include systems or procedures that facilitate inter-agency communication and information sharing. In the United States, for example, FCPA investigations often develop during the course of criminal investigations originating from other matters such as anti-trust or government procurement. The United States Department of Justice (DOJ), the agency responsible for the criminal enforcement of the FCPA, and the Securities and Exchange Commission (SEC), which enforces the recordkeeping and accounting provisions of the FCPA, co-ordinate and share information on a regular basis where possible. Further, in its Attorney’s Manual, the DOJ states that any information relating to a possible violation of the anti-bribery or recordkeeping provisions of the FCPA should be brought immediately to the attention of the Fraud Section of the DOJ. By contrast, the absence of inter-agency procedures to facilitate the detection of bribery constituted a major handicap in detection. It is noteworthy that in one Party (Luxembourg), professional secrecy was a bar to exchanging

99 In addition to having contact with companies doing business abroad, some government agencies provide goods and services to foreign governments and are thus vulnerable to solicitation of bribes in certain situations.
data between different government departments and the absence of foreign bribery cases in that jurisdiction was largely attributed to this. The Ombudsman has recommended that the government draft a bill to amend the general tax law in order to specify which offences otherwise covered by confidentiality provisions could be disclosed to the judicial authorities.

526. In Australia, given that the Australian Federal Police (AFP) generally relies on formal referrals before initiating investigations, inter-agency communication is vital. The AFP has issued a document advising other Commonwealth agencies to refer matters to the AFP in accordance with the procedures under the Commonwealth Fraud Control Guidelines, which state that such agencies must refer all instances of “potential serious or complex fraud offences” to the AFP, unless such agency has the capacity to investigate such an offence (or if the matter involves multi-jurisdictional organised crime being considered by the Australian Crime Commission). In response to concerns of the examination team that the Fraud Control Guidelines did not specifically refer to foreign bribery, and that the Australian Securities Investments Commission (ASIC), which has investigatory powers, might decide to investigate foreign bribery cases without referring them to the AFP, the Australian government undertook to amend the Fraud Control Guidelines accordingly and the ASIC undertook to ensure that all foreign bribery cases are referred to the AFP.

527. Centralising the exchange of information and ensuring regular inter-agency communication have been achieved by some Parties through the creation of anti-corruption bodies that perform an oversight and co-ordinating role. In Italy, the High Commissioner for the Prevention and Fight against Corruption does not have investigative powers; but he/she has the authority to refer cases to the judiciary or the State Audit Court. In 2002, Bulgaria established a Commission for Co-ordination of Activities in the Fight against Corruption which is chaired by the Minister of Justice. As part of its responsibility to enforce Bulgaria’s National Anti-Corruption Strategy, the Commission oversees the exchange of information between the domestic authorities. The advent of the Unified Information System, giving all enforcement agencies appropriate levels of access, will also enhance co-operation and information-sharing. In Australia, in order to ensure effective co-operation and co-ordination between the AFP and other Commonwealth departments and agencies with a law enforcement or regulatory function, the AFP has entered into Memoranda of Understanding (MOU) with certain agencies (e.g. Australian Customs Service, Australian Taxation Office, and the Australian Transaction Reports and Analysis Centre). However, the AFP had not entered into MOUs with two agencies with an important potential for detecting foreign bribery—the Australian Prudential Regulatory Authority, and the Australian Crime Commission. The Working Group thus recommended that the AFP enter into a formalised agreement with them concerning areas of overlapping jurisdiction. A similar recommendation was made concerning Australian state and territorial bodies with which the AFP has overlapping jurisdiction with respect to the foreign bribery offence.

528. While systemic factors contributed to the potential number of bribery cases detected by public administrations and reported to the law enforcement authorities, the majority of Parties have opted for an ad hoc approach. One Recommendation made to Iceland which has no formal co-ordinating body was to issue general guidelines on how to detect foreign bribery and what course of action to follow such as establishing internal procedures for receiving reports as well as rules, regulations or standards for determining which reports should be passed to the police or prosecutors for investigation. As an alternative to formal guidelines, the Lead Examiners commented that the United States could enhance the efficiency of inter-agency co-operation by introducing clear processes. A Recommendation made to Finland was to clarify internally the responsibilities of state authorities for the implementation of the Convention which could be accomplished by creating a central authority for, inter alia, gathering and sharing information. The Working Group recommended that Belgium establish co-ordination among the different judicial and police bodies, and enter into MOUs with public agencies to improve the detection of foreign bribery. It is noteworthy that apart from co-ordination on a horizontal level, few Parties appeared to have structures in place to facilitate information sharing across the federal, state and municipal levels of
government and to ensure that local authorities act in accordance with national objectives in the fight against corruption.

529. Concerning Australia, to enhance cooperation between the state and territorial agencies and the Australian Federal Police, the Working Group recommended measures, such as Memoranda of Understanding, to provide guidance for the referral of the Commonwealth foreign bribery offence by state and territorial agencies to the Australian Federal Police, regardless if the relevant state or territorial law provides a bribery offence broad enough to cover foreign bribery. In Mexico, to enhance State involvement in eradicating foreign bribery, the Ministry of Public Administration conducts weekly presentation on the Convention to high-level State officials, and is designing an integral anti-corruption platform involving the states.

b. Reporting by public officials

530. Almost half of the Parties covered in this Study expressly require their public officials to report suspected foreign bribery directly to the law enforcement authorities (Belgium, Bulgaria, France, Greece, Hungary, Italy, Korea100, Luxembourg, Mexico and the Slovak Republic). Of the remaining Parties, five had not established clear, mandatory reporting obligations for foreign bribery and recommendations were made to introduce or clarify such a reporting obligation. In Japan, for instance, where civil servants have a general obligation to file an “accusation” of suspected crimes to the judicial police or prosecutor but where Local and National Public Service Laws impose secrecy provisions, clearly establishing such a reporting obligation as a matter of course was recommended to improve reporting of the offence.

531. In Norway and Iceland, civil servants have a non-statutory duty to report suspicions of a crime to the law enforcement authorities. Although, except for certain categories of public officials, such as tax officials, Swedish law does not impose on public officials a duty to report suspicions of crime, the public officials who participated in the on-site visit believed that they had a duty to do so. In practice however, only officials from the tax administration and the Swedish International Development Co-operation Agency knew of such reports emanating from their agencies. In Australia, since the only relevant obligation is provided by the Public Service Code (i.e. to conduct one’s duties with integrity), the Working Group recommended that public officials be reminded of their duty to report credible evidence of foreign bribery offences.

532. At the time of the Phase 2 examination of Canada, Canadian public servants were required to report suspicions of a crime to their superiors in the first instance, and externally to the law enforcement authorities in the second instance if, for example, all internal procedures had been exhausted. Canada indicated in its oral follow-up report that, as of March 2005, a bill permitting federal public servants to disclose wrongdoing directly to law enforcement authorities without retaliation was before the Canadian House of Commons (i.e. in committee hearings). In Germany where external reporting may be sanctioned for breach of official secrecy and where employees may be reluctant to report bribery in cases where a superior in the reporting chain may be connected with the offence, some German state firms, Länder and municipalities have established an Ombudsman’s office which has resulted in a substantial increase in the number of reported cases. Independent of management, the Ombudsman is empowered to keep reports confidential, conduct limited investigations and make recommendations which, under certain circumstances, must be implemented by management. Since the Phase 2 examination of Germany, the German government began the process of reviewing legislation with a view to allowing federal civil

100 In Korea, pursuant to article 26 of the Anti-Corruption Act, a public official is obligated to report without delay an “act of corruption” perpetrated by another public official.
servants to report substantiated suspicions of corruption directly to law enforcement authorities without retaliation. Similar amendments are under consideration at the Land level.

533. Even where the law imposes a clear reporting obligation on public agents, however, it was apparent from the Phase 2 reports that few if any civil servants complied. This weak link in the reporting chain appears to be largely attributable to inadequate whistleblower protection for public officials. Indeed, comprehensive whistleblower protection was provided only by the Slovak Republic, although awareness of this protection seemed low among Slovakian civil servants. Three Parties provided partial protection under certain circumstances (i.e. 1. for public officials in civil proceedings in the United States; 2. in administrative proceedings where the briber is a public official in Mexico; and 3. for Commonwealth civil servants in Australia who report to the Australian Public Service breaches by other civil servants of the Commonwealth Public Service Code). In this regard, Recommendations were made to 11 Parties to remedy such a situation by introducing adequate protection (Australia, Belgium, Bulgaria, Canada, France, Greece, Hungary, Italy, Luxembourg, Mexico and Norway). Further, Recommendations were made to two Parties (Germany and Mexico) to facilitate reporting by establishing an Ombudsman, hotline or special anti-corruption unit, for example. Concerning the latter approach, the German Ministry of Defence has created a unit (ES) with preventive and investigative powers which has had positive results. The legal obligation to report corruption to the ES and/or an official’s superior and the direct reporting link between the ES and the executive group of the Ministry appears to have reduced corruption, suggesting that a more generalised introduction of anti-corruption units could alleviate concerns about violating official secrecy.

534. The absence of reports by civil servants is also due to the lack of targeted initiatives that remind civil servants of their obligation to report the foreign bribery offence and the disciplinary measures that result from non-compliance. Indeed, only three Parties (Hungary, Mexico and the Slovak Republic) imposed disciplinary sanctions for failing to comply with a reporting obligation, but these were either not applied or too low to be dissuasive. In this respect, recommendations were made to seven of the Parties to either introduce sanctions for failing to report and/or issue reminders about an official’s duty to comply (Belgium, France, Hungary, Italy, Luxembourg, Mexico and the Slovak Republic).

535. In its oral follow-up report of January 2005, France informed the Working Group that a draft Civil Service Code, which would include provisions reminding public officials of their duty to report foreign bribery cases to the prosecuting authorities, was under preparation. Norway similarly announced plans to issue ethical guidelines by the end of 2005. In Australia, the Working Group recommended raising the awareness of officials who come into contact with companies operating abroad of their duty under the Commonwealth Public Service Code to report credible evidence of foreign bribery and facilitate such reporting.

536. Reporting is moreover affected by the capacity of an agency to process reports, determine which matters should be handled by the investigating authorities and under what rules or standards. In this connection, few Parties had established a formal system for receiving allegations and passing them on to the law enforcement authorities. As a result, the risk that reports are lost or “filtered” before reaching the police or prosecutor is correspondingly greater. Further, few Parties appeared to have issued guidelines or standards for determining which reports should be sent to the law enforcement authorities. In one Party (France), broad discretionary powers are given to public officials to determine whether a matter warrants the attention of the Public Prosecutor.

537. Concerning Australia, the Working Group recommended clarification that all cases of foreign bribery are to be referred to the Australian Federal Police by Commonwealth agencies, due to some ambiguities in the Commonwealth Fraud Control Guidelines about what constitutes “fraud against the Commonwealth” and “is serious or complex and should be referred to the AFP”. The Australian authorities undertook to make such a clarification. In Korea, plans were underway at the time of the Phase 2
examination to amend the Anti-Corruption Act in order to expand its scope to include corruption in the private sector. In addition, in Japan, the lead examiners were concerned that since the Ministry of Economy, Trade and Industry (METI) is the main agency responsible for implementing the Convention (for instance it publishes Guidelines on the interpretation of the foreign bribery offence), it could conceivably receive reports of foreign bribery. The Working Group therefore recommended the establishment of a formal system to enable METI to process allegations of foreign bribery effectively and pass them on to the law enforcement authorities.

c. The role of police in detecting foreign bribery

538. The role of the police in detecting foreign bribery depends on its ability to initiate inquiries and whether it takes a pro-active or reactive approach to law enforcement. One comment made to Mexico by the Working Group, for example, where the investigative authorities generally launch an inquiry once a formal complaint or report is made, was to develop the capacity of the judicial police to detect foreign bribery through intelligence gathering (e.g. investigations of fraud in public tendering or accounting that reveal indicia of corruption), statistical tools and case analysis for a more pro-active approach to law enforcement. In its oral follow-up report of October 2005, Mexico pointed out that its Financial Intelligence Unit (FIU) has an intelligence gathering role with respect to money laundering and terrorist financing, and that the FIU pro-actively sends intelligence reports to law enforcement authorities. Norway, for example, has developed a government-run database which is regularly consulted by police and other investigative authorities. Welcomed by Økokrim, Norway’s specialised police and prosecutorial authority for economic crime, for its potential use as a pro-active detection tool, the Register of Business Enterprises contains detailed financial, operational and historical information required of all Norwegian-based businesses. Subscribers such as the police can monitor companies through an alert system which could indicate suspicious activity such as the frequent turnover in a company’s external auditors. The resourcefulness of the investigative police is also enhanced with training about “red flags” or indicators of foreign bribery and investigative techniques. Finally, the quality of a police inquiry, which determines whether a case is sufficiently grounded for action by the prosecutor, depends heavily on the legal means available to the investigators to compile evidence (e.g. coercive means in a preliminary inquiry).

539. With respect to Australia, following the on-site visit, the examination team was concerned about whether the Australian Federal Police (AFP) was sufficiently pro-active in detecting foreign bribery. In particular, the examination team felt that credible media sources, as well as foreign requests for mutual legal assistance and public available court documents in foreign jurisdictions could be useful sources of information for triggering investigations into foreign bribery. In response to Working Group recommendations in Phase 2 that Bulgaria and Luxembourg more pro-actively pursue foreign bribery cases, both Parties have taken measures to permit the use of undercover agents.

d. Role of foreign diplomatic missions in detecting foreign bribery

540. Given that foreign diplomatic missions come into regular contact with companies from their countries engaged in business transactions with the host country, they are well-placed to learn about foreign bribery transactions that have already occurred as well as potential foreign bribery transactions involving companies from their countries. For this reason, the Working Group examination teams have frequently explored the role of embassies in detecting foreign bribery transactions. In this regard, certain reports are notable. Two Phase 2 reports (Canada and Korea) also recognise that the steps to be taken by foreign representations, including embassy personnel, where credible allegations arise that a company from a Party has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities, is “a general issue for many Parties”.
541. In the Slovak Republic, foreign diplomatic personnel are required to report all crimes involving foreign bribery to the law enforcement authorities in the Slovak Republic as well as to the Ministry of Foreign Affairs, Ministry of Interior and the Slovak prosecutor’s office. Moreover, they are required to verify the alleged offence with the local authorities. In addition, the Slovak Government has taken steps to ensure that foreign diplomatic missions and foreign trade missions are aware of their reporting obligations. With respect to Sweden, the Swedish Ministry of Foreign Affairs issued a Plan of Action in 2005 including guidelines encouraging diplomatic staff to report suspicions of offences committed abroad directly to the National Anti-Corruption Unit. The Working Group recommended that Sweden reinforce this action by encouraging diplomatic staff to report foreign bribery allegations to the competent authorities in Sweden. In addition, the Working Group recommended that Greece issue guidance to its foreign representations and embassy personnel concerning steps to take in connection with bona fide allegations involving Greek nationals, including reporting such allegations to the competent authorities.

542. In their follow-up reports, Canada, Norway and the United States provided information about measures taken since their Phase 2 examinations to enhance reporting by foreign diplomatic personnel. Canada’s Trade Commissioner Service has issued instructions to embassy personnel to report credible allegations of foreign bribery by a Canadian company abroad to the competent authorities in Canada. The Ministry of Justice in Norway has issued a note to all diplomatic missions and has organised meetings with a number of embassies to discuss how to handle situations involving corruption. Training on the FCPA has been provided to United States diplomatic missions.

e. Reporting by the public

543. In all of the Phase 2 reports discussed in this Study, reporting by the general public, civil society and the media constituted primary sources for detecting foreign bribery. However, the actual number of reports made by the general public could not be quantified because most Parties did not collect and process such data with the notable exceptions of Korea and Canada. In addition, the United States indicated in its follow-up written report of March 2005 that the Securities and Exchange Commission (SEC) maintains a database of all FCPA investigations, which includes information about the origin of the investigations. In addition, the United States Department of Justice is developing a pilot non-public internal database to track allegations of foreign bribery. In Bulgaria, Greece, Mexico and the Slovak Republic, all citizens are bound by law to report suspicions of a crime directly to the law enforcement authorities. Despite such a legal obligation, reports of foreign bribery by citizens are noticeably absent. This has been attributed to several factors, namely, the general lack of awareness about the duty to report, conflicts of loyalty and the absence of whistleblower protection. Likewise, Hungary, Italy, Japan and Korea have enacted laws permitting the public to provide information about suspected violations directly to the police or prosecutors but the level of reporting appeared also to be very low. Italy has, however, taken an interesting approach to encourage reporting by companies: those companies that proactively investigate and report suspicions of foreign bribery by their employees may receive reduced punishment for offences.

544. Some Parties provide formal channels for their citizens to report foreign bribery offences. The United States, for example, facilitates reporting by making bribery hotlines publicly available and user friendly at the Department of Justice (DOJ) and the SEC Complaint Centre. Each United States federal agency’s Inspector General also maintains confidential hotlines for reporting suspected fraud. Alternatively, reports can be made by telephone, facsimile or mail. Korea provides the public with an accessible and relatively secure means to report suspicions of corruption involving persons employed by

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101 Canada reported in its oral follow-up report in March 2005 that for the fiscal year 2003-4, the Public Service Integrity Officer received 67 disclosures, while internal departmental and agency disclosure mechanisms received 90 disclosures.
the government or public enterprises, including foreign bribery committed by such persons, to the Korea
Independent Commission against Corruption (KICAC). KICAC is obliged to refer cases reported to it to
an investigative authority if there is sufficient evidence to warrant an investigation. Mexico has introduced
a simplified administrative reporting system to facilitate reporting by its citizens via Internet and hotlines
(Sactel), but at the time of publication of its Phase 2 Report, this administrative tool was only available for
alleged offences committed by federal public officials. However, the Mexican authorities point out that
when allegations are received concerning non-federal Mexican public officials, they are made available to
the relevant authorities. Germany indicated in its written follow-up report that several Länder have
established portals (i.e. via telephone or Internet) for receiving anonymous reports of corruption
allegations, and that a federal/Land administration project group is studying whether such a system should
be introduced throughout Germany.

545. In addition to allegations from citizens, companies and competitors, civil society is an important
source of bribery allegations. Nongovernmental organisations (NGOs) in the United Kingdom for
example, have played an active watchdog role by closely monitoring bribe paying by companies and
reporting allegations which often come from the media or trade unions. NGOs [such as Grupo Oaxaca in
Mexico] have also spearheaded efforts to enact freedom of information laws, and have made use of such
laws to detect misappropriation in the areas of public procurement and privatisation. In Hungary, the
“glass pocket programme”, adopted in 2003, has sought to make the use of public funds more transparent
by, *inter alia*, balancing the need for secrecy with access to public documents. In Bulgaria, the 2000
Access to Information Act was hailed as the most significant initiative governing the relationship between
the government and its citizens. Despite these promising initiatives to enhance detection by civil society,
however, NGOs had not mobilised around the issue of foreign bribery at the time of Bulgaria’s Phase 2
Report and a high level of discretion in responding to requests for information was cited as an impediment
to uncovering corrupt practices in Bulgaria.

546. Investigative journalism also plays an important role in exposing bribery in the United Kingdom
and is considered to be a credible source for investigations in a number of other Parties provided that
allegations are well-founded. Nevertheless, it appeared that few investigations had been triggered on the
basis of a media report alone. In view of the essential role the media plays in exposing foreign bribery, it is
of particular relevance to note that two major obstacles that hampered reporting by the media in four of the
Parties covered in this Study were defamation suits and/or the absence of laws protecting journalists’
sources (France, Hungary, Luxembourg, and the United States). However, since its Phase 2 examination,
Luxembourg passed a law protecting journalists’ sources in June 2004.

547. Several factors, including cultural ones contributed to an overall reluctance in the public and
private sectors to “blow the whistle” in most Parties. In France, Italy and Switzerland, citizens and
employees infrequently engage in whistleblowing. In Japan, employees are reluctant to report corporate
misconduct despite the recent promulgation of a whistleblower protection law. Some Parties have
sought to overcome cultural impediments by introducing alternative reporting mechanisms such as the

102 Pursuant to Korea’s Anti-Corruption Act, Korean citizens may present a petition signed by 300 or more
citizens requesting the Board of Audit and Inspection to audit and inspect a public institution that may have
been involved in the bribery of foreign public officials. From January 2002-February 2004, 82 corruption-
related cases were reported to the Board.

103 At the date of the Phase 2 Report, Japan’s Whistleblower Protection Law of 18 June 2004 was not yet in
force. Also, the law as drafted does not cover offences under Japan’s anti-bribery law but METI
representatives that met with the examining team said that the scope of the new Law would be extended to
cover the UCPL by way of government ordinance within one year.
“right to raise the alarm” in France, or simplified reporting procedures in Mexico, but this had not led to any noticeable changes in reporting levels at the time of the publication of their respective Phase 2 reports.

548. Importantly, the absence of whistleblower protection laws was cited by a number of civil society organisations and trade unions as the single most important disincentive to disclosure by the public. Fear of retaliation in the workplace, dismissal and prosecution for defamatory denunciation were the foremost concerns of the public, along with the general lack of witness protection. While both whistleblower and witness protection are discussed in more detail below, it is interesting to note that Parties with higher frequencies of reporting by the public at large do not appear to afford greater protection, suggesting that other factors such as awareness raising, the availability of alternative, anonymous reporting channels coupled with a pro-transparency “culture” may also be responsible.

549. Another issue raised in several reports in respect of enhancing detection in particular, is the collection of data on the number, sources, characteristics and handling of foreign bribery allegations. Statistical analysis improves detection by identifying vulnerable sectors or regions, patterns and responses so that resources are optimised for maximum results. However, a number of Parties (e.g. Italy, Japan, Luxembourg, Norway, the Slovak Republic, the United Kingdom and the United States) were unable to provide data for purposes of assessing and enhancing the effectiveness of existing detection mechanisms, and specific recommendations were made to four Parties (Bulgaria, France, the Slovak Republic and the United States) to maintain statistics with a view to improving detection. Nevertheless, a few initiatives are noteworthy. Mexico, for example, has improved detection through data analysis under its simplified administrative reporting system. Although the expedited filing procedure via the Internet or hotlines was only available for reporting alleged offences by Mexican public officials at the time of publication of the Phase 2 Report, it has been used by the Mexican authorities to identify, rotate, remove or disqualify public servants that have acted improperly. In Bulgaria, the compilation of police and judicial statistics is to be implemented under its Anti-Corruption Action Plan.

f. Whistleblower protection

550. Reporting suspicions of foreign bribery by whistleblowers in public or private entities requires adequate safeguards to be truly effective in practice. However, comprehensive whistleblower protection is notably absent in the Parties in this Study, with the exception of the Slovak Republic, although the Working Group recommended that whistleblower protections be made more widely known among companies and the general public in the Slovak Republic. In Sweden, it was the view of union representatives who participated in the on-site visit that general labour law and collective agreements appear to provide adequate protections. Concerning Australia, the Commonwealth Public Service Code provides protection only if a report is made to the Australian Public Service. In addition, although the Australian Corporations Act provides some protections to private sector employees, it does not assure anonymity, nor does it protect persons who report allegations directly to the law enforcement authorities. Thus the Working Group recommended that Australia review its whistleblower provisions for Commonwealth public servants and consider introducing stronger protections for private sector employees. In Belgium, companies that participated in the on-site visit explained that large companies had been prompted to implement internal whistle-blowing procedures, due to the United States Sarbanes-Oxley Act.

551. The United States affords protection to employees of issuers (generally, publicly traded companies) under the Sarbanes-Oxley Act (SOX) (see: 18 USC 1514A or section 806 of SOX) and civil protection to public employees who report suspected violations in good faith under the Whistleblower

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104 In Mexico, criminal proceedings may be launched on the basis of an administrative investigation, by submitting a report to the General Attorney’s Office.
Protection Act and Inspector General Act of 1978. Some State legislatures have enacted similar laws. Mexico too, provides whistleblower protection to its civil servants under the Federal Law on Public Officials’ Administrative Responsibilities, but in the case of active foreign bribery, protection is available only for administrative proceedings and only where the briber is a public official. Mexico announced in its follow-up oral report in October 2005 that a bill to provide general whistleblower protections was before the Mexican Congress. Moreover, since their Phase 2 examinations, Germany and Norway began work on statutory whistleblower protections. In the remaining Parties, five (Australia, Canada, Germany, Hungary, and Sweden) rely on a system of labour law provisions.

552. Recent whistleblower initiatives of two Parties show an encouraging trend even though they are not directly related to anti-bribery measures. Japan promulgated a Whistleblower Protection Law in 2004 which protects public and private employees from dismissal or disadvantageous treatment if they make a report internally or to the relevant regulatory authority. However, at the time of the publication of its Phase 2 Report, the Act did not cover the foreign bribery offence under the UCPL. Since then Japan has informed the Working Group that the new law, which will be in force on 1 April 2006, covers the whistleblowing of offences under the UCPL. Korea has a comprehensive whistleblower law but at the time of publication of its Phase 2 Report, the protection was limited to persons reporting to KICAC. Since then, the Korean authorities informed the Working Group that on 21 July 2005, the Anti-Corruption Act was amended to provide greater protections to a whistleblower who reports corruption to his/her organisation or its supervisory authorities, not just to those who report to KICAC.105

553. Outside a statutory framework, some joint government/business initiatives exist to encourage whistleblowers under the guarantee of confidentiality. In Mexico, for example, the General Directorate for Citizen Attention of the Ministry of Public Administration, which oversees Mexican public officials, has entered into an agreement with transport carriers to guarantee confidentiality to complainants who report economic crimes via the Internet. The Mexican authorities also point out that steps have been taken by the Mexican Government to promote the making of confidential reports by individuals and various bodies, through, for instance “focus groups” organised to have direct contact with potential whistleblowers. Notwithstanding a handful of government/private initiatives and absent whistleblower protection under the law, employees must generally look for protection under the umbrella of an employer or trade union. As for the latter, there was no indication that collective bargaining agreements were a common source of whistleblower protection. Likewise, the Phase 2 reports reveal that companies generally do not offer whistleblower protection to their employees. For example, under Belgian law, employees have a duty to refrain from disclosing confidential company information for the duration of their contract of employment.

554. Companies that do offer whistleblower protection often make it conditional upon internal disclosure but not to the law enforcement authorities or to the media, creating a risk of dysfunction in the reporting chain through “filtering” or inaction. The United Kingdom has provided an alternative, two-step approach under its Public Interest Disclosure Act which provides incentives to the employer and the employee to expose the matter internally and subsequently covers external disclosure by employees in certain, albeit exceptional circumstances. External disclosures to a prescribed regulatory body, which includes bodies with law enforcement responsibilities, or the media as a last resort, are also protected in exceptional circumstances (e.g. a showing of a high probability of victimisation). Notwithstanding certain national initiatives to encourage whistleblower protection in the private sector, in view of the limited safeguards generally available, employees are faced with conflicting interests and divided loyalties. Not surprisingly, poor reporting levels reflect the generalised absence of protection in the private sector.

105 In general, whistleblower protection under the Anti-Corruption Act is provided in relation to the reporting of corruption offences committed by a public official, as well as corruption offences committed by a private individual when such acts cause financial damage to a public organisation.
Indeed, in the majority of the Parties in this Study (Australia, Belgium, Bulgaria, France, Hungary, Italy, Japan, Korea, Luxembourg, Mexico, Norway, Switzerland and the United Kingdom), specific recommendations were made to Parties to introduce or reinforce existing measures to ensure effective protection of whistleblowers as a means to encourage reporting without fear of retaliatory action.

g. Witness protection

555. Against this backdrop of limited whistleblower protection under the law or by contract, the need for witness protection is compelling. Indeed, in the absence of whistleblower protection, witness protection becomes especially important and vice versa. However, only two Parties (Australia and the Slovak Republic) in this Study afforded comprehensive protection to witnesses in court-related proceedings, including a change of identity, relocation and physical protection. In Australia and the Slovak Republic\textsuperscript{106}, protections are also available for persons related to the witness who are also at risk. In Sweden, wide protections are available, but the prosecution is required to disclose the identity of the witnesses to the accused prior to trial. Nonetheless, some Parties provide partial protection. Italy protects co-operating witnesses in exchange for their testimony. And, in one high-profile case, the identity of a witness was withheld from the defendant. France has recently introduced the concept of “protected witness” whose identity is only known to the police and magistrates. Also, the Treasury Board of Canada’s “Policy on the Internal Disclosure of Information concerning Wrongdoing in the Workplace” states that employees and managers who retaliate against an employee who has been called as a witness may be subject to administrative and disciplinary measures including dismissal.

556. Further information about witness protection was provided by Luxembourg and Norway in their oral follow-up reports. Luxembourg explained that in November 2004, due to pressure from civil society, the government withdrew draft legislation for protecting the anonymity of witnesses and other witness protections. In Norway, although witness protections are not provided for foreign bribery cases under the Code of Criminal Procedure, certain protections are available under the Police Act when a witness is threatened physically.

557. Encouraging initiatives were announced in Bulgaria, Finland and Mexico at the time of publication of their Phase 2 reports. In Bulgaria, the support of the Prosecutor General for the creation of a Regional Agreement on Witness Protection along the lines of European Union legislation, existing conventions and best practices would permit witness protection (e.g. new identity, residence in a partner country) on a regional and international basis. For a small country like Bulgaria where the assurance of anonymity is compromised by its size, regional co-operation provides opportunities for more effective protection. Finland affords some protection under the law but like Bulgaria, its small size was considered to be a limiting factor by its authorities. Accordingly, a project was pending before Finland’s Ministry of Justice to develop limited witness protection such as videotaping testimony. Lastly, under its proposed judicial reform programme, Mexico has envisaged protection when the life of a witness is at risk and his/her testimony is fundamental at trial. The oral follow-up report of Mexico in October 2005 indicated that an initiative before Congress to reform the Public Safety and Criminal Justice System included witness protections for all crimes that had previously only been available for witnesses in organised crime cases.

\textsuperscript{106} Section 1 of the Act on Witness Protection provides that protection and assistance is available for the witness and his or her immediate relatives, and article 116 of the Civil Code defines who constitutes an immediate relative.
III. CONCLUSIONS

558. Part II of this Mid-Term Study concludes that there are several areas in which the Working Group might consider undertaking further review and analysis, in particular as practice in enforcing the Convention evolves. The overall objective of such work could be as follows:

- Further clarify the relevant areas through additional analysis where appropriate.
- Determine how the issues can be systematically and effectively canvassed in future Phase 2 examinations.
- Monitor how future Phase 2 reports address the identified issues, as well as how Parties already subject to relevant recommendations in their Phase 2 reports address them through the follow-up reporting mechanisms.
- Consider whether any of the cross-cutting issues disclosed by this Mid-Term Study relate to unclear or misleading provisions in any of the OECD anti-foreign bribery instruments, or the need to include new provisions in any of these instruments. The Working Group could also propose, in consultation with other OECD bodies, where relevant, how to amend such instruments where deemed appropriate.

559. The conclusions in Part II of this Mid-Term Study are reproduced as follows:

1. Offence of Bribing a Foreign Public Official (Article 1 of Convention)
   a. Various approaches to implementing the offence

560. The Phase 2 reports have not addressed the issue of choice of statute to any degree, except with regards to Japan. The variety of statutes chosen by Parties to implement Article 1 of the Convention demonstrates the robust application of the principle of “functional equivalence”. This is clearly a sign that the Parties have been able to adapt Article 1 to the particularities of different legal systems. Nevertheless, with respect to Japan, the Working Group intends to follow up on whether placement of the offence in an unfair competition statute might affect enforcement. In addition, another issue that the Working Group might decide to study is whether in different national systems, certain criminal statutes take enforcement priority over others, and how this might affect enforcement of the foreign bribery offence. In the absence of a comparative analysis of this issue, it might seem that placement of the foreign bribery offence in a Party’s penal code, where this avenue exists, especially where the domestic bribery offence is contained therein, could maximise the likelihood of enforcement actions.

561. Since most Parties are able to choose between implementing Article 1 in a penal code or in a different statute, either one specifically aimed at foreign bribery or one that also covers other matters, such as a “statute prohibiting the bribery of agents generally” (as foreseen by Commentary 3 on the Convention), the Working Group might decide that an analysis of this issue would be useful. The Working Group might consider raising this issue as a matter of routine in future Phase 2 examinations, in particular where Parties have established the offence in legislation other than their penal code.
562. The Phase 2 examinations have not so far considered the advantages and disadvantages of either establishing a stand-alone foreign bribery offence or extending the domestic bribery offence to also cover the bribery of a foreign public official. The Phase 2 Report on Italy remarks that the relevant provision is “somewhat complicated because of its chain of cross-references to various domestic (active and passive) bribery offences in the Criminal Code”, but does not look further at whether the complicated nature of the offence could be an obstacle to effective enforcement in Italy. In the absence of a comparative analysis, it might seem that a separate offence of foreign bribery would give more prominence to the offence than by incorporating it into the same provisions as the domestic bribery offence. However, it is not known whether the advantages of increasing its visibility would be outweighed by other possible factors. Since so far it appears that either technique provides the same opportunity to rely on case law from the domestic bribery offence, it may be useful to look at whether either technique results in more enforcement actions.

b. Amendments to the offence made in response to Working Group Recommendations

563. The amendments so far observed in the Phase 2 process are largely intended to clarify the scope of Parties’ foreign bribery offences. This is part of a positive trend globally to ensure that penal sanctions are only applied for acts clearly prohibited in the law. Clarity in the foreign bribery offence also helps to dispel confusion about what acts are prohibited. In order to ensure that such amendments are effective in practice, the Working Group should ensure that a systematic review of amendments to the foreign bribery offence be included in each Phase 2 examination, in particular where there has not been a Phase Ibis examination of the amendments, or where there has been a Phase Ibis review but it was not sufficiently comprehensive. This review could address the level of awareness of the enforcement authorities and the private sector of any amendment. In addition, the Working Group might consider routinely addressing the interpretation of amendments, in particular the repeal of exceptions and defences and the possibility that they might still be applied in practice, in its meetings at the on-site visits with law enforcement authorities and government bodies.

c. Coverage of specific elements of the foreign bribery offence

i. Bribes through intermediaries

564. Where Parties have not expressly covered the act of bribing a foreign public official through an intermediary in their implementing legislation, the Working Group has been fairly consistent in its resulting recommendations. Except for the United Kingdom, the Group has recommended follow-up of the issue in the absence of supporting case law on the coverage of bribes through intermediaries in relation to the domestic bribery offence. Moreover, in the case of Korea, follow-up was recommended despite the existence of supporting case law due to the non-coverage of attempts to bribe through an intermediary. It is not clear whether the problem identified in the examination of Korea might also apply to other Parties, since the link between the law of attempts and bribing through intermediaries has not been looked at routinely.

ii. Definition of “foreign public official”

565. Regarding cases where a Party’s definition of “foreign public official” is not as broad as required by Article 1 of the Convention (except where this relates to the definition of “public enterprise”), and where the application of the definition is unclear in some respect, the Working Group’s recommendations have been consistent within the Phase 2 monitoring process. The Working Group did not recommend any action where the Party was able to provide supporting authority for its position. In any case, in light of the recommendation of the Working Group in Phase 2 to undertake a horizontal analysis of the direct applicability of the Convention, the Working Group might decide to review, once there has been sufficient practice, how effective this technique has been in relation to the definition of “foreign public official” in
the Convention. Otherwise, in Phase 2, either follow-up or clarification was recommended, depending upon the authoritativeness of the supporting materials.

566. As the Phase 2 reports do not disclose any routine assessment of how such Parties would in practice interpret the definition of “public enterprise”, the Working Group might therefore decide to systematically address this aspect of the interpretation of “foreign public official” in each Phase 2 examination, regardless if the implementing legislation provides a definition.

iii. Bribes for the benefit of third parties

567. Under the Phase 2 process, the Working Group has been consistent in addressing in some depth the coverage of each Party’s foreign bribery offence with respect to bribes that benefit third parties, but has made different recommendations depending on the facts of each examination. In some cases, the Working Group has required case law supporting the position of the Parties that this situation is covered. In others, where a Party’s domestic bribery offence expressly covers this situation, the Working Group has recommended that the foreign bribery offence be amended to align it with the domestic bribery offence. The Working Group might therefore decide to ensure consistency in its approach to recommendations regarding the absence of express language for bribes directly benefiting third party beneficiaries.

iv. Defences contemplated under the Convention

Defence for Small Facilitation Payments

568. Given that, where an exception for facilitation payments is available, companies will have to address the exception in their internal compliance programmes, any Phase 2 follow-up on this issue as recommended by the Working Group could review how in practice companies are defining and applying the exception. In addition, to ensure that the Phase 2 reports provide sufficient information for the Working Group to review the impact of the exception in Commentary 9 for facilitation payments on the effectiveness of the Convention, it is important that future Phase 2 examinations routinely include a review of how companies are interpreting and applying the exception. Although companies cannot be compelled to provide this kind of information, the codes of conduct of many large companies involved in international business transactions are publicly available, and thus could be consulted in this regard. In addition, the Working Group may need to consider in each Phase 2 examination whether an exception for facilitation payments has been introduced through less formal means, such as interpretive guidelines.

569. Moreover, the Working Group might decide to undertake a mid- to long-term analysis about whether the exception for “small facilitation payments” in Commentary 9 is too vague to implement in practice. Such an analysis could also address the socio-economic factors related to the issue of small facilitation payments. It might also be prudent to canvass whether Parties that do not provide such an exception under their laws will nevertheless apply one in practice through, for instance, the exercise of prosecutorial discretion.

Defence where the payment is permitted or required by the law of the foreign public official’s country

570. Given that one Party (Australia) has codified the defence under Commentary 8 for a payment that is “permitted or required by the law of the foreign public official’s country” in a manner which the Working Group considers exceeds the limits of Commentary 8, the Working Group might decide that it would be prudent to systematically review how in practice the law enforcement and other authorities of Parties that include such a defence under their laws interpret it in practice. It might also be prudent to canvass whether Parties that do not provide such a defence under their laws will nevertheless apply it in practice through, for instance, the exercise of prosecutorial discretion.
v. Defences not contemplated under the Convention

Reasonable expenses incurred in good faith

571. In the absence of adoption of the defence of reasonable expenses incurred in good faith by Parties other than Canada and the United States, it might appear that the Working Group needs only to consider the impact of the defence specifically in relation to the foreign bribery offences in Canada and the United States. However, since a Party could apply the defence implicitly in the exercise of prosecutorial discretion, without having it expressly provided as a defence under the law, it would seem prudent to canvass this issue systematically in respect of all Phase 2 examinations.

Effective regret

572. The Working Group has not been consistent in the treatment of the defence of “effective regret” so far, having recommended repeal of the defence of “effective regret” in the case of Bulgaria in Phase 1, and on the other hand in Phase 2 recommending monitoring of its application with respect to Greece where the defence still applied and in Hungary where it has been repealed but still applies to the domestic bribery offence.

573. It is also likely that, although the concept of “effective regret” does not constitute a defence in other Parties, it is at least taken into consideration at the sentencing stage. In addition, in some Parties there has been increasing emphasis on obtaining evidence from co-operative accomplices, sometimes in exchange for immunity from prosecution or a reduced sanction. However, the Phase 2 examinations have not so far routinely considered Parties’ policies in this regard. Thus, the Working Group might decide that it would be timely to address this issue on a systematic basis in all the Phase 2 examinations.

Coercion by the foreign public official

574. Although the defences of duress and concussione seem restricted to Hungary and Italy respectively, the related issue of the link between the bribery of foreign public officials and extortion has not been explored in any depth. Although extortion is commonly considered to involve the wrongful obtaining of an advantage from another through actual or threatened bodily injury, it is possible that in some Parties extortion applies in less onerous circumstances.

vi. Potential deficiencies that do not form clear trends across Parties

575. The interpretations by Canada and Japan of “business” under Article 1 of the Convention appear specific to those Parties, and there has not been any indication in the other Phase 2 examinations that the application of the offence would be limited by a requirement that the business be for profit or repeatedly and continuously conducted.

576. The Working Group has consistently recommended follow-up where a Party’s law or interpretation thereof requires an agreement between the briber and the foreign public official. In addition, it may be prudent to canvass whether Parties that do not require such an agreement will nevertheless require one in practice, in particular given that in the absence of the proof of such an agreement it may be difficult to prove the purpose of the payment made to the foreign public official.
2. Responsibility of Legal Persons for Foreign Bribery Offence (Article 2 of Convention)

a. Forms of liability of legal persons

577. The Phase 2 reports have provided an objective analysis of the various systems for establishing the liability of legal persons for the foreign bribery offence. By focussing on the effectiveness in practice of each Party’s system in this regard, the Working Group has not favoured one form of liability over another (i.e. administrative versus criminal liability). This has been especially important in terms of respecting the principle under the Convention of “functional equivalence”. Nevertheless, once there has been sufficient practice under the Convention, the Working Group might deem it expedient to assess whether one form of liability appears to favour a more effective treatment of foreign bribery cases involving legal persons, both in terms of enforcement activity, the level and forms of sanctions obtained, and the ability to provide and obtain MLA. Such an analysis could help Parties determine whether it would be advisable to revise their systems for the liability of legal persons, and would also be helpful for those Parties (and countries not Party to the Convention) in the process of proposing draft legislation.

b. Parties that have not established the liability of legal persons

578. Although two Parties (Luxembourg and the Slovak Republic) continue to be in non-compliance with Article 2 of the Convention, globally many non-Parties have not established the liability of legal persons, including those that struggle with the notion of such liability. The Working Group could address the reasons for non-compliance by these Parties with the idea in mind that the problem is broader, and the broader problem could have a serious impact on the effective implementation of the Convention due to obstacles in obtaining MLA for foreign bribery offences committed by legal persons from countries that have not established the liability of legal persons.

c. Forms of legal persons covered

579. Given that the issue of coverage of bribe by state-owned and state-controlled companies has been raised in a number of Phase 2 reports, and that this issue was already identified as a horizontal issue in the Phase 1 reports of two Parties, the Working Group might want to consider, in light of emerging law enforcement activity, any trends regarding the application of the foreign bribery offence to such companies. The analysis could also look at Parties in which the bribery of state-owned and state-controlled entities does appear to be covered, due to the risk of a conflict of interest with the State in such prosecutions.

580. The issues regarding the application of the liability of legal persons after mergers and to foreign legal persons as well as to trusts and partnerships have not been raised systematically in the Phase 2 examinations. The findings of the Working Group concerning France and Norway in these respects therefore cannot be compared to the situation for other Parties. The Working Group might want to assess whether these issues are of sufficient importance to raise them as a matter of course in all Phase 2 examinations.

d. Standard of liability

i. Linkage of liability of legal persons to acts of management or person in senior position

581. In view that the standard of liability for legal persons is largely in a state of flux across the Parties, and that the Convention has been an important catalyst for the general development of this kind of liability, it might be useful for the Working Group to closely follow whether certain standards are more effective than others in addressing foreign bribery perpetrated by legal persons. In addition, a horizontal analysis of this type was recommended in two Phase 1 reports. Since it is beneficial to the fight against
foreign bribery for non-Parties to also meet the standards under the Convention, in part to ensure that they

can provide effective MLA, sharing the work in this respect could also be useful for non-Parties
contemplating the establishment of the liability of legal persons.

ii. Requirement of identification, prosecution or conviction of natural perpetrator

582. Having regard to the number of Parties for which the identification and/or prosecution/conviction
of the natural person was raised as an issue in relation to the liability of legal persons, it appears that it
might be prudent for the Working Group to follow up emerging enforcement actions. In addition, even
where a Party’s laws clearly do not require the identification of the natural person, it might be advisable to
follow up whether in practice the foreign bribery offence can be effectively enforced in relation to the legal
person involved in the absence of identifying or prosecuting/convicting the perpetrator(s). Since one of the
main purposes of legal person liability is to address “aggregate behaviour” and complex, decentralised
decision-making systems, it is vital that the liability of legal persons for the purpose of implementing the
Convention is workable in the absence of the identification, etc. of specific individuals.

e. Effect of internal compliance programmes on liability or sanctions

583. Since internal compliance programmes can play a role to varying degrees in either mitigating
sanctions or releasing legal persons completely from liability, they represent a significant issue in the
liability of legal persons for the foreign bribery offence. The Working Group might therefore deem it
expedient to compare the impact of internal compliance programmes on the liability of legal persons for
the foreign bribery offence, once there has been sufficient practice. In addition, because they play such a
prominent role in enforcement actions, corporate management is increasingly establishing such
programmes, and sometimes including anti-foreign bribery elements in them. The Working Group might
therefore consider it useful to do a comparative analysis of such programmes and identify the key elements
of an effective corporate compliance programme for the purpose of detecting and preventing the bribery of
foreign public officials.

f. Mutual legal assistance regarding foreign bribery offences committed by legal persons

584. The issue of providing and obtaining mutual legal assistance regarding foreign bribery offences
committed by legal persons has only been systematically raised for Parties that have not established the
criminal responsibility of legal persons. However, it is conceivable that, contrary to Article 9.1 of the
Convention, Parties that have the criminal liability of legal persons for the foreign bribery offence might
not necessarily be able to provide prompt and effective legal assistance for non-criminal proceedings
within the scope of the Convention brought by a Party against a legal person. Thus, consistent with the
remark of the Working Group in the Phase 2 recommendations to Australia, once there has been sufficient
practice in this area, it might be useful to undertake a horizontal analysis of the compatibility between
administrative and criminal systems for the liability of legal persons for the purpose of providing and
obtaining mutual legal assistance concerning offences within the scope of the Convention.

g. Use in practice of liability of legal persons

585. When undertaking any of the further analysis suggested in this part of the Mid-Term Study
concerning the liability of legal persons for the foreign bribery offence, it will be important for the
Working Group to keep in mind the low level of enforcement activity so far in relation to legal persons for
the offence, and whether any of the issues identified could individually or cumulatively be the reason for
this.
h. Sanctions for legal persons

i. Fines

586. Given that the vast majority of Phase 2 reports raise the issue of whether in practice fines for legal persons for the foreign bribery offence are “effective, proportionate and dissuasive”, the Working Group could consider undertaking a horizontal analysis for the purpose of determining how in practice Parties can meet the standard under Article 3.1 of the Convention. The Working Group could also consider whether various factors, such as the size of a Party’s economy, should be taken into account in determining whether the applicable sanctions meet the standard under Article 3.1.

ii. Confiscation

587. Given the preponderance of issues regarding the level of fines for legal persons for the foreign bribery offence, there is a significant potential for the confiscation of the proceeds of bribery to compensate at least to some extent for weaknesses in this respect. However, at this stage there has not been sufficient practice to assess the effectiveness of confiscation as a sanction for foreign bribery. In addition, there is not sufficient information about how in practice Parties will quantify the proceeds of bribing a foreign public official. The Working Group could thus include the application of the confiscation of the proceeds of bribing a foreign public official in any mid-to long-term analysis of monetary sanctions for legal persons.

iii. Additional civil or administrative sanctions

588. In light of the number and substance of the concerns raised in the Phase 2 reports regarding monetary sanctions for legal persons convicted of bribing a foreign public official, there is significant potential for non-criminal penalties, such as debarment from participating in public procurement contracts, to compensate for weaknesses in monetary penalties. However, due to the differing approaches by Parties to this issue, and the variety of concerns raised by the Working Group where some form of civil or administrative sanction is available, any mid- to long-term analysis of monetary sanctions could include an assessment of the relationship between monetary sanctions and civil or administrative sanctions.

4. Jurisdiction (Article 4 of Convention)

i. Territorial jurisdiction

589. Even though all Parties (except one) examined so far have established nationality jurisdiction over natural persons for the foreign bribery offence, the effectiveness of territorial jurisdiction in respect of offences committed in part in the territory of a Party comes into play when the offence is committed abroad by an individual or legal person who is not a citizen of the Party, or when it is difficult to obtain evidence abroad. Given that so far there has been little overall analysis of how Parties apply territorial jurisdiction to economic crimes, including bribery, which take place in part in their territory; and given that where the analysis has taken place, it discloses a variety of approaches, the Working Group might decide that this issue warrants a horizontal analysis in the mid-to long-term.

ii. Nationality jurisdiction

590. In addition, in view that the offence of bribing a foreign public official is an offence that will normally be perpetrated abroad, the effectiveness of nationality jurisdiction is a fundamental issue regarding implementation of the Convention. However, the application of nationality jurisdiction to foreign bribery cases remains largely untested by the Parties. In addition, the principles for its application vary widely between the Parties, in particular with respect to the requirement of dual criminality and the
application of special restrictions in some Parties. The Working Group might therefore decide that it would be appropriate to follow up the application of nationality jurisdiction to natural (as well as legal) persons on a horizontal basis in the mid- to long term. A horizontal analysis of the application of nationality jurisdiction was already recommended in four Phase 1 reports, including with respect to the requirement of dual criminality.

591. The application of nationality jurisdiction to legal persons raises further issues, given that practical experience in this regard is just evolving, and that in some Parties there is only a theoretical basis for such application. One such issue was raised already in two Phase 1 reports, and was raised again in two Phase 2 reports—i.e. the application of jurisdiction for the foreign bribery offence to legal persons that use a non-national to bribe a foreign public official abroad.

iii. Consultation and co-operation with regard to jurisdiction

592. Implementation of the requirement under Article 4.3 of the Convention regarding consultations for determining the most appropriate jurisdiction for prosecution, has already been the subject of a recommendation in one Phase 1 report (Italy), due to the finding that Italian prosecutors may not have the discretion to refrain from prosecuting a foreign bribery offence where Italian jurisdiction can be established. The Working Group determined that this situation is not unique to Italy, and stated that it may need to be considered on a horizontal basis. Given the identification of the implementation of Article 4.3 as a horizontal issue in Phase 1, and that it has also been raised as an issue in some Phase 2 reports, the Working Group might consider undertaking a review of how Parties can enhance co-operation amongst themselves in this regard.

5. Enforcement (Article 5 of Convention)

i. Statistical information

593. In view that it would be difficult if not impossible to undertake any in-depth analysis of the cross-cutting issues identified in this Mid-Term Study in the absence of comprehensive statistics on the investigation and prosecution of the foreign bribery offence, the Working Group might consider agreeing in advance on the nature and type of statistical information to be compiled by the Parties for the purpose of any future analysis of the issues. Indeed, the need for the review on a horizontal basis regarding such statistics has been foreseen in the Phase 2 Report of Germany.

ii. Prohibited considerations

594. Implementation of Article 5 of the Convention, which lists considerations that shall not influence the investigation and prosecution of foreign bribery (i.e. the “national economic interest, potential effect upon relations with another State or the identity of the natural or legal persons involved”) has been raised systematically by the Working Group in the Phase 2 examinations. Although concerns about the implementation of Article 5 have so far only arisen in seven examinations, the importance of this issue cannot be underplayed, given that the bribery of foreign public officials is an offence that will often cause political embarrassment for the country of the foreign public official as well as the country of the briber, in cases where the bribery was perpetrated or condoned by a political figure. In addition, where large companies are involved, enforcement actions by Parties could potentially affect the national economy of the relevant Parties. For this reason it is important that the Working Group remain diligent in canvassing this issue in future Phase 2 examinations, as well as following up Parties’ progress where recommendations regarding implementation of Article 5 in this regard have been made to them.
6. Statute of Limitations (Article 6 of Convention)

595. There is not enough statistical information regarding foreign bribery cases to make an accurate assessment of the impact of Parties’ limitations periods on the effectiveness of foreign bribery investigations. Since it may be some time before a body of useful statistics is available in this respect, the Working Group might consider monitoring cases of domestic bribery for Parties, in particular where such limitations periods are the same (or longer) as for foreign bribery. However, any such analysis would need to take into account that foreign bribery investigations normally rely on obtaining MLA, which can take many months (and sometimes years) to obtain. The analysis also needs to take into account the variations between Parties in respect of the following: 1. the starting point for the running of the limitations period; 2. the possible grounds for suspending or interrupting the period; and 3. whether an “ultimate” (overall) period applies regardless of suspensions and interruptions.

596. In addition, pursuant to the recommendation of the Working Group in the Phase 1 Report of Denmark and the Phase 2 Report of Italy, the Working Group has already identified this as an issue that warrants a horizontal review.

7. Money Laundering (Article 7 of Convention)

597. To conclude, the overriding concern is that anti-money laundering measures in the examined Parties have uncovered few foreign bribery and related money laundering cases. The Phase 2 reports have identified areas for improvement in the reporting systems and money laundering offences of the examined Parties. However, the deficiencies that have been identified may not explain the low number of foreign bribery cases that have been detected. Moreover, these deficiencies could be theoretical because there have been few foreign bribery cases to demonstrate the problems. The lack of cases also raises questions because anti-money laundering measures have generated investigations of other types of crimes. The reason could be that the reporting entities, the FIUs or both, do not yet have the knowledge or capability to detect the laundering of bribes and proceeds of bribery. Perhaps the number of known cases merely indicates that the incidence of foreign bribery and related money laundering crimes is much lower than other crimes. Or maybe by its nature, money laundering in relation to foreign bribery (unlike other crimes) is inherently less susceptible to detection by suspicious transaction reporting. The Phase 2 reports do not contain the necessary data to conclusively answer these questions. However, given the importance of anti-money laundering systems for detecting and deterring the bribery of foreign public officials, the Working Group could follow up this issue with an assessment of why these systems have not to date proved effective for achieving these purposes.

8. Accounting and Auditing (Article 8 of Convention and Paragraph V of Revised Recommendation)

a. Accounting requirements, liability and sanctions

598. The Phase 2 examinations have to a large extent focussed on the effectiveness of Parties’ fraudulent accounting offences at capturing accounting fraud for the purpose of bribing foreign public officials or of hiding such bribery. The Working Group has identified significant concerns in this respect in the Phase 2 examinations of several Parties, including the application of materiality thresholds and the non-application or limited application of fraudulent accounting offences to unlisted companies (including very large unlisted companies which predominate in certain economies). Given that foreign bribery is a difficult offence to detect, since it is committed in secret and involves two satisfied parties, the ability to detect it through associated offences that are easier to detect, such as fraudulent accounting, is essential to the effective implementation of the Convention. The Working Group might therefore consider a medium- to
long-term horizontal analysis of the main obstacles to detecting foreign bribery through accounting
offences, as well as their deterrence value.

599. In addition, consistent with the recommendations of the Working Group in the Phase 1 Report of
Switzerland, a horizontal examination of Parties’ accounting standards may still be expedient.

b. Reporting of suspicions of foreign bribery by auditors

600. Paragraph V of the Revised Recommendation states that member countries “should consider”
requiring auditors to report indications of a possible illegal act of bribery to the competent authorities. Very
few Parties have imposed a legal requirement in this regard, while some Parties permit such reporting
under their law, and many Parties prohibit such reporting. Where reporting is permitted as opposed to
required, it is not reliable or effective, in large part because auditors are naturally strongly influenced by
their duties of confidentiality, which they perceive as conflicting with any legal permission to disclose.
Furthermore, the International Standards of Auditing (i.e. ISA 240), which do not require any reporting by
auditors to regulatory and enforcement authorities unless national law so provides, reinforce non-reporting
by auditors to the competent authorities in the absence of a legal obligation to do so. The Working Group
might therefore want to consider whether it would be expedient to amend the Revised Recommendation to
recommend Parties to require the auditor to report indications of a possible illegal act of bribery to the
competent authorities. Consideration of such a proposal could take place in the context of the horizontal
review proposed by the Working Group in four Phase 2 reports.

9. Internal Company Controls (Paragraph V. C. of Revised Recommendation)

601. An issue that has not to date been addressed systematically in the Phase 2 examinations is the use
of compliance programmes to encourage the voluntary disclosure of the bribery of foreign public officials.
It might be useful to comment on best practices in this area in the Phase 2 reports in order that Parties may
exchange information and benefit from each other’s experiences.

10. Mutual Legal Assistance and Extradition (Articles 9 and 10 of Convention and Paragraph
VII of Revised Recommendation)

602. The Phase 2 reports do not systematically address two issues that may be important for future
work: 1. whether a Party requires a treaty in order to be able to provide MLA, and what affect this has on
the Party in terms of implementing its obligations under the Convention; and 2. the evidentiary threshold
which must be met in some Parties in order for them to be able to provide MLA (keeping in mind that
since not all Parties have evidentiary thresholds this is not an issue for every Party).

603. Moreover, a third MLA-related issue, appears to have even more impact on the implementation
of the Convention by Parties—whether non-Parties, in particular countries at high risk for bribe
solicitation, are able or willing to provide effective MLA for foreign bribery offences upon the request of
Parties. The unavailability of MLA from the country in which the foreign bribe transaction takes place may
be the single most important reason for terminating an investigation. A Party might not even initiate an
investigation believing that the country in which the bribery transaction took place will not co-operate.
Indeed, the challenge of obtaining MLA from non-Parties might be one of the biggest obstacles to the
effective implementation of the Convention. The Working Group might therefore decide to undertake an
analysis of what can be done by the Working Group to address this overriding problem. This might involve
consideration of how the OECD Outreach activities (i.e. work with non-OECD members) could identify
and address obstacles faced by non-Parties in providing effective MLA for the foreign bribery offence.
11. Tax Treatment of Bribe Payments

a. Legislation on non-tax deductibility of bribe payments

604. Given that the Phase 2 reports do not systematically assess whether Parties with defences for facilitation payments permit a tax deduction for such payments, the Working Group might include this issue in any future work on facilitation payments.

605. In addition, in view that nine Parties do not expressly prohibit under their laws tax deductions for bribe payments to foreign public officials, and that for most of these Parties the Working Group was concerned that the non-tax deductibility of bribe payments needs to be clarified, the Working Group might decide to consider whether the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (1996 Recommendation) needs to be amended to require an express prohibition. The Working Group could also consider whether in some instances (e.g. where a Party has a simplified tax code which does not provide any non-allowable expenses, but only provides categories of allowable expenses under which bribe payments could not be disguised), an express prohibition under the tax law might be counterproductive to other important tax policy goals of that Party.

b. Reporting aspects

606. Given the important role that tax authorities could play in the detection (and deterrence) of foreign bribery, the Working Group might decide to consider whether the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (1996 Recommendation) needs to be amended to encourage Parties to require their tax authorities to report foreign bribery to the law enforcement authorities. Work in this regard could also include consideration of the level of proof that should trigger such a report.

12. Prevention, Detection and Combating of Foreign Bribery through Systems for Official Development Assistance and Official Export Credit Support

b. Official development assistance

i. Co-ordination

607. The Working Group might want to explore means for further co-ordinating the work of the Working Group and the OECD Development Assistance Committee (DAC) on foreign bribery in aid-funded procurement.

ii. Reporting to the competent authorities

608. In view of the number of recommendations in the Phase 2 reports addressing the lack of or problems regarding reporting obligations of ODA officials, and that this has been identified in the Phase 2 Report on Korea as “an issue for many Parties”, the Working Group might want to consider whether the frequency of problems is a reflection of the absence of guidance in this regard in the Revised Recommendation. In particular, with respect to ODA contracting, the Revised Recommendation (i.e. Recommendation VI iii) only addresses the use of anti-corruption provisions in bilateral aid-funded procurement.

iii. Denial, suspension and termination of contracting opportunities

609. In view of the important deterrent effect of disqualification and termination of ODA contracting on foreign bribery, the Working Group could ensure that this issue be systematically raised in every Phase
2 examination, including Parties’ policies concerning natural and legal persons who have been debarred by the World Bank or other multilateral development banks. The Working Group could also consider whether the directive in the Revised Recommendation (i.e. to require anti-corruption provisions in bilateral aid-funded procurement) is strong enough to encourage Parties to take such actions.

c. Official export credit support

i. Co-ordination

610. The Working Group might want to explore means for further co-ordinating the work of the Working Group and the OECD Working Party on Export Credits and Credit Guarantees (ECG) on foreign bribery and officially supported export credits.

ii. Reporting to the competent authorities

611. Given that the Phase 2 Report on Canada identifies the disclosure of foreign bribery offences to the law enforcement authorities by export credit agencies as “a general issue for many Parties”, and, moreover, several Phase 2 reports provide recommendations regarding the introduction of an obligation for export credit agency staff to report indications of foreign bribery to the law enforcement authorities, as well as to remind staff of the obligation to report where one already exists, the Working Group might consider whether this might reflect the lack of clarity on this issue in the Revised Recommendation, and whether the ECG Action Statement is clear on this issue. In particular it is noted that the Action Statement only provides an obligation to refer evidence of foreign bribery to the appropriate national authorities if involvement of a beneficiary in such bribery is “proved” after export credit support has been approved. This raises two questions for Parties implementing this particular aspect of the Action Statement. First, what is required for foreign bribery to be “proved”? Second, what is the obligation when foreign bribery is detected before export credit support has been approved? However, enhancement of the Action Statement is currently under negotiation in the OECD Export Credit Group and these perceived weaknesses could be addressed.

iii. Denial, suspension or termination of contracting opportunities

612. There is a clear theme throughout all the Phase 2 reports that address the denial, suspension or termination of export credit support where there are indications of foreign bribery regarding uncertainty about the level of evidence to take such action. Although this uncertainty might be due to the lack of reference to this matter in the Revised Recommendation, it could also stem from the treatment of it in the ECG Action Statement. In particular, Parties might be unclear about what is meant to be covered by “sufficient evidence” in relation to the denial of support, and that foreign bribery is “proved” in relation to cases where support has been approved. Future work by the Working Group could address this uncertainty. In addition, enhancement of the Action Statement is currently under negotiation in the OECD Export Credit Group and these perceived weaknesses could be addressed.

613. Furthermore, the Working Group could systematically raise, in the course of its Phase 2 examinations, Parties’ policies on providing official export credit support to individuals and legal persons who have been debarred by the World Bank and other multilateral development banks.

13. Awareness and Detection (Paragraph I of Revised Recommendation)

614. Discussions on the level of awareness of the Convention and the foreign bribery offence in the national law of the various players comprise a lengthy part of the on-site visits and the Phase 2 reports. The nature of the information obtained is not necessarily uniform. In addition, the issue of awareness has given rise to a large proportion of the recommendations of the Working Group. For the sake of clarity and an
economic use of resources, the Working Group might therefore want to consider establishing a clear minimum standard on what awareness-raising measures should be taken by a Party, and address these at the on-site visit and in the Phase 2 reports in a concise and systematic manner.
### ANNEX

**TABLE OF APPLICABLE SANCTIONS IN THE TWENTY-ONE PARTIES REVIEWED IN THE MID-TERM STUDY**

<table>
<thead>
<tr>
<th>Australia</th>
<th><strong>Prison (maximum penalty)</strong></th>
<th><strong>Fines for natural persons (NPs) and legal persons (LPs)</strong> <strong>a</strong>, <strong>b</strong> (maximum penalty)</th>
<th><strong>Other Sanctions upon Criminal Conviction</strong> <strong>c</strong></th>
<th><strong>Confiscation</strong></th>
<th><strong>Sanctions for other economic crimes</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2 years (summary)</td>
<td>NPs: AUD 13 200 on summary offence (EUR 8137); AUD 66 000 on indictment (EUR 40 684)</td>
<td>-- Disqualification from managing corporations</td>
<td>Bribe and proceeds. Possible if in possession of non bona fide third parties. Monetary equivalent possible</td>
<td>Cartel offences: maximum penalty of AUD 10 million (EUR 6 164 278) for LPs</td>
</tr>
<tr>
<td></td>
<td>10 years (indictment)</td>
<td>LPs: AUD 330 000 (EUR 203 421)</td>
<td>-- Suspension of financial services licence</td>
<td>---</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Belgium</th>
<th><strong>Prison (maximum penalty)</strong></th>
<th><strong>Fines for natural persons (NPs) and legal persons (LPs)</strong> <strong>c</strong> (maximum penalty)</th>
<th><strong>Other Sanctions upon Criminal Conviction</strong> <strong>c</strong></th>
<th><strong>Confiscation</strong></th>
<th><strong>Sanctions for other economic crimes</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1 to 15 years (depending on rank of foreign public official)</td>
<td>NPs: EUR 55 000 to EUR 1.1 million LPs: EUR 10 million</td>
<td>-- Loss of rights (to hold a public function, act as estate administrator, etc.) -- Disqualification from public procurement</td>
<td>Mandatory for bribe Discretionary for proceeds Monetary equivalent possible</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Bulgaria</th>
<th><strong>Prison (maximum penalty)</strong></th>
<th><strong>Fines for natural persons (NPs) and legal persons (LPs)</strong> <strong>c</strong> (maximum penalty)</th>
<th><strong>Other Sanctions upon Criminal Conviction</strong> <strong>c</strong></th>
<th><strong>Confiscation</strong></th>
<th><strong>Sanctions for other economic crimes</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3 years</td>
<td>NPs: BGN 5 000 (EUR 2 554) (introduced after Phase 1) LPs: EUR 500 000 <strong>d</strong></td>
<td>-- Disqualification from public procurement (2004 Law on Public Procurement)</td>
<td>Bribe and proceeds Not for legal persons Possible if in possession of non bona fide third parties</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
</tbody>
</table>

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* Fines are indicated in the local currency, as well as in their euro equivalent, as of 31 December 2005.

** NPs = natural persons; LPs = legal persons.

*** This column shows civil and administrative penalties which may be pronounced by the courts upon sanctioning a foreign bribery offence. It does not include decisions to exclude natural or legal persons from publicly funded schemes, which may be taken independently by public agencies such as those involved in official export credit support, official development assistance, public procurement or privatisation.

107 According to information provided in the Oral Follow-Up Report, there has been one foreign bribery conviction in a relatively minor case. No information was provided on the nature of sanctions pronounced by the court.

108 The administrative liability of legal persons was introduced under Bulgarian law following the Phase 2 Recommendations, as indicated by Bulgaria in its Written Follow-Up Report.
<table>
<thead>
<tr>
<th></th>
<th>Prison (maximum penalty)</th>
<th>Fines for natural persons (NPs) and legal persons (LPs) (maximum penalty)</th>
<th>Other Sanctions upon Criminal Conviction*</th>
<th>Confiscation</th>
<th>Sanctions for other economic crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Canada</strong></td>
<td>5 years</td>
<td>No upper limit</td>
<td>Not directly on foreign bribery offence conviction</td>
<td>Bribe and proceeds</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td>Finland</td>
<td>4 months to 4 years</td>
<td>NPs: 120 day/fines (1/60th personal income) LPs: EUR 850 000</td>
<td>Not directly on foreign bribery offence conviction</td>
<td>Bribe and proceeds Possible if in possession of non bona fide third parties No monetary sanctions of comparable effect</td>
<td>Comparable</td>
</tr>
<tr>
<td>France</td>
<td>10 years</td>
<td>NPs: EUR 150 000 LPs: EUR 750 000</td>
<td>-- Deprivation of civic and civil rights (NPs) -- Professional restrictions (NPs and LPs) -- Closure of establishment (LPs) -- Exclusion from PP (LPs) -- Ban on public appeals for funds (LPs) -- Ban on use of checks and/or credit cards (LPs)</td>
<td>Bribe and proceeds</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td>Germany</td>
<td>2 to 10 years, depending on seriousness of the offence (or fine)</td>
<td>NPs: 360 daily rates (1 daily rate = EUR 1 to 5 000) (or prison) LPs: EUR 1 million, or higher in order to cover all the economic profit of the offender</td>
<td>Exclusion from public contracts (for LPs) -- Project to create a federal corruption register</td>
<td>Bribes (if still in the possession of the briber) and proceeds</td>
<td>Comparable</td>
</tr>
<tr>
<td>Greece</td>
<td>5 years</td>
<td>NPs: available (no indication of amount) LPs: up to 3 times the value of the benefit</td>
<td>Exclusion from public procurement and privatisation</td>
<td>Proceeds Unclear whether “undue advantage” may be confiscated</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td>Hungary</td>
<td>5 years</td>
<td>NPs: HUF 10 million (EUR 39 700) (not applicable if confiscation) LPs: up to 3 times the value of the advantage gained or intended to be gained</td>
<td>Only for LPs: -- Winding-up -- Limitation of activity, incl. exclusion from public procurement, concession contracts, public funding (but not export credit, ODA, privatisation)</td>
<td>Bribe and proceeds Mandatory Possible if in possession of non bona fide third parties</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td>Country</td>
<td>Prison (maximum penalty)</td>
<td>Fines for natural persons (NPs) and legal persons (LPs)**</td>
<td>Other Sanctions upon Criminal Conviction***</td>
<td>Confiscation</td>
<td>Sanctions for other economic crimes</td>
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<td>------------------------------------</td>
</tr>
<tr>
<td>Iceland</td>
<td>3 years</td>
<td>NPs: ISK 4 million (EUR 53 195) LPs: no upper limit</td>
<td>Not directly on foreign bribery offence conviction</td>
<td>Bribe if still in possession of bribe Proceeds</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td>Italy</td>
<td>5 years</td>
<td>Not for NPs LPs: between max. EUR 312 000 and max. EUR 1.248 million, depending on seriousness of the bribery</td>
<td>-- Disqualification from public office or management positions (NPs and LPs) -- Loss of capacity to enter into contracts with the public administration (LPs) -- Suspension or revocation of authorisations and licenses (LPs) -- Denial of facilitations, funding, subsidies (LPs) -- Prohibition from conduct of business activities (LPs)</td>
<td>Obligatory for proceeds Discretionary for the bribe (for non EU officials)</td>
<td>Fines available for economic and financial offences</td>
</tr>
<tr>
<td>Japan</td>
<td>3 years</td>
<td>NPs: JPY 3 million (EUR 21 495) LPs: JPY 300 million (EUR 2 149 488)</td>
<td>Not directly on foreign bribery offence conviction</td>
<td>Bribe (or monetary equivalent)¹⁰⁹ Not proceeds (too difficult to quantify)</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td>Korea¹¹⁰</td>
<td>5 years</td>
<td>NPs: KRW 20 million (EUR 16 966) or twice the amount of profit if profit &gt; KRW 10 million (EUR 8 483) LPs: KRW 1 billion or twice the amount of profit if profit &gt; KRW 500 million (EUR 424 147)</td>
<td>Not directly on foreign bribery offence conviction to date, but under consideration (disbarment from public procurement)</td>
<td>Mandatory if bribe if in possession of offender Discretionary for monetary equivalent Not proceeds</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
</tbody>
</table>

¹⁰⁹ According to information provided by Japan after the Phase 2 Report, the monetary equivalent to the bribe can be confiscated under the Japanese Law for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters.

¹¹⁰ A total of four cases have been investigated in Korea resulting in convictions for seven natural persons and two legal persons.
<table>
<thead>
<tr>
<th></th>
<th>Prison (maximum penalty)</th>
<th>Fines for natural persons (NPs) and legal persons (LPs) (maximum penalty)</th>
<th>Other Sanctions upon Criminal Conviction***</th>
<th>Confiscation</th>
<th>Sanctions for other economic crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Luxembourg</td>
<td>10 years</td>
<td>NPs: EUR 187 500</td>
<td>Bribe, if still in possession of offender</td>
<td>Not directly on foreign bribery offence conviction</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td></td>
<td></td>
<td>LPs: no liability</td>
<td>Proceeds or monetary equivalent</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Mandatory for crimes111</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mexico</td>
<td>2 to 14 years</td>
<td>1 000 fine days (fine day = net daily wage for the NP and declared income for the LP)112</td>
<td>Dismissal and disablement from holding a public job, post or commission (NPs)</td>
<td>Bribes and proceeds Mandatory Monetary equivalent in draft bill (following Phase 1 Recommendations)</td>
<td>Comparable</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Declared null and void (LPs)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Norway113</td>
<td>3 years (simple bribery)</td>
<td>No upper limit</td>
<td>Loss of public office</td>
<td>Mandatory for “gains accrued from a criminal act” Discretionary for bribe Monetary equivalent possible</td>
<td>Not addressed in Phase 2 Report</td>
</tr>
<tr>
<td></td>
<td>10 years (aggravated)</td>
<td></td>
<td>-- Prohibition from exercising certain activities linked to the offence (no explicit exclusion from PP or other public subsidies)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slovak Republic114</td>
<td>5 years (non-aggravated foreign bribery)</td>
<td>SKK 10 million (EUR 264 101) for both aggravated and non-aggravated</td>
<td>Disqualification from public procurement</td>
<td>Mandatory for bribe and proceeds, but only if in possession of the offender Discretionary for property</td>
<td>Lower than for other economic offences (see footnote 116 of Phase 2 Report)</td>
</tr>
<tr>
<td></td>
<td>12 years (aggravated)</td>
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111 Foreign bribery is a crime under Luxembourg law, but bribery is often “downgraded” to a lesser offence for reasons of efficiency. For lesser offences, confiscation is only discretionary.

112 These penalties were increased following recommendations made to Mexico in Phase 1 (previous maximum fines amounted to 500 times the minimum daily wage). Mexico’s Oral Follow-Up report indicates that these monetary sanctions entered into force in August 2005 with the Decree amending the Federal Criminal Code.

113 The Norwegian authorities indicate in their Oral Follow-Up Report that a number of courts have handed down severe sanctions, and cites as an example a court decision for a gross breach of trust offence (equivalent to the foreign bribery offence, but under the former legislation) where the natural person was sentenced to six years imprisonment and a fine of NOK 16 million (EUR 2 million).

114 The sanctions indicated are as of 1 January 2006, when the new Penal Code came into force.
<table>
<thead>
<tr>
<th></th>
<th>Prison (maximum penalty)</th>
<th>Fines for natural persons (NPs) and legal persons (LPs) (maximum penalty)</th>
<th>Other Sanctions upon Criminal Conviction</th>
<th>Confiscation</th>
<th>Sanctions for other economic crimes</th>
</tr>
</thead>
</table>
| **Sweden** **115** | 2 years (non aggravated bribery)  
6 years (aggravated)  
NB: Imprisonment or fine | **NPs:** SEK 150 000 (EUR 15 941 (non aggravated))  
**NB:** Fine or imprisonment  
**LPs:** SEK 3 million (EUR 318 820) | Exclusion from public procurement | Bribes and proceeds (benefit derived from criminal conduct)  
Monetary equivalent possible | Not addressed in Phase 2 Report |
| **Switzerland** **116** | 5 years | None for NPs.  
**LPs:** CHF 5 million (EUR 3 208 810) | -- Expulsion for foreigners (NPs)  
-- Disqualification from a profession, industry or business (NPs)  
-- Exclusion from public procurement, export credit support, ODA and others (NPs and LPs) | Bribes and proceeds  
Mandatory  
Assets that are proceeds from a foreign bribery offence may also be confiscated  
Monetary equivalent possible | Not addressed in Phase 2 Report |
| **United Kingdom** | 6 months (summary)  
7 years (indictment) | GBP 5 000 (EUR 7 265) (summary)  
No upper limit (indictment) | -- Disqualification of directors from certain functions (NPs)  
-- Not directly on foreign bribery offence conviction for LPs | Bribes and proceeds (benefit derived from criminal conduct)  
Monetary equivalent possible | Not addressed in Phase 2 Report |

115 One conviction in a case of bribery of a foreign public official, in the “World Bank” case: two natural persons have been sentenced by the first instance court to 18 months and one year imprisonment. At the time of the Phase 2 Examination of Sweden, appeals were underway: the prosecution appealed the dismissal of certain charges, and the defendants cross-appealed their convictions. Later the sentences were confirmed by a Court of Appeal. A number of proceedings concerning possible instances of foreign bribery were also underway at the time of the Phase 2 Review.

116 In the one Swiss foreign bribery trial (petty bribery of an Italian customs officials for a passport stamp), the sentence was a 30-day suspended prison term + expulsion from Switzerland for three years.
<table>
<thead>
<tr>
<th>United States ¹¹⁷ ¹¹⁸</th>
<th><strong>Prison</strong> (maximum penalty)</th>
<th><strong>Fines for natural persons (NPs) and legal persons (LPs)</strong> (maximum penalty)</th>
<th><strong>Other Sanctions upon Criminal Conviction</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 years (Since corrected to 15 years)</td>
<td>NPs: Up to USD 100 000 (EUR 84 441) LPs: Up to USD 2 million (EUR 1 688 818) Actual fine may be up to twice the benefit sought by defendant by making corrupt payment (NPs and LPs) (Fines may not be paid by employer or principal for NPs)</td>
<td>-- Civil penalties up to USD 10 000 (for NPs as well as LPs) -- In a SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation, ranging from USD 5 000 to USD 100 000 for a NP and 50 000 to 500 000 for any other person Violation of FCPA by NP or LP may result in: -- Debarment from US government procurement and non-procurement activities (Note: (i) debarment or suspension by one government agency has government-wide effect; and</td>
<td>Bribe Not proceeds ¹¹⁹</td>
</tr>
</tbody>
</table>

¹¹⁷ Statistics from 1977 to 2001 indicate that fines imposed on natural persons have ranged from USD 2 500 to 309 000 (EUR 202 1 to 250 000), and only four prison sentences ranging from four to 84 months.

¹¹⁸ Further information provided in the Phase 2 Oral and Written Follow-up Report indicates that 12 cases have been prosecuted under the FCPA since the Phase 2 Report. Statistics on the amount of fines imposed were only provided in aggregate form for the totality of the cases, with no breakdown for each case or individual sanctioned.

¹¹⁹ The United States contends that the possibility to impose a fine equivalent to twice the gain amounts to confiscation. The Working Group did not fully accept this approach.
<table>
<thead>
<tr>
<th>Prison (maximum penalty)</th>
<th>Fines for natural persons (NPs) and legal persons (LPs)* (maximum penalty)</th>
<th>Other Sanctions upon Criminal Conviction***</th>
<th>Confiscation</th>
<th>Sanctions for other economic crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ii) indictment alone can lead to suspension of right to contract business with government.) -- In addition, NP or LP may be ruled ineligible to receive export licenses. --The Attorney-General or SEC, as appropriate, may bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the anti-bribery provisions.</td>
<td></td>
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