The attached document reproduces the comments received from Lead Examiners and the comments made by the country reviewed on the draft report.

This document is for information of Working Group delegates as background to the discussion of agenda item 4.

The draft report for Denmark has been issued under the reference number DAFFE/IME/BR(2000)25.

Workng Group on Bribery in International Business Transactions (CIME)


DENMARK

COMMENTS BY LEAD EXAMINERS AND COUNTRY REVIEWED
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I. COMMENTS BY LEAD EXAMINERS

AUSTRALIA

The Danish legislation addresses most matters required by the OECD Convention on Combating Bribery of Foreign Public Officials. While Denmark is to be congratulated on much of the detail of the legislation, Australia is deeply concerned about the approach taken in relation to corporate criminal responsibility where it appears the limitation period is 2 years. Australia is also concerned about the weak penalties.

We have read the Swedish evaluation comments and agree with the matters about which they have sought further clarification. The only difference is that Australia has some sympathy with what appears to be the Danish view about the interaction of its law and countries which provide for a ‘facilitation payments’ exemption (discussed under item 1.1.4, page 3, of the draft review).

A far more important issue is the approach taken with legal persons/corporate criminal responsibility and the low penalties which differentiate between the givers and receivers of bribes.

Limitation period

We are puzzled as to why corporations are treated more leniently than individual bribers. The statute of limitations restriction on individuals is unrealistically short, but if we are correct about the position with corporations, the proposed limit is unacceptable and would appear to be contrary to Article 6. The limitation seriously undermines the good work completed by Denmark in relation to other aspects of the package. In Australia and many other countries, corporations and individuals are not given the benefit of any statute of limitations in relation to offences of this nature. At the very least Denmark should make it longer, at least 10 years, but our preference is that the limitation should be eliminated all together. In reality this deficiency also means that Article 3 is not met because by the time many bribery scandals become apparent the statute of limitations will no longer apply. The shortness of the period means there is no “effective, proportionate and dissuasive criminal penalty”. By its very nature corruption is a crime which often takes many years to come to the attention of authorities. Further, it often involves complex and long investigations. Each of these factors make the 2 year limitation period completely unrealistic.

1. These comments are reproduced as they were received by the Secretariat.
**Penalties**

We consider the penalty for bribery should be a maximum 10 years imprisonment and that there is no basis for distinguishing between the givers and receivers of bribes. Culpability depends very much on the circumstances of the particular case - not these broad categories. The damage caused by corruption is such that it warrants much higher penalties.

Yours sincerely

Geoff McDonald  
Assistant Secretary  
Criminal Law Branch  
Telephone: (02) 6250-6395  
Facsimile: (02) 6250-5918  
Email: geoff.a.mcdonald@ag.gov.au

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**SWEDEN**

**General Remarks**

Denmark has in an elegant and appropriate way implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The overall view of the Danish implementation is positive, but on some points there is a need for clarification. I will come back to these questions below.

Before I comment on the substantial questions, I would like to thank the Secretariat for an excellent work based on the extensive and thorough Danish reply to the questionnaire. Furthermore, I would like to express my gratitude to the representatives of Denmark.

**Comments and Questions**

1.1.2. To evaluate the Danish compliance with the requirements of the Convention, it would be most helpful if Denmark further described its concept of intent.

1.1.4. Article 1 paragraph 1 of the Convention contains an obligation to establish criminal liability for any person to offer, promise or give *any undue pecuniary or other advantage*. The Danish legislation criminalizes “a gift or other privilege”. I share the concerns expressed by the Secretariat on the interpretation of the term “privilege”. Further clarification is needed.

The obligation under the Convention is qualified by the term “undue” advantage. The Danish legislation only applies if the grant, promise or offer of a gift or other privilege is “unlawful”. To my preliminary opinion this qualifier deviate from the requirement of the Convention. The qualifier seems to limit the scope of application. It will be most helpful if the Danish authorities can provide further material on the
interpretation of the term “unlawful”. The Danish authorities stated in their reply to the questionnaire that the grant of a gift as a reward for an act already carried out without any advance promise to do so is not regarded as unlawful. This statement gives rise to some concern on my behalf. The organized use of granting gifts and other privileges for acts already carried out can create an expectation on behalf of a foreign public official with the same consequences as an promise in advance. This interpretation can limit the scope of application in a significant way. Please, provide further information.

1.1.5. The Convention contains a clear obligation to criminalize both direct actions and actions through intermediaries. I share the Danish view that this obligation is met through the general rules on complicity but nevertheless it had been clearer if this had been stated in the provision on active bribery. The issue would benefit from further evaluation during phase 2 of the evaluation process.

1.1.7. The Convention covers undue advantages for the official or for a third party. As the Secretariat has pointed out section 122 of the Danish Criminal Code only covers bribes to a public official. I do not question the Danish statement that the Criminal Code also covers advantages to third persons, but in my view the Danish legislation is not sufficient clear in that regard. The Danish legislation would benefit from an explicit coverage of advantages to third persons.

2. Please, explain how the rules on jurisdiction are applied concerning responsibility of legal persons. Does the Danish legislation require jurisdiction over the natural person to be able to prosecute the legal person ?

3.1. The bribe of a domestic or foreign public official is punishable by imprisonment for at most three years. Concerns can be raised that this sanction is comparatively weak, at least with regard to cases of aggravated bribery. The question if the sanction is effective, proportionate, and dissuasive can benefit from a horisontal analysis.

3.3. For the purposes of providing mutual legal assistance, Denmark has stated that there is no requirement that a specific minimum sentence be imposed for the offence in question. Does this apply also when the mutual legal assistance involves coercive measures ?

3.6. According to the Convention each Party shall take the necessary measures to provide that the bribe and the proceeds of the bribery are subject to confiscation or comparable monetary sanctions. Section 75 of the Danish Penal Code only provides that the proceeds gained from a criminal act may be confiscated. The Danish legislation seems to give wide discretionary powers to the courts and a wide scope for non-forfeiture. Please, provide further information on how the provisions on confiscation are applied. Furthermore, it would be interesting to know if the provisions on forfeiture are applicable if the bribe still is in the briber’s possession and if so on what conditions.

4.4. The Danish legislation includes both territorial and nationality jurisdiction. It fulfills the requirements of Article 4 paragraph 2 of the Convention. However, with regard to the issue of nationality jurisdiction, it shall be noted that, if the offence has been committed in the territory of a foreign state, Danish law would only apply provided that the offence is punishable also under the law of the place of the commission. In light of the requirements of Article 4 paragraph 4 of the Convention, this issue should be reviewed in phase 2 of the evaluation process.

6. According to article 6 of the Convention any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of the offence. It seems as if the statute of limitations is two years if the prosecution concerns responsibility of legal persons. Please, can the Danish authorities confirm if so is the case.
8.3. The Danish legislation provides criminal penalties for violations of accounting rules. The penalties seems comparatively weak. Could the Danish authorities comment on the issue if the prescribed sanctions are effective, proportionate and dissuasive.
II. COMMENTS BY COUNTRY EXAMINED

Denmark’s response to


(2) Comments and questions by lead examiner (6 November 2000)

[Note: Excerpts from the OECD documents (the questions) are italicised. The Danish responses are in regular typeface]


A. IMPLEMENTATION OF THE CONVENTION

What legal effect has the Convention under the Danish legislation?

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

2. These comments are reproduced as they were received by the Secretariat.
1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

1.1 The Elements of the Offence

1.1.1 any person

*Could the Danish authorities provide some supporting case law [showing that section 122 covers any person irrespective of nationality]*?

Until 1 May 2000 section 122 of the Danish Criminal Code only covered persons who exercised Danish public office of function. It was, however, not a requirement that the person was a Danish national. There is, however, no published case law on this issue.

Since 1 May 2000 the provision applies whether the office or function is Danish, foreign or international. The new provision has only been in force for a very short period of time and the Ministry of Justice is not aware of any prosecution initiated – or case decided – with reference to the amended provision.

As for the rules on Danish criminal jurisdiction, please refer to paragraph 4 of the Danish response to the questionnaire.

1.1.2 intentionally

1.1.3 to offer, promise or give

*Can the Danish authorities confirm that they consider the terms “grant” and “give” to have the same meaning?*

Yes, the term “grant” (yde) and “give” (give) have the same meaning within the context of section 122.

1.1.4 any undue pecuniary or other advantage

*What does the term “privilege” mean?*

The use of the term “privilege” in the (privately published) English translation of section 122 is perhaps an inaccuracy. The Danish term is “fordel” which is actually best translated to “advantage”.

*It is not clear what the term “unlawful” implies in the context of bribery of foreign public officials. Can the Danish authorities confirm that they consider the offering, promising or giving of a gift or other privilege for the purpose of bribery of a foreign public official as unlawful? In particular, could one not regard the granting of a gift (e.g. for an anniversary) for an act already carried out as an implicit bribe for possible future acts of the foreign public official?*

As it appears from the comments on section 1(iii) of the bill amending section 122 of the Criminal Code (Annex 4 to the Danish response to the questionnaire, page 6),

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

The word “unlawful” refers to the general principle of “material atypicality” (materiel atypicitet) in Danish criminal law. This ground of impunity is based on the fact, that sometimes an act or omission is covered by the wording of a statute but not by the reasons for criminalizing such acts in general.

As the travaux préparatoires of section 122 shows this reservation is more narrow in scope than the previous requirement that the gift or the privilege must have been granted, promised or offered to make the public official commit a breach of duty, cf. paragraph 1.1.8. below.

The exemption from the scope of section 122 of gifts (e.g. for an anniversary) only covers “ordinary” (small) gifts, i.e. gifts of an inferior nature which do not involve a risk of affecting the performance of the official duties of the public official. If the gift is an implicit bribe for possible future acts of the foreign public official it is unlawful.

Would an offence be committed whether or not the company concerned was the best-qualified bidder or was otherwise a company which could properly have been awarded the business (Commentary 4)?

Yes.

Commentary 7 of the Convention prohibits the taking into account of “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.” If the assessment of what is "unlawful" must take account of a country’s “situation”, is this not contrary to Commentary 7?

In our opinion Commentary 7 should be read in connection with Commentary 9 on “small facilitation payments”, which “in some countries” (quote) are made to induce public officials to perform their functions. It is for this reason that the Danish travaux préparatoires mentions the need to take account of a country’s “situation” (Annex 4 to the Danish response to the questionnaire, page 7 and 9). Small facilitation payments do not – and should not – fall outside the scope of section 122 irrespective of local custom.

It should be noted that the European Criminal Law Convention on Corruption does not exempt small facilitation payments from criminal responsibility and that section 122 also implements this convention.

It should further be noted that the example given (Annex 4, page 9) concerns obtaining the right to visit a prisoner, i.e. an example falling outside the scope of the OECD Convention.

Please also refer to the Minister for Justice’s reply of 4 February 2000 to question no. 11 from the Legal Affairs Committee of the Danish Parliament (Annex 4, page 12):

“… it should be emphasised that the grant of gifts, etc., to public officials to induce them to do or fail to do anything in relation to their official duties will, as a main rule, constitute criminal bribery. Thus in accordance with the underlying conventions, the reservation concerning “unlawful” must be interpreted narrowly.”

What is the situation with regard to advantages permitted or required by written law of the foreign public official’s country, including case law (Commentary 8)?
Such gifts, etc. would most likely not be considered “unlawful” within the context of section 122.

This response seems to imply that if the act occurs abroad, such payments are considered “facilitation payments” and thus excluded in accordance with Commentary 9 of the Convention; however if the act occurs in Denmark the payment would not be considered a "facilitation payment" but would be covered by Section 122. Please comment. Furthermore, how is it determined whether a particular gift falls outside the criminal area in a particular country?

Please refer to the reply above concerning Commentary 7.

As stated in the Danish travaux preparatoires (Annex 4, page 7), the assessment of whether a particular gift falls outside the criminal area will depend on a concrete assessment in each case.

Could the Danish authorities comment [on how the courts will interpret the term “unlawful”]?  

As stated above, the term “unlawful” refers to the general principle of “material atypicality” (materiel atypicitet) in Danish criminal law.

With respect to some crimes the possibility of material atypicality is expressed by wordings as for example “unlawful” or “wrongful” as a supplementary condition to the actus reus. The use of such words in the statute, however, is not a necessity for acquitting the defendant because of material atypicality.

Consequently, Danish courts are well accustomed with applying this principle of material atypicality – without a more detailed delineation of the law – based on the general purpose of the statute and the reasons for criminalizing such acts in general.

It should be stressed that the reservation concerning “unlawful” is intended to be interpreted narrowly and that example given in the travaux preparatoire falls outside the scope of the OECD Convention, cf. the reply above concerning Commentary 7.

1.1.5 whether directly or through intermediaries

What is the criminal liability of the person who bribes through intermediaries? What is the legal situation if the foreign public official is not aware of the fact that the intermediary acts for the briber?

It constitutes criminal bribery if a person bribes an official through an intermediary.

Danish criminal law does not make specific distinctions between principals, participators and other parties to the crime. Once a crime has been committed all the involved persons are liable to punishment regardless of how close their participation was to the actus reus, as long as their acts (or omissions) fall within the wording of section 23, whose primary scope is to “widen” the range of all criminal offences so that they include not only the person actually accomplishing or attempting to accomplish the described act but everyone who has been involved in the criminal transaction.

Neither section 122 nor section 23 require that the foreign public official is aware of the fact the intermediary acts for the (principal) briber.
1.1.6 to a foreign public official

Is there case law concerning the definition of the terms “public office” and “public function”? How does Danish law define the terms “public agency” and “public undertaking”? Would state enterprises be covered?

The definition of the terms “public office” and “public function” are described in detail in the Danish response to the questionnaire, paragraph 1.1.6. These terms – which are found in several provisions in the Danish Criminal Code – have not given rise to case law within the context of section 122.

The term “public agency” includes any central or local government administration entity. The term “public undertaking” includes state enterprises and other publicly owned entities.

Can the Danish authorities provide supporting legal material [with regard to the non-importance of the specific nature of employment or function in the definition of “public office”]? Can the Danish authorities confirm that the term “public office” includes “all levels and subdivisions of government, from national to local”?

The definition of the term “public office” given in the Danish response to the questionnaire is the definition generally applied in Danish law and it is referred to in the general comments to the bill amending section 122 of the Criminal Code.

The term “public office” includes all levels and subdivisions of government, from national to local. It is a translation error, when the Danish response to the questionnaire refers only to employment with the central administration; the public administration in general is covered.

Could the Danish authorities provide any supporting legal material [with regard to the definition of “public office”]? Would members of local, regional, foreign and supranational Parliaments be covered?

The definition of the term “public function” given in the Danish response to the questionnaire is the definition generally applied in Danish law and it is referred to in the general comments to the bill amending section 122 of the Criminal Code.

The term includes members of local, regional, foreign and supranational Parliaments.

1.1.7 for that official or for a third party

Could the Danish authorities please provide supporting case law [with regard to the non-importance of whether the advantage is to benefit others than the public official]? Would the case be covered where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to the third party?

The interpretation of section 122 given in the Danish response to the questionnaire is the interpretation generally given in Danish criminal law and it is referred to in the general comments to the bill amending section 122 of the Criminal Code.
Section 122 consequently covers cases where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to the third party.

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

Could the Danish authorities provide any supporting legal material for these statements [that this requirement is not part of the actus reus of section 122]?

The statements in the Danish response to the questionnaire reflects the stipulations of the actus reus given in the general and specific comments to the bill amending section 122 of the criminal code, cf. paragraph 1.1.4. above.

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

1.2 Complicity

Can the Danish authorities confirm that any form of complicity, including incitement, aiding and abetting or authorisation, would be covered?

Yes.

It would appear that this provision [section 23, paragraph 3] is not applicable in the case of bribery of foreign public officials. Could the Danish authorities confirm?

Yes.

1.3 Attempt and Conspiracy

Would the Danish authorities consider the bribery of a foreign public official as an attempt or an accomplished offence if the foreign public official does not receive the bribe?

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

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

2.1 Criminal Responsibility

What is the relationship between section 306, paragraph 1 and 2, as far as sanctions for bribery of foreign public officials are concerned? Could the Danish authorities give an example under what circumstances paragraphs 1 and 2 would apply respectively?

Section 306, paragraph 1, imposes criminal responsibility on legal persons for violations of section 122 (active bribery), section 289 a (EU-fraud) and section 299, paragraph 2, second indent (active bribery in the private sector).

Section 306, paragraph 2, imposes criminal responsibility on legal persons for violations of section 284 (money laundering) with respect to proceeds from the following predicate offences: section 122 (active bribery), section 289 a (EU-fraud) and section 299, paragraph 2, second indent (active bribery in the private sector).
bribery), section 144 (passive bribery), section 289 a (EU-fraud) and section 299, paragraph 2, second indent (active bribery in the private sector) – provided the violations have been committed to secure the legal person a share in a gain acquired by violations of the said predicate offences.

With respect to active bribery, section 306, paragraph 1, consequently covers cases, where an employee, etc., of the legal person commits the bribery offence. Paragraph 2 covers cases, where the employee is not involved in the commission of the bribery offence itself, but only in the subsequent money laundering of the proceeds of the crime. The proceeds from active bribery includes, e.g., the advantage obtained as a consequence of the bribe. It is recognised in the comments to the bill amending the Criminal Code that it can be difficult to identify the proceeds from active bribery. It is, however, necessary to criminalize such money laundering to fulfil the obligations under the Second Protocol to the EU Fraud Convention.

Are state enterprises covered by [section 26,] paragraph 1? Could the Danish authorities provide an example of the application of [section 26,] paragraph 2?

State enterprises are covered by section 26, paragraph 1, to the extent they perform functions comparable to functions exercised by natural or legal persons (i.e. crimes committed outside the exercise of public authority).

Section 26, paragraph 2, covers one-person businesses which, considering their size and organisation, are comparable to joint-stock companies, etc. In the comments to the bill, which introduced section 25-27 into the Criminal Code, it is stipulated that the provision only covers individually owned businesses with 10-20 employees or more.

Does this imply that, in principle, the committing of bribery by any employee of the company can give rise to the responsibility of the legal person? Is it necessary to identify the natural person who committed the offence? Is prior conviction of the employee a pre-condition for the responsibility of the legal person?

The commission of bribery of any employee – irrespective of the charge of the employee – can give rise to the responsibility of the legal person, provided the crime is committed “within the establishment” of the legal person, i.e. in the exercise of the employees function within the company, etc. The legal person may be held responsible even if the employee acted in conflict with explicit instructions from the management, but totally abnormal actions exempts the legal person from responsibility.

Since section 306 covers crimes that are only punishable when committed intentionally, only cases where one or more (identified) natural persons within the company, etc., intentionally have committed bribery – or money laundering of the proceeds from bribery – can give rise to criminal responsibility of the legal person. A prior conviction of the natural person(s) is, however, not necessary, but during the trial of the legal person, it must be proved that the natural person(s) within the company intentionally committed the crimes.

Could the Danish authorities comment [on defences to criminal responsibility of legal person]?

Supervision mechanisms to prevent bribery are not a defence available under Danish criminal law, cf. the reply above on bribery committed in conflict with explicit instructions from the management. Apart from totally abnormal actions and private actions of employees, the legal person is responsible for intentional activities of one or more natural persons connected to the legal person.

Could the Danish authorities provide supporting legal material [on the non-preclusion of personal responsibility]?
Criminal responsibility which is imposed upon or which may be imposed upon a legal person does not exclude the possibility of also imposing criminal responsibility under general rules on natural persons. The president of a joint-stock company may, for instance, be subject to independent responsibility or responsibility for aiding and abetting, even if the company as such is subject to criminal responsibility which is or which may have been invoked. In general the prosecution applies its “principle of choice” for not indicting inferior employees who have been engaged in only minor, negligent offences. As intentional activities are involved with respect to bribery, it is presumed that the relevant individuals are also held criminally responsible irrespective of charge.

This is the interpretation generally given in Danish criminal law and it is explicitly referred to in the general comments to the bill introducing section 306 into the Criminal Code.

2.2 Non-Criminal Responsibility

Is there any non-criminal responsibility of legal persons concerning bribery of foreign public officials?

No.

3. ARTICLE 3. SANCTIONS

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

What is the difference between detention and imprisonment? What are the sanctions for comparable offences like theft, fraud and embezzlement? Can a fine be imposed in addition to imprisonment? Are there guidelines for determining whether a fine, detention, or imprisonment will be imposed? What is the possible range of fines? What is meant by “other fines” in section 51, paragraph 3, of the Criminal Code?

Simple detention – which will be abolished from 1 July 2001 – was originally a more lenient form of imprisonment and considered less stigmatising. There is no longer any significant difference between simple detention and ordinary imprisonment, which is why simple detention will be abolished.

Fine can be imposed in addition to imprisonment where the perpetrator obtained or intended to obtain, through his offence, gain for himself or another, cf. section 50, paragraph 2, of the Criminal Code.

There are no sentencing guidelines with respect to bribery.

Fines for violations of the Criminal Code may range from 1 day-fine of 2 DKK to 60 day-fines of an indefinite amount, cf. section 51, paragraph 1, of the Criminal Code. The main principle of the day-fine system is that the number of day-fines reflects the seriousness of the offences while the size of a single day-fine is set according to the economic situation of the perpetrator.

Pursuant to section 51, paragraph 2, the court may impose a fine other than in the form of day fines (i.e. a fixed-sum fine) where the application of day-fines would result in the penalty being fixed at a lower amount than is considered reasonable, and the perpetrator obtained or intended to obtain a considerable economic gain for himself or another person. There is no maximum limit for fixed-sum fines.

What is the possible range of fines? What has been the average fine imposed on legal persons in domestic bribery cases?

As for the possible range of fines, see above. Section 306 has only been in force since 1 May 2000. The Ministry of Justice is not aware of any prosecution initiated – or case decided – with reference to sections 306 and 122.
3.3 Penalties and Mutual Legal Assistance

What is the legal basis for this [statement that there is no requirement that a specific minimum sentence be imposed for the offence in question]?

As stated in the Danish response to the questionnaire there is no requirement of a specific minimum sentence for the Danish authorities to be able to fulfil a request for mutual legal assistance. The only requirement is that the request (i.e. the investigative measure) could be carried out in corresponding (national) Danish criminal proceedings. The provisions in the Administration of Justice Act (AJA) on coercive investigative measures are thus – according to case law – applied by analogy to requests for mutual legal assistance.

For certain coercive investigative measure the AJA require – both for national criminal proceedings and (by analogy) for requests for mutual legal assistance – that the crime under investigation carry a maximum sentence of either 1½ years or more (e.g. inspection of the body) or 6 years or more (e.g. tapping of telephone conversations).

3.4 Penalties and Extradition

3.5 Non-criminal sanctions applicable to legal persons for bribery of foreign public officials

Can the Danish authorities confirm that there are no non-criminal (administrative, civil) sanctions for legal persons (e.g. exclusion from public procurement procedures)?

As explained in paragraph A.3.7. in the Danish response to the questionnaire it is possible to impose civil liability in damages under the general rules on civil law to that effect. Beyond this, Danish law provides no possibility of imposing civil or administrative sanctions.

With respect to public procurement procedures, please refer to paragraph B.5. in the Danish response to the questionnaire and paragraph 3.7./3.8. below.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Could the Danish authorities explain the meaning of the reference to paragraph 2 in subsection (ii) [of section 802, paragraph 1.] above?

The reference in the English translation of section 802 (in Annex 2) reads: “but cf. subsection (2) below” (and not “see paragraph 2” as stated in the question). Nevertheless, perhaps the following translation would give better guidance: “except in instances covered by paragraph 2”. Paragraph 1 consequently covers confiscation and forfeiture pursuant to other provisions than the provisions listed in paragraph 2. Paragraph 1 covers confiscation of objects used in or produced by a criminal act or (the actual) proceeds gained from a criminal act whereas paragraph 2 covers confiscation of a sum equivalent to the value of the proceeds.

Is there a difference between the terms “object” and “goods” and please define each of them?

The term “object” refers to individualised objects or assets (including the actual proceeds from a criminal act) covered by paragraph 1. “Objects” need not be of economic value.
The term “goods” refers to any property suitable of serving as security for the claims mentioned in paragraph 2.

Is confiscation mandatory? Must the acquirer have known (or have been grossly negligent) that the proceeds were gained from bribery? Can the bribe be the object of seizure and confiscation? Can the Danish authorities confirm that procedures are the same for the offence of bribery of domestic and foreign public officials?

Under Danish criminal law confiscation is not a mandatory measure. It is left with the courts to decide – based on an assessment of the individual case – if, and to what extent, confiscation should be imposed.

Confiscation from a subsequent acquirer of the proceeds or of objects, cf. section 76, paragraph 4, of the Criminal Code, can only be imposed, if the acquirer “knew of the connection of the transferred property to the criminal act, or has displayed gross negligence in this respect”. The acquirer must consequently have knowledge of (or have been grossly negligent with respect to) the criminal act with which the transferred property is connected but not necessarily with the legal qualification of this act (as bribery).

The bribe itself can be subject to seizure and confiscation as proceeds of passive bribery (section 144).

The procedures are the same for the offence of bribery of domestic and foreign public officials.

What are these special circumstances [mentioned in section 75, paragraph 2]? How does this provision relate to the requirements of the Convention?

The objects referred to in section 75, paragraph 2, are the tools, products (not the proceeds which are covered by paragraph 1) and corpus delicti of the crime. It is not likely that this provision will be relevant in bribery cases.

3.7/3.8 Civil Penalties and Administrative Sanctions

Do these [EU public procurement] directives provide for the exclusion from public procurement procedures in cases of bribery of foreign public officials?

The existing public procurement directives do not contain specific provisions for the exclusion of participants from public procurement procedures in cases of bribery of foreign public officials.

The directives, however, provide that contracting authorities may exclude participants who have been convicted by final judgement of any offence concerning their professional conduct.

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

In addition, it should be noted that the European Commission has presented proposals for new public procurement directives. The proposals provide for the mandatory exclusion of participants from public procurement procedures who have been convicted “of corruption, that is to say, of having promised, offered or given, whether directly or via third parties, a benefit of whatever kind to a civil servant or public agent of a Member State, a third country or an international organisation or to any person for the benefit of that person or a third party, with the intention that such person will carry out or refrain from carrying out any act in breach of his professional obligations”.

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The proposals are currently being negotiated within the EU and as of yet it is doubtful whether a provision corresponding the above mentioned text will be adopted.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Would a telephone call, fax, etc. be sufficient to establish territorial jurisdiction?

As stated in the Danish response the questionnaire also cases where only part of the activity was carried out in Denmark are subject to Danish criminal jurisdiction under section 6(i) of the Criminal Code on crimes committed within the territory of the Danish state.

In a judgement from the Eastern High Court of 5 October 1989 this provision was applied in a case of drug smuggling where drugs were received in Germany for the purpose of distribution in Germany and the Netherlands. Due to passport problems the defendant had arranged contacts, meeting times and meeting places for the persons involved by telephone from Denmark.

4.2 Nationality and other Extraterritorial Jurisdiction

**Jurisdiction over Nationals**

Could the Danish authorities confirm that section 7, paragraph 1 (a) applies to the offence of bribery of a foreign public official?

Yes.

**Jurisdiction over Non-Nationals**

Do the Danish authorities consider that the OECD Convention is one of the conventions to which section 8, paragraph (v) would apply? Would section 8, paragraph (v) apply to the case of a non-Danish person working for a Danish company who bribes a foreign public official abroad?

Section 8, paragraph (v), may serve as basis for jurisdiction in cases where Denmark is under an international law obligation to have Danish criminal jurisdiction, and where such jurisdiction is not available under section 6, 7 and 8 (i)-(iv).

Article 4 of the OECD Convention requires each Party to establish jurisdiction with respect to acts of bribery committed in whole or in part in its territory and to its nationals for offences committed abroad. Such jurisdiction is already available under section 6(i) and section 7(1). It is consequently not necessary to invoke section 8(v).

4.3 Consultation Procedures

Do these rules also apply in case that a request for transfer of proceedings is made by another country?

Yes.

4.4 Review of Current Basis for Jurisdiction
5. ARTICLE 5. ENFORCEMENT

5.1 Rules and Principles regarding Investigations and Prosecutions

*Can the police initiate an investigation on information provided by a victim, a competitor, others?*

Yes, the police can investigate based on information from any person (natural or legal) or on its own initiative.

*Can the Danish authorities confirm that the principle of mandatory prosecution/enforcement applies? Are there exceptions? Are prosecutors involved in the investigation itself? How do they obtain information on the results of the investigation? According to section 718, also a private party is entitled to prosecute. What is the procedure for transferring the results of the investigation to a private party for purposes of prosecution? Could the Danish authorities provide further explanations?*

Danish criminal procedure is based on the principle of opportunity – not of mandatory prosecution. However, prosecutors virtually always take action when so warranted by the evidence. The broad English maxim about prosecution only when demanded by the public interest is not recognised in Denmark.

As stated in the Danish response to the questionnaire the police may terminate the investigation if, for example, the case is deemed not to involve an offence liable to public prosecution or it is deemed impossible to find the offender. If a charge has been preferred in the case, the charge can only be withdrawn pursuant to the provision in section 721 of the Administration of Justice Act (AJA).

With respect to prosecutors’ involvement in the investigation, it should be noted that the police is amalgamated with the prosecution service on the local level. Close co-operation is thus readily possible. A national Serious Fraud Office – lead by a senior prosecutor – handles investigation and prosecution of the most serious and complicated economic crimes. The main characteristic of the Serious Fraud Office is the intimate co-operation between the legal staff and detectives during the investigation stage, whereas the legally trained prosecutors with the local prosecution (generally) do not interfere with the investigation but supervise the legality of the investigative measures taken and concentrate their work on the indictment and trial.

The reference in section 718 of the AJA to private prosecution only refers to (the few) criminal offences subject to private prosecution (e.g. libel and slander and violations of privacy). Private prosecution is not available in bribery cases.

*Do the Danish authorities consider that section 721, paragraph 1, could apply in cases of bribery of foreign public officials?*

Yes.

*What situation is covered by section 975?*

Section 975 (translated in Annex 3) stipulates the requirements for reopening a criminal investigation and prosecution after a two month period following a withdrawal of charges.

*Can a victim (i.e. a competitor) appeal against a decision not to prosecute?*
The right to appeal rests with persons who are party to the case, i.e. persons individually and substantially affected by the decision of the prosecution service. It is not possible to state with certainty, whether a competitor in a bribery case would always be considered individually and substantially affected by a decision not to prosecute. However, nothing prevents the superior prosecution service from evaluating such a decision on its own motion after being approached by a non-party.

5.2 Considerations such as National Economic Interest

Is it nevertheless necessary to obtain the permission of the Minister of Justice before proceeding with a prosecution? Can the Danish authorities confirm that investigation and/or prosecution of the bribery of a foreign public official must not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved?

It is not necessary to obtain the permission of the Minister of Justice to prosecute a bribery case.

Generally, the Minister of Justice will not be involved in a decision whether or not to prosecute a bribery case under section 122 of the Criminal Code. Such a decision is made by the local prosecution service subject to appeal to the District Public Prosecutors. As stated in the Danish response to the questionnaire the Minister of Justice hears appeals concerning decisions made by the Director of Public Prosecution at first instance and cases where the Director of Public Prosecutions has been unable to hear an appeal because of earlier involvement in the case or a particular interest in the case.

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

6. ARTICLE 6. STATUTE OF LIMITATIONS

Under what circumstances and for how long can the statute of limitations be interrupted? What triggers the running of the statute of limitations? What is the reason that the statute of limitations is considerably shorter for legal persons than for natural persons? Do the Danish authorities consider a 2-year limitation for legal persons to be an "adequate" period within the meaning of Article 6 of the Convention?

Triggering and suspension of the statute of limitations is regulated in section 94 of the Criminal Code:

"Section 94.
(1) The period of limitation shall calculated from the day when the punishable act or omission ceased.
(2) When liability depends on or is influenced by a consequence that has taken place or any other later event, the period shall be calculated from the occurrence of such consequence or later event.
(3) Where the act was committed on board a Danish vessel outside the territory of the Danish state, the period shall be calculated from the day when the vessel enters a Danish harbour. However, the commencement of the period of limitation may not be postponed under this provision for more than one year.
(4) For breach of section 210, 216-220, 222 and 223 the period of limitation shall not be calculated from an earlier time than when the victim attained the age of 18. The same applies to breach of section 224 and 224, cf. section 210, 216-220, 222 and 223."
The period of limitation shall be suspended by any legal proceedings whereby the person concerned is charged with the offence. In cases, which under the Administration of Justice Act, may be settled by acceptance of a fine issued by the police, the period of limitation shall be suspended when the offender is informed of the ticket. In other cases where punishment for an offence may be imposed by an administrative authority, the limitation period shall be interrupted when the person concerned is informed that he is charged with the offence. In case the period of limitation is suspended in relation to any natural person who has acted on behalf of a legal person, the period of limitation is also suspended in relation to that legal person. However, suspension in relation to a legal person has no bearing on the period of limitation applicable to natural persons who have acted on behalf of that person.

Where prosecution is withdrawn without any decision to the contrary having been made by the responsible prosecuting authority within the statutory time for making such a decision, the period of limitation shall run as if no prosecution has been instituted. This shall also apply where the prosecution is suspended indefinitely. If the suspension is due to the fact that the accused has evaded prosecution, this time shall not be included in the calculation of the period of limitation.

As explained in the Danish response to the questionnaire the period of limitation depends on the maximum penalty for the offence in question. Since, in relation to legal persons, the only penalty available is a fine, the period of limitation in relation to legal persons is two years.

When formulating the present rules on criminal responsibility of legal persons the Standing Committee on Criminal Law considered whether to propose longer periods of limitation for legal persons (report no. 1289/1995, p. 190-191). It was, however, the conclusion of the Committee that practical experiences had shown no need for a longer general period of limitation for legal persons.

7. ARTICLE 7. MONEY LAUNDERING

Does this provision [section 284 of the Criminal Code] apply to the money laundering itself (i.e. concealing, etc. the proceeds in order to avoid prosecution)?

Section 284 applies to concealment of the proceeds of the specified predicate offences for the purpose of securing the gain acquired (and not for the purpose of avoiding prosecution—although the effect may be the same).

Would the laundering of the bribe and the proceeds be covered in respect of active bribery of a foreign public official? What does the term “article” mean?

Laundering of the proceeds is covered in respect of active bribery. Laundering of the bribe is covered in respect of passive bribery.

The use of the term “articles” in the (privately published) English translation of section 284 is perhaps an inaccuracy. A better term would be “profits” or “gain”.

Must the launderer be aware that the money comes from bribery? What sanction applies with regard to section 284 of the Criminal Code? Is it correct that section 284 does not apply if the bribe is still in the hands of the briber?
The launderer can be sentenced for (accomplished) breach of section 284 even if he – mistakenly – assumes the proceeds comes from another offence than the actual predicate offence as long as both the actual and assumed predicate offence is covered by section 284. Criminal responsibility for attempted money laundering is an option where the defendant intended to commit money laundering with respect to bribery, but the predicate offence cannot be proven.

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

The money laundering offence (section 284) is not applicable with respect to passive bribery (section 144) if the bribe is still in the hands of the briber. With respect to active bribery (section 122) the proceeds subject to money laundering is not the bribe but, e.g., the advantage obtained as a consequence of the bribe. Such advantage may have been attained based only on a promise or offer of bribe.

8. ARTICLE 8. ACCOUNTING

8.1/8.2 Accounting Requirements/Companies Subject to Requirements

Please define more fully the undertakings subject to accounting requirements. What is a commercial activity? What is an industrial activity? Do undertakings include registered and non-registered companies? Must enterprises domiciled abroad have their main seat established in Denmark in order to be subject to the Bookkeeping Act or is it enough that the bulk of their activity be carried out in Denmark?

According to the Bookkeeping Act section 1 the Act applies to commercial and industrial undertakings of any kind established in Denmark regardless of ownership or nature of liability and to commercial and industrial activities carried out in Denmark by enterprises domiciled abroad.

In section 2 of the Bookkeeping Act it is laid down which undertakings are subject to accounting requirements. An undertaking conducts commercial or industrial activity if it contributes goods, rights, funds, services etc. for which it normally receives payment. Apart from this an undertaking conducts commercial or industrial activity if it applies to the Companies Act, the Act on Private Limited Companies, the Act on Commercial Foundations, the Act on Commercial Enterprises and furthermore according to other legislative regulation.

According to the above all known forms of undertakings are subject to accounting requirements whether they are registered or not. Enterprises domiciled abroad and thus do not have their main seat in Denmark are still within the scope of the Bookkeeping Act with regard to their activities in Denmark.

Could the Danish authorities briefly describe what would “good bookkeeping practices” consist of and provide the relevant legislation? What must be provided in the case where there is no external voucher to identify the trail?

Best bookkeeping practise is defined as a legal standard in line with other legal standards e.g. best auditors’ practise, best lawyers’ practise etc.

Best bookkeeping practise could also be described as the practise, which at any time is considered as good practise in the field of bookkeeping by skilled and responsible experts.
If a violation of the Bookkeeping Act or the rules concerning safekeeping of vouchers has taken place the auditor must mention this in his Report or qualify the Report as the case may be. Furthermore there is generally no tax-deductibility for expenses for which vouchers for some reason do not exist.

_Could the Danish authorities explain how the recording of purchases and sales is modified by e.g. the size, the nature, or the turnover, etc. of the enterprise and support the explanation with the relevant legislation?_

According to section 7 of the Bookkeeping Act all transactions must be recorded accurately having regard to the nature and scope of the undertaking. In this connection, transactions must be recorded as soon as possible after the occurrence of the matters on which the recordings are based. An undertaking, which, due to its nature and scope, cannot record purchases or sales, may instead make recordings on the basis of daily cash balances.

To the extent possible, the recordings shall be made in the order in which the transactions are made. The recordings shall refer to the associated vouchers and contain information that allows the individual recording to be chronologically placed in the bookkeeping.

According to chapter 5 in the Bookkeeping Guidelines a total of a number of similar transactions can be recorded instead of every single transaction if they refer to and can be documented by manually or electronically generated vouchers. This is the situation for e.g. retail businesses. Vouchers are not only paper based but the denomination: "voucher" signifies any documentation whether it is based on paper, film or electronically.

_8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements_

Please define what is meant by supplementary information. Please provide section 28 and 29 of the Criminal Code if relevant. What are the companies subject to auditing requirements? Are there internal auditors? If so, how are they chosen? What are their duties? Are there external auditors as well? If so are there any companies subject to both internal and external auditing?

Supplementary information is not new information but information on facts which is necessary for the recipient of the information to know

Supplementary information may be information on facts according to which the management of a company may be held responsible.

Part (not section) 28 and 29 of the Criminal Code contain the “acquisitive offences” (section 276-290, e.g. theft, embezzlement, fraud, blackmail and money laundering) and “other offences against property” (section 291-305, e.g. destruction of property, unlawful and bribery in the private sector).

All entities subject to the Annual Accounts Act, cf. section 1 and 1 a of this act and referred to in other acts, are subject to audit requirement. This appears implicitly from section 61 a and 61 g of the Annual Accounts Act.
Financial Services enterprises and groups above a certain size are subject to internal audit as well as external audit. The internal auditors are independent of the executive management per se as they are appointed and dismissed only by the board of directors.

The internal audit must take place according to the audit instructions approved by the board of directors and furthermore according to best auditing practice. The internal audit should to a certain extent be executed in cooperation with the external audit according to the audit instructions. The internal audit shall also be subject to the external audit.

8.3 Penalties

Would a violation of section 6 in relation to bribery of foreign public officials be sanctioned by Section 16 of the Bookkeeping Act or by Section 122 of the Criminal Code? What are the fines imposed for violation of any of the bookkeeping requirements? (please provide relevant legislation as well). Are the fines or any of the sections quoted in article 65 of the annual account act relevant to explain how Denmark prohibits the making of falsified or fraudulent accounts? What are the penalties for violation of the duties of the auditors?

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

There is no general limit to the fines, which will be decided by a court of justice.

It is the provisions laid down in the Bookkeeping Act alongside with the duties of the auditors that explain how Denmark in the Accounting area prohibits the making of falsified or fraudulent accounts.

According to the Order on Auditors’ Reports auditors shall be punished by a fine for violation of their duties.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

What legal source exists for this case law [on the conditions for granting a request for MLA]? Is there domestic legislation on MLA in cases that are not covered by the European Convention on Mutual Legal Assistance in Criminal Matters? Can the Danish authorities confirm that they consider multilateral treaties, such as the Convention, a sufficient legal basis for mutual legal assistance? Can they confirm that they grant mutual legal assistance in respect of all matters covered by the Convention - and not only with regard to a request for seizure of evidence? What type of assistance may be provided, and which requirements would apply to each of them?

As described in paragraph 3.3. above, the provisions in the Administration of Justice Act (AJA) on coercive investigative measures are applied by analogy to requests for mutual legal.
There is no domestic legislation on MLA applying to cases that are not covered by the European Convention on Mutual Legal Assistance in Criminal Matters. The case law described in the Danish response to the questionnaire also applies in this situation.

Neither the European Convention on Mutual Legal Assistance in Criminal Matters nor the OECD Convention do themselves serve as legal basis for MLA, cf. paragraph A above (p. 1) on the status of the OECD Convention (and other conventions) in Danish law. Danish law is, however, in conformity with the convention, since the AJA can be applied by analogy.

For a more detailed description of MLA in Denmark, please refer to the “Evaluation report on Denmark on Mutual Legal Assistance and Urgent Requests for the Tracing and Restraint of Property” (Council of the European Union, 9 September 1999, document no. 10860/99, CRIMORG 128).

We can confirm that Denmark can fulfil its obligations under the OECD Convention – not only with respect to search and seizures. Coercive investigative measures can be applied provided the measure in question would have been available in similar criminal proceedings in Denmark. It is not possible within the time limit available to give an exhaustive description of the requirements for coercive investigative measures since it would require a detailed account of a large part of the AJA’s provisions on criminal procedure.

9.1.1/9.1.2 Criminal Matters/Dual Criminality

9.1.2 Non-Criminal Matters

Question: What does the accession to the 1970 Hague Evidence Convention imply?

As with the European Convention on Mutual Legal Assistance in Criminal Matters, accession to the Hague Evidence convention implies that Denmark is under an international law obligation to fulfil request for the taking of evidence in accordance with the convention. Danish law is in conformity with the convention.

Do sections 190, 347 of the AJA only apply to MLA in non-criminal matters? Is there a requirement that the request must not be contrary to the principle of public order in Denmark? Has the Minister of Justice adopted any additional rules?

Section 190 applies to both criminal and non-criminal matters whereas section 347 applies only to non-criminal matters.

Request for the taking of evidence is only denied to the extent permitted by article 12 of the Hague Evidence Convention.

No additional rules have been adopted.

9.2 Dual Criminality

Would the Danish authorities consider the requirement of dual criminality to be met if the offence is within the scope of the Convention?

Yes, to the extent the Convention is properly implemented into national criminal law of the state party in question.

9.3 Bank Secrecy
What does it mean that banks and bank employees are in practice not covered by bank secrecy? What are the criteria, conditions that must be met in order to obtain information from banks or finance institutions?

As described in the Danish response to the questionnaire a Danish court could in theory decide that a bank or a bank employee need not make a witness statement or produce documents, etc., if the bank secrecy was considered of material importance in the specific case. The Ministry of Justice is not aware that any requests for mutual legal assistance in practice have been denied with reference to bank secrecy.

In practice the only requirement is that the information requested can serve as (relevant) evidence.

10. ARTICLE 10. EXTRADITION

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

Can the Danish authorities confirm that dual criminality is a requirement for extradition? Would the requirement of dual criminality be deemed to be met if the act were unlawful under a different criminal statute? Is this requirement deemed to be fulfilled if the offence for which extradition is sought is within the scope of the Convention?

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

See also paragraph. 9.2. above.

Could Denmark explain the reason for this requirement [that extradition can only take place where the requesting country intends to detain the accused person pending trial] and how it would operate in the case of bribery of a foreign public official which may not be an offence for which the requesting country would normally order pre-trial detention?

Section 3(2) of the Extradition Act provides that extradition for prosecution can only take place if the foreign state has decided that the person in respect of whom extradition is requested must be arrested or imprisoned for the act in question.

This provision does not imply that the requesting state must intend to detain the accused person pending trial. It simply reflects article 12(2)(a) of the 1957 European Convention on Extradition according to which a request for extradition shall be supported by “the conviction and sentence or detention order immediately enforceable or … the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party”.

Does this requirement [that extradition shall be denied if the charge lacks sufficient evidential basis] pertain to the weight of the evidence or the nature of the evidence? How high is the burden of proof in these cases? What kinds of restrictions is Denmark imposing on the forms of evidence acceptable for the purpose of obtaining extradition? What is meant by “special circumstances”?

Section 3(5) of the Extradition Act reflects the Danish reservation to article 12 of the 1957 European Extradition Convention:

“Where seemingly indicated by special circumstances, the Danish authorities may require the requesting country to produce evidence establishing a sufficient presumption of guilt on the
part of the person concerned. Should such evidence be deemed insufficient, extradition may be refused.”

The requirement of section 3(5) pertains to an overall assessment of the evidence in the individual case.

A “not guilty” plea from the person in respect of whom extradition is requested will not in itself be considered sufficient ground for the Danish authorities to require the requesting country to produce the evidence described in the reservation. If, however, the person in question, can refer to specific “special circumstances” in support of his plea according to which reasonable doubt can be raised with respect to his guilt such a requirement can be made.

According to the travaux preparatoires extradition must not take place, if there is reasonable doubt as to the guilt of the person in question. It is not an additional requirement that “special circumstances” calls for denying extradition.

10.3 Extradition of Nationals

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

Is prior conviction by a court a prerequisite for denying tax deductibility?

No.

Re: Comments and questions by lead examiner (6 November 2000)

Comments and Questions

1.1.2. To evaluate the Danish compliance with the requirements of the Convention, it would be most helpful if Denmark further described its concept of intent.

Before the Criminal Code was passed by Parliament in 1930 thorough preliminary considerations were carried out, the main conclusions of which are to be found in three expert reports accompanied by draft Criminal Codes. The last two of these draft Criminal Codes included definitions of intention which, in the final version, were as follows:

“Intention exists when the actor knows that his act will lead to the fulfilment of the requirements of the law for the offence (actus reus), or when he sees the occurrence of the offence as necessary or predominantly probable consequence of the act, or finally when he only sees the occurrence of the offence as possible but would have acted even if he had seen it as certain.”

Under its passage through Parliament this provision was struck out as being superfluous, but precisely because it was regarded as superfluous, it can serve as a useful summary of what is demanded under Danish law for criminal intention.
Danish law on criminal intent thus includes direct intention, intention of probability and intention of eventuality (dolus eventualis).

1.1.4. Article 1 paragraph 1 of the Convention contains an obligation to establish criminal liability for any person to offer, promise or give any undue pecuniary or other advantage. The Danish legislation criminalizes “a gift or other privilege”. I share the concerns expressed by the Secretariat on the interpretation of the term “privilege”. Further clarification is needed.

See paragraph 1.1.4. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

The obligation under the Convention is qualified by the term “undue” advantage. The Danish legislation only applies if the grant, promise or offer of a gift or other privilege is “unlawful”. To my preliminary opinion this qualifier deviate from the requirement of the Convention. The qualifier seems to limit the scope of application. It will be most helpful if the Danish authorities can provide further material on the interpretation of the term “unlawful”. The Danish authorities stated in their reply to the questionnaire that the grant of a gift as a reward for an act already carried out without any advance promise to do so is not regarded as unlawful. This statement gives rise to some concern on my behalf. The organized use of granting gifts and other privileges for acts already carried out can create an expectation on behalf of a foreign public official with the same consequences as an promise in advance. This interpretation can limit the scope of application in a significant way. Please, provide further information.

See paragraph 1.1.4. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

1.1.5. The Convention contains a clear obligation to criminalize both direct actions and actions through intermediaries. I share the Danish view that this obligation is met through the general rules on complicity but nevertheless it had been clearer if this had been stated in the provision on active bribery. The issue would benefit from further evaluation during phase 2 of the evaluation process.

See paragraph 1.1.5. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

1.1.7. The Convention covers undue advantages for the official or for a third party. As the Secretariat has pointed out section 122 of the Danish Criminal Code only covers bribes to a public official. I do not question the Danish statement that the Criminal Code also covers advantages to third persons, but in my view the Danish legislation is not sufficient clear in that regard. The Danish legislation would benefit from an explicit coverage of advantages to third persons.

See paragraph 1.1.7. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

2. Please, explain how the rules on jurisdiction are applied concerning responsibility of legal persons. Does the Danish legislation require jurisdiction over the natural person to be able to prosecute the legal person?

No, jurisdiction over the natural person is not required to be able to prosecute the legal person.

With respect to jurisdiction over the legal person the crime is considered to have been committed where the natural person responsible committed his act or omission, cf. paragraph 2.1. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).
When the criminal responsibility of the legal person is triggered by the sum of acts or omissions attributable to several natural persons, the crime will be considered to have been committed where the *actus reus* is fulfilled. If the legal person is domiciled in Denmark and the *actus reus* is fulfilled in another state, but the criminal responsibility is triggered partly by an act or omission in Denmark the crime might be considered (also) to have been committed in Denmark, cf. report of the Standing Committee on Criminal Law 1289/1995, p. 187-188.

3.1. *The bribe of a domestic or foreign public official is punishable by imprisonment for at most three years. Concerns can be raised that this sanction is comparatively weak, at least with regard to cases of aggravated bribery. The question if the sanction is effective, proportionate, and dissuasive can benefit from a horisontal analysis.*

3.3. *For the purposes of providing mutual legal assistance, Denmark has stated that there is no requirement that a specific minimum sentence be imposed for the offence in question. Does this apply also when the mutual legal assistance involves coercive measures?*

See paragraph 3.3. and 9.1. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

3.6. According to the Convention each Party shall take the necessary measures to provide that the bribe and the proceeds of the bribery are subject to confiscation or comparable monetary sanctions. Section 75 of the Danish Penal Code only provides that the proceeds gained from a criminal act may be confiscated. The Danish legislation seems to give wide discretionary powers to the courts and a wide scope for non-forfeiture. Please, provide further information on how the provisions on confiscation are applied. Furthermore, it would be interesting to know if the provisions on forfeiture are applicable if the bribe still is in the briber’s possession and if so on what conditions.

See paragraph 3.6. in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

4.4. *The Danish legislation includes both territorial and nationality jurisdiction. It fulfils the requirements of Article 4 paragraph 2 of the Convention. However, with regard to the issue of nationality jurisdiction, it shall be noted that, if the offence has been committed in the territory of a foreign state, Danish law would only apply provided that the offence is punishable also under the law of the place of the commission. In light of the requirements of Article 4 paragraph 4 of the Convention, this issue should be reviewed in phase 2 of the evaluation process.*

6. According to article 6 of the Convention any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of the offence. It seems as if the statute of limitations is two years if the prosecution concerns responsibility of legal persons. Please, can the Danish authorities confirm if so is the case?

Yes, cf. paragraph 6 in the Danish response to the draft review of implementation of the Convention and the 1997 Recommendation (above).

8.3. *The Danish legislation provides criminal penalties for violations of accounting rules. The penalties seem comparatively weak. Could the Danish authorities comment on the issue if the prescribed sanctions are effective, proportionate and dissuasive?*

[Erhvervs- og Selskabsstyrelsen bidrager]