

## SWEDEN

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Sweden signed the Convention on December 17, 1997. On March 25, 1999, the Swedish Parliament passed the necessary amendments to Swedish legislation in order to be able to ratify and implement the Convention. On June 8, 1999, the instrument of ratification was deposited with the OECD, and on July 1, 1999, the implementing legislation entered into force.

##### Convention as a Whole

The Swedish Penal Code<sup>1</sup> was amended in order to implement the requirements of the Convention by adding certain categories of foreign public officials to the list of persons to whom it was already an offence to give a bribe (e.g. certain domestic officials, employees and certain persons who hold positions of trust), in addition to clarifying that the offence applies where there is a third party beneficiary. Additionally, an amendment was made to the tax legislation<sup>2</sup> to prohibit the deduction of bribes.

The Penal Code contains provisions on complicity, jurisdiction and prosecution. It also contains an offence in relation to accounting obligations. Other existing laws, including the Bookkeeper Act<sup>3</sup>, the Act on Use of Coercive Measures on Demand of a Foreign Country<sup>4</sup>, and the Act on Extradition of Offenders<sup>5</sup> contain provisions relevant to other obligations under the Convention.

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

Chapter 17, section 7 of the Swedish Penal Code establishes the offence of bribery. This provision, along with the portion of chapter 20, section 2 that is incorporated by reference into chapter 17, section 7, is reproduced below, and the amendments for the purpose of implementing the Convention are underlined.

*Chapter 17, section 7*

*A person who, to*

*1. an employee,*

*2. a person referred to in Chapter 20, section 2,*

*3. a minister of a foreign state, a member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in Chapter 20, section 2, second paragraph, point 1, or*

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<sup>1</sup> Ds 1999:36

<sup>2</sup> Law on Municipal Taxation (1928:370)

<sup>3</sup> 1976:125

<sup>4</sup> 1975:295

<sup>5</sup> 1957:668

4. a person who without holding an employment or assignment as aforesaid, exercises public authority in a foreign state,

gives, promises or offers a bribe or other improper reward, whether for himself or any other person, for the exercise of official duties, shall be sentenced for bribery to a fine or imprisonment for at most two years.

Chapter 20, section 2 refers to an “employee” in the first paragraph, and lists the following persons in the second paragraph<sup>6</sup>:

1. *a member of a directorate, administration, board, committee or other such body attached to the State, or to a municipality, county council, association of local authorities, parish, religious society or social insurance office;*
2. *a person who exercises an assignment regulated by statute;*
3. *a person falling under the Law on Disciplinary Offences by Members of the Armed Forces (Law 1994:1811) or other person performing an official duty prescribed by law;*
4. *a person who, without holding an employment or assignment as aforesaid, exercises public authority, and*
5. *a person who, in a case other than that falling under points 1-4, by reason of a position of trust has been given the task on another person’s behalf of managing a legal or financial matter, carrying out a scientific or similar investigation, independently handling an assignment requiring qualified technical knowledge, exercising supervision over the management of the tasks designated in (a), (b) or (c), and*
6. *a member of the European Commission, the European Parliament, or the European Court of Auditors or judges of the European Court of Justice.*

Chapter 17, section 17, of the Penal Code, which places restrictions on the prosecution of certain types of bribery, is also reproduced below, and the amendment thereto is underlined.

*Chapter 17, section 17*

*In certain cases of bribery, a public prosecutor may prosecute only if the employer or principal of the person exposed to the bribery reports the crime for prosecution or if prosecution is called for in the public interest. This applies to bribery that has taken place in relation to a person who*

- 1. is not an employee of the state or a municipality;*
- 2. does not fall under the provisions of Chapter 20, section 2, second paragraph, points 1-4 or 6, and*
- 3. is not a minister of a foreign state or member of the legislative assembly of a foreign state.*

The Swedish authorities state that the term “state or municipality” covers only the Swedish state and Swedish municipalities. They also confirm that the public prosecutor may prosecute a case of bribing a foreign public official only if the requirements in chapter 17, section 17 are satisfied. It would, however, appear that the following foreign public officials could be prosecuted without satisfying the requirements in chapter 17, section 17:

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<sup>6</sup> Chapter 20, section 2 establishes the offence of receiving a bribe by an “employee” and the other persons listed therein.

1. members of the European Commission, the European Parliament, or the European Court of Auditors or judges of the European Court of Justice, and
2. Ministers of foreign states and members of legislative assemblies of foreign states.

The Swedish authorities state that a report under chapter 17, section 17, shall be made to the Swedish prosecutorial authorities, and where this is inconvenient a report may be made to a Swedish embassy or consulate, which shall in turn pass on the report to the competent authority. Where a report has not been made, the requirements of section 17 can still be met if the prosecution is called for in the “public interest”. The Swedish authorities explain that this rule was introduced in order to ensure that minor and excusable offences in the private sector were not prosecuted, and that this rationale also applies in relation to the bribery of foreign public officials. They explain further that prosecution of foreign bribery cases would usually be called for in the public interest where economic damage occurs or the bribe is of a significant value. Additionally, prosecution is normally called for in the public interest where the bribery has been reported by a competitor, or an association of entrepreneurs or consumers, or a report has been made against the person bribed (but not the briber) and vice versa. Moreover, consideration of the public interest also involves consideration of the “permissibility” of the action in the country where the crime was committed. The Swedish authorities emphasise that in determining whether a prosecution is in the public interest, Sweden’s commitments under the Convention would be taken into account.

## **1.1 The Elements of the Offence**

Chapter 17, section 7, by incorporating by reference chapter 20, section 2, applies to the giving, promising or offering of a bribe or other improper reward to a variety of persons, including employees, certain domestic officials, Armed Forces personnel, certain persons in positions of trust, and certain types of public officials of foreign states. For the purpose of this report, the discussion will be limited to the application of section 7 to the bribery of persons that fit the definition of foreign public officials in the Convention.

### **1.1.1 any person**

Chapter 17, section 7 of the Penal Code applies to “a person”. It is assumed that “a person” means any natural person. The only restriction on the term is contained in chapter 1, section 6, which states that a sanction shall not be imposed on a person for a crime committed before attaining the age of 15.

### **1.1.2 intentionally**

The Swedish authorities provide that there is no requirement under chapter 17, section 7 that the improper reward be given, etc. to obtain actions or omissions of a foreign public official. Section 7 is satisfied if the improper reward is given, etc “to a person due to his/her official position”. Thus, the intentional requirement under section 7 includes the principle of *dolus eventualis*.

### **1.1.3 to offer, promise or give**

Chapter 17, section 7 applies to a person who “gives, promises or offers” a bribe, etc., in compliance with the requirements of the Convention.

### **1.1.4 any undue pecuniary or other advantage**

Chapter 17, section 7 prohibits the giving, etc. of “a bribe or other improper reward”. The Swedish authorities explain that the word “improper” is meant to correspond to the word “undue” under the

Convention. Additionally, the term “reward” contemplates anything that can be defined as a benefit, including an intangible benefit.

The Swedish authorities state that in interpreting the meaning of “improper award”, the Commentaries on the Convention shall be taken into account. Thus, according to Commentary 8 on the Convention, an offence is not committed where the “advantage was permitted or required by the written law or regulation” of a foreign public official’s country. In addition, in accordance with Commentary 9, “small facilitation payments” do not constitute “improper reward”.

The Swedish authorities state that the court shall consider all relevant circumstances, including the legislation and custom of the foreign public official’s country, in deciding whether a particular reward is “improper”.

### **1.1.5 whether directly or through intermediaries**

Chapter 17, section 7 does not expressly apply to a person who offers, etc. a bribe or reward to a foreign public official through an intermediary.<sup>7</sup> The Swedish authorities explain that reference to general legal principles is avoided in Swedish legislation, and for this reason there is no explicit reference to intermediaries in section 7. However, they state that it would be obvious to anyone with knowledge of the Swedish penal system that bribes given through intermediaries are covered. The use of intermediaries does not differ from the use of instrumentalities. Thus an intermediary can be regarded as a kind of human instrumentality through which the perpetrator commits the crime.

### **1.1.6 to a foreign public official**

In order to determine to whom it is an offence to give, promise or offer a bribe or other improper award, it is necessary to look at chapter 17, section 7, cross-reference over to chapter 20, section 2<sup>8</sup> [which includes some foreign public officials in subsection 2(6)], go back to chapter 17, section 7, cross-reference over to chapter 20 subsection 2(1) and convert the persons therein into members of corresponding bodies of a foreign state<sup>9</sup>, and then go back to chapter 17, section 7. The Swedish authorities state that this technique of cross-referencing is commonly employed in Swedish legislation in order to avoid repetition.

The resulting list, would appear to include the following foreign public officials:

1. A minister of a foreign state [subsection 7(3)].
2. A member of the legislative assembly of a foreign state [subsection 7(3)].
3. A member of a directorate, administration, board, committee or other such body attached to a foreign state [subsection 7(3) incorporating chapter 20, subsection 2(1) by reference].
4. A member of the European Commission, the European Parliament, the European Court of Auditors or judges of the European Court of Justice [subsection 7(2) incorporating chapter 20, subsection 2(6) by reference].
5. A person who without holding an employment or assignment as aforesaid, exercises public authority in a foreign state [subsection 7(4)].

The resulting list would appear to not cover the following types of foreign public officials that are included in the definition in the Convention:

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<sup>7</sup> The passive bribery offence under chapter 20, section 2 also does not expressly apply to a person who receives a bribe through an intermediary.

<sup>8</sup> Pursuant to chapter 17 subsection 7(2).

<sup>9</sup> Pursuant to chapter 17 subsection 7(3).

1. A person holding a judicial office in a foreign state, whether appointed or elected, other than a member of the European Court of Auditors or judges of the European Court of Justice.
2. A person holding an administrative office, who has not been elected.
3. A person exercising a public function for a foreign country, including for a public agency, who is not an employee; and a person exercising a public function for a public enterprise, who is or is not an employee.
4. An official or agent of a public international organisation.

However, the Swedish authorities explain that the four above categories are indeed covered because paragraph 1 of chapter 17, section 7 applies to foreign employees (persons who have been appointed are generally considered to be “employees”); and paragraph 5 of chapter 20, section 2 applies to foreign persons who by reason of a position of trust have been given certain tasks (which they state would include an “official or agent of a public international organisation”). They explain that it is not necessary to state specifically that the provision on employees applies to employees of foreign states and the provision on persons holding positions of trust applies to foreign persons even though paragraph 3 of chapter 17, section 7 expressly applies to a “minister of a foreign state”, etc. and expressly applies to “a member of a foreign state, which corresponds to those referred to in Chapter 20, section 2, second paragraph, point 1”.

Additionally, the Swedish authorities state that the term “foreign state” includes “all levels and subdivisions of government, from national to local”, and the term “public authority” corresponds in meaning with the term “public function” in Article 1.4 of the Convention.

#### **1.1.7 for that official or for a third party**

The recent amendments to chapter 17, section 7 included the addition of the words “whether for himself or any other person”. The Swedish authorities explain that this amendment is intended to clarify that liability for bribery is imposed where an advantage is given “to any other person than the official”. This includes the case where the briber and a foreign public official enter into an agreement to transmit the bribe directly to a third party (e.g. spouse, friend or political party) in exchange for an act or omission by the foreign public official.

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

Chapter 17, section 7 applies where a bribe or improper award is given, etc. “for the exercise of official duties”. This language is very close to the language in the Convention, except that it does not expressly include an omission in relation to the exercise of official duties. The Swedish authorities reiterate that section 7 is satisfied if the improper reward is given, etc. “to a person due to his/her official duties” (see discussion under 1.1.2), and that “with this in mind the Swedish legislation applies both to actions and omissions”.

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

It is irrelevant under chapter 17, section 7 whether a bribe is given “in order to obtain or retain business or other improper advantage in the conduct of international business”.

## **1.2 Complicity**

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

Pursuant to chapter 23, section 4 of the Penal Code, punishments under the Code shall be imposed not only on the perpetrator of the act but also on the following persons:

1. Anyone who furthered the act by “advice or deed”. This would appear to include aiding and abetting, and authorisation of an act of foreign bribery.

2. A person who induced another to commit the act (“instigation”). This would appear to include incitement of an act of foreign bribery.

## **1.3 Attempt and Conspiracy**

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

### *Attempt*

Chapter 23, section 1 states that an attempt to commit an offence is only punishable where a specific provision to this effect exists. In the case of bribery, no such provision exists. However, Sweden points out that because the bribery offence applies to acts of promising and offering, criminal responsibility does in effect include acts that would be considered attempts to bribe. It is notable that attempts are punishable by “at most what is applicable to a completed crime”. Since the acts of offering and promising a bribe constitute “completed crimes”, they are more severely punishable than they would have been if Sweden had chosen to capture them as attempts.

### *Conspiracy*

Similarly, chapter 23, section 2 states that the conspiracy to commit an offence is only punishable where a specific provision to this effect exists. And again no such provision exists in relation to bribery. Under this provision, conspiracy is defined as the decision to act “in collusion with another” to commit an offence, as well as undertake or offer to execute the offence or to seek to incite another to do so. The difference between conspiracy and complicity, as it is defined in chapter 23, section 4, is that conspiracy does not require that the offence is completed, but does require the existence of the element of collusion. As in the case of attempt, conspiracy is not punished as severely as the completed offence.

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

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

## 2.1 Criminal Responsibility

Under Swedish law, only natural persons can commit crimes. However, pursuant to chapter 36, section 7 of the Penal Code, a kind of quasi-criminal liability<sup>10</sup> is applied to an “entrepreneur” for a “crime committed in the exercise of business activities”, as follows:

*For a crime committed in the exercise of business activities the entrepreneur shall, at the instance of a public prosecutor, be ordered to pay a corporate fine if:*

*1.the crime has entailed gross disregard for the special obligations associated with the business activities or is otherwise of a serious kind, and*

*2.the entrepreneur has not done what could reasonably be required of him for prevention of the crime.*

*The provisions of the first paragraph shall not apply if the crime was directed against the entrepreneur or if it would otherwise be manifestly unreasonable to impose a corporate fine.*

According to the Swedish authorities, “entrepreneur” is a general term that is used in different statutes. The uncodified definition of the term is “any natural or legal person that professionally runs a business of an economic nature”.<sup>11</sup> They add that the term covers state owned and municipal trading companies.

The provisions on corporate fines are obligatory. Thus where the requirements of chapter 36, section 7 are satisfied, a corporate fine must be imposed. There is no requirement that a natural person has been convicted or even prosecuted for a corporate fine to be applied, where the requirements under chapter 36, section 7 are satisfied.

A fine can be imposed pursuant to this provision for a crime committed by a natural person in the exercise of business activities. There is no requirement under this provision that a person in a leading position must have committed the crime. The requirement is that the “entrepreneur has not done what could reasonably be required of him/her for prevention of the crime”. According to the commentary to the Penal Code<sup>12</sup>, the obligation on the entrepreneur to monitor the business is far reaching, except where there is a weak link between the business and the crime. To avoid liability the business must have been organised in such a way that it could be reasonably supervised. Instructions to prevent the commission of a crime must be detailed, appropriate and focused and the entrepreneur must have supervised their application.

The Swedish authorities explain that in determining whether a crime entails “a gross disregard for the special obligations associated with the business activities” or is otherwise “serious” involves consideration of the criminal activity as a whole.<sup>13</sup> The economic aspects of the crime are of particular importance, including the economic gain and future economic prospects as a result of the crime. There is, however, no case law in this respect on the offence of bribing a foreign public official.

A corporate fine shall not be imposed where it would be “manifestly unreasonable” to impose such a fine. In addition to the case included in chapter 36, section 7 (i.e. where the crime was directed against the entrepreneur), the Commentary to the Penal Code<sup>14</sup> provides that it would be “manifestly unreasonable” to

<sup>10</sup> The Swedish authorities explain that these fines are treated as a “special legal effect of crime”.

<sup>11</sup> See the Commentary to the Penal Code, Part III, Fourth edition, 1993, page 480.

<sup>12</sup> Ibid. pages 504-506.

<sup>13</sup> Ibid. page 504.

<sup>14</sup> Ibid. page 506.

impose a corporate fine where the nature of the crime is such that it would be unreasonable to expect the entrepreneur to have taken protective measures. It would also be unreasonable to apply section 7 where, for instance, a new owner took over the business after the crime was committed, or where the business no longer exists.

The Swedish authorities explain that corporate fines are imposed in the context of criminal proceedings concerning the liability for the crime in question.

The Ministry of Justice is currently reviewing the quasi-criminal liability of entrepreneurs, and Sweden's international commitments in this regard are being given special consideration. Sweden states that although the Convention only requires the establishment of the legal responsibility of legal persons, the Ministry of Justice is considering a proposal for establishing the "full criminal responsibility" of legal persons.

### **3. ARTICLE 3. SANCTIONS**

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

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

##### *Natural Persons*

Pursuant to chapter 17, section 7, a bribe given, promised or offered by a natural person to a person listed therein, including a foreign public official or a domestic public official, is punishable by "a fine or imprisonment for at most 2 years". (A fine and imprisonment cannot be imposed together.) Pursuant to chapter 23, section 4, the punishment for furthering the commission of an act through "advice or deed" or "instigation" is the same as is provided for the completed offence. This section provides further that the punishment for the act of an accomplice shall be determined according to the intent or the negligence attributable to him/her.

The Swedish authorities provide that the tradition in Sweden has for a long time been to avoid too lengthy periods of incarceration. A fixed term of imprisonment cannot exceed 10 years, and the maximum penalty is reserved for crimes such as severe crimes against life, health and liberty, sexual crimes, drug crimes and crimes against the State. The Swedish authorities state that considered in this context, the maximum term of imprisonment for bribery is proportionate to the penal value of the crime, and, thus, 2 years is sufficient even in aggravated cases.

Chapter 29 of the Penal Code contains guidelines for assisting the court in the determination of an appropriate sanction. Section 1 provides the general principle that a sentence shall be determined according to the "penal value" of the crime. Section 2 lists "aggravating circumstances" that shall be given special consideration, including:

- “whether the accused grossly exploited his position or otherwise abused a special confidence or trust”;
- “whether the accused induced another person to take part in the crime by coercion”, etc.; and
- “ whether the crime was part of a criminal activity that was especially carefully planned or carried out on a large scale and in which the accused had a significant role.”

Section 3 lists “mitigating circumstances” that shall be given special consideration. These include, by cross-reference, the following acts exempted from criminal responsibility in chapter 24:

- “An act committed by a person with the consent of some other person towards whom it is directed”<sup>15</sup>
- “An act committed by a person on the order of someone to whom he owes obedience...if in view of the nature of the obedience due, the nature of the act and the circumstances in general, it was his duty to obey the order”<sup>16</sup>; and
- “An act committed by a person labouring under a misapprehension concerning its permissibility...if the mistake arose by reason of an error in the proclamation of the criminal provision or if, for other reasons, it was manifestly excusable”<sup>17</sup>.

Chapter 25 of the Penal Code establishes a day-fine system in Sweden for the imposition of fines. Pursuant to section 2, “each day-fine shall be imposed as a fixed amount from 30 up to and including 1 thousand Swedish crowns<sup>18</sup>” and between 30 and 150 day-fines shall be imposed.<sup>19</sup> The amount is calculated according to what is reasonable taking into account “the income, wealth, obligations to dependants and other economic circumstances of the accused”. In addition, it can be adjusted “if special reasons exist”. Chapter 25 also contains provisions for the consolidation of day-fines for several crimes. The Swedish authorities indicate that the whole range of day-fines has been used in respect of bribery, with the majority of cases falling within the high end of the range.

### *Legal Persons*

The corporate fine applicable to an entrepreneur for a “crime committed in the exercise of business activities” is, pursuant to chapter 36, section 8, “at least 10 thousand Swedish crowns and at most 3 million Swedish crowns”.

Chapter 36 contains some guidelines on determining the appropriate fine in a particular case. Pursuant to section 9, “special consideration shall be given to the nature and extent of the crime and to its relation to the business activity”. The Penal Code does not contain any guidelines for interpreting this requirement. However, the Swedish authorities provide that in addition to the guidelines in chapter 29 of the Penal Code (see discussion above on aggravating and mitigating factors), some guidance in this regard can be found in

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<sup>15</sup> Chapter 24, section 7 of the Penal Code.

<sup>16</sup> Chapter 24, section 8 of the Penal Code.

<sup>17</sup> Chapter 24, section 9 of the Penal Code.

<sup>18</sup> On 21 September 1999, 8.15 Swedish Crowns were valued at 1 U.S. dollar.

<sup>19</sup> Pursuant to chapter 25, section 2 of the Penal Code, the lowest amount for a day-fine is 450 Swedish crowns.

the Commentary to the Penal Code.<sup>20</sup> It states that the extent and severity of the crime, the motive of the crime (especially economic gain), the position of the perpetrator and the significance of the affected public interest are all important in this determination. Moreover, whether the crime is committed with intent or through negligence, and whether it was committed at the request of management or without management's knowledge are also factors to be considered. It is an unwritten rule that a corporate fine should amount to 50 percent of the gain of the crime where it is committed with intent and with the purpose of gaining an economic advantage, and 10 to 30 percent of the gain if it is committed through negligence and the crime normally gives rise to economic advantages. (See 3.6 below on "Seizure and Confiscation of the Bribe and its Proceeds" for a discussion on the forfeiture of the gain.)

In addition, chapter 36, section 10 requires the mitigation or non-imposition of a corporate fine in the following cases:

1. A sanction for the crime has been imposed on the entrepreneur or a representative of the entrepreneur.
2. The crime involves some other payment liability or a special legal effect for the entrepreneur.
3. There are other special grounds necessitating the mitigation or non-imposition of a fine.

The Swedish authorities indicate that the first ground is aimed at avoiding the imposition of a double punishment where the entrepreneur is a natural person, or a very small joint-stock limited company in the case where the owner and the company representative is the same person.

The second ground is intended to address the situation where the entrepreneur is obliged to pay damages or administrative sanctions, which have the same effect as corporate fines (i.e. punishment) and, therefore, should mitigate the amount of the corporate fine. Sweden emphasises that the obligation to pay administrative sanctions or damages does not affect the applicability of the provisions on forfeiture.

The third ground, which addresses extraordinary circumstances, is very limited in scope. According to the Swedish authorities, an argument can be made that pursuant to this provision the financial status of an entrepreneur can be considered where the normal rules for the imposition of a corporate fine would result in the closure of the business or unemployment. However, corporate fines are not normally imposed having regard to the financial status of the entrepreneur.

### **3.3 Penalties and Mutual Legal Assistance**

Pursuant to section 3 of the Act Concerning the Use of Certain Coercive Measures at the Request of a Foreign State<sup>21</sup>, a request for mutual legal assistance by a country other than Denmark, Finland, Iceland or Norway that involves coercive measures can only be met where the criminal act concerned can lead to "imprisonment for more than 1 year" under Swedish law. Otherwise, the term of imprisonment is not relevant to the provision of mutual legal assistance.

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<sup>20</sup> Commentary to the Penal Code, Part III, Fourth edition, 1993, page 508-509.

<sup>21</sup> 1975:295

### 3.4 Penalties and Extradition

Under section 4 of the Act on Extradition of Offenders<sup>22</sup>, extradition to countries other than Denmark, Finland, Iceland and Norway is only available in relation to offences punishable under Swedish law by “imprisonment for more than 1 year”.

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

#### *Forfeiture with respect to Proceeds of Crime*

Pursuant to chapter 36, section 1 of the Penal Code, the “proceeds of a crime” as defined in the Code shall be declared forfeited unless “manifestly unreasonable”.

In determining whether forfeiture would be “manifestly unreasonable”, the factors to be considered under section 1 include “*inter alia*” whether “there is reason to believe that liability to pay damages in consequence of the crime will be imposed”. The Swedish authorities explain that the liability to pay damages is relevant because it is reasonable to try to ensure that damages are available when due. Pursuant to the Tort Liability Act<sup>23</sup>, a person who causes financial damage through a crime, including active bribery is liable to damages. Fines imposed pursuant chapter 17, section 7 and chapter 36, section 7 are not relevant to the issue of forfeiture because the purpose of forfeiture is to eliminate the economic gain that the crime has produced, whereas fines are imposed as punishment.

Moreover, the Swedish authorities provide that all relevant circumstances shall be considered in determining whether forfeiture would be “manifestly unreasonable”, and that the Supreme Court<sup>24</sup> has stated that these include the financial status of the offender.

The Swedish authorities explain that under this provision, the bribe can be declared forfeited from the person who has received a bribe and has been convicted of passive bribery. They indicate that the bribe cannot be declared forfeited from the briber if it has remained with him/her. They add that where a briber makes an undue profit, it would be possible to forfeit the profit from him/her under chapter 36, section 1. The “proceeds of a crime” include an object, immovable property and economic value. Sweden indicates that in the case of active bribery, they are usually in the form of an economic value.

Where the “proceeds” are in the form of an object, it is optional under chapter 36, section 1 to declare forfeited the object or the value of the object. Sweden explains that it is an unwritten principal that the object should be forfeited where possible.

#### *Forfeiture with respect to Crimes Committed in the Course of Business*

Chapter 36, section 4 of the Penal Code provides for the forfeiture of the “value” of “financial advantages” derived by an entrepreneur “as a result of a crime committed in the course of business”, unless the forfeiture is “unreasonable”. It further provides that the factors to be considered in determining whether forfeiture would be “unreasonable” include “whether there is reason to believe that some other obligation to pay a sum corresponding to the financial gain derived from the crime will be imposed upon the entrepreneur”. The court shall also consider all other relevant circumstances in determining whether forfeiture would be “unreasonable”. Although this would not normally include consideration of the

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<sup>22</sup> 1957:668

<sup>23</sup> Chapter 2, section 4 (1972:207)

<sup>24</sup> NJA 1976 s. 202.

financial status of the entrepreneur, arguably it could be taken into account where forfeiture according to the normal rules would result in closure of a business or unemployment.

A fine ordered pursuant to chapter 17, section 7 for a conviction for foreign bribery in relation to a natural person or a corporate fine ordered under chapter 36, section 7 does not constitute “some other obligation to pay a sum corresponding to the financial gain derived from the crime”. However, administrative sanctions, such as environmental sanctions and tax sanctions, whose purpose it is to eliminate undue profits, as well as damages, would be considered relevant.

The Swedish authorities indicate that the proceeds of the bribery of a foreign public official can be forfeited pursuant to chapter 36, section 4, because “financial advantages” would include the profit derived therefrom. They point out that the term “financial advantages” is broader than the term “proceeds of crime” used in chapter 36, section 1 because it covers the financial gain as well as the reduction of costs and loss. An object can be considered a “financial advantage”, but it is the “value” thereof that is subject to forfeiture. In addition, if proof of the “financial advantage” is difficult or impossible to determine, “an amount that is reasonable in view of the circumstances” may be ordered forfeited.

The Swedish authorities state that there is no requirement that someone has been convicted of bribing a foreign public official in order to be able to forfeit under section 4.<sup>25</sup>

#### *The Persons that may be subject to Forfeiture*

Pursuant to chapter 36, section 5, the persons who may be subject to forfeiture include the offender or an accomplice, the entrepreneur described in section 4, and a third person who obtained the property with knowledge of, or reasonable grounds to suspect the criminal origins of the property in question.

#### *Review of the Current Provisions on Forfeiture*

A review of the current provisions on forfeiture is due to be released in the autumn of 1999. Its purpose is to design proposals for more effective forfeiture that address the development of organised and other business-related crimes. The measures for dealing with these issues through international co-operation are to be followed.

### **3.8 Civil Penalties and Administrative Sanctions**

The Swedish authorities indicate that chapter 1, section 17 of the Act on Public Procurement<sup>26</sup> “should” be relevant to the offence of bribing a foreign public official. It provides that a “supplier” can be excluded from procurement if he/she is sentenced for a crime related to the exercise of a profession or is guilty of a serious mistake in the exercise of a profession.

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<sup>25</sup> This is due to a provision in the Act on Procedure in Certain Cases Concerning Forfeiture (1986:1009), which states that a claim on forfeiture can be tried separately if the issue does not affect a person who is prosecuted for a crime.

<sup>26</sup> 1992:1528

## **4. ARTICLE 4. JURISDICTION**

### **4.1 Territorial Jurisdiction**

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

Pursuant to chapter 2, section 1 of the Penal Code, crimes committed in Sweden “shall be adjudged in accordance with Swedish law and by a Swedish court”. Chapter 2, section 4 states that “a crime is deemed to have been committed where the criminal act was perpetrated and also where the crime was completed or, in the case of an attempt, where the intended crime would have been completed”. According to the pre-enactment reports<sup>27</sup> on these provisions of the Penal Code, this means that territorial jurisdiction is established where “some part” of the criminal action is committed in Sweden. For instance, if a crime is initiated in Sweden, it is considered to be committed in Sweden even if it is completed in another country. Therefore, if a person in Sweden calls or writes to a foreign public official in another country, offering him/her a bribe, the crime is committed in Sweden and shall be adjudged by Swedish law by a Swedish court.

Chapter 2, section 5, paragraph 1 of the Penal Code states that in the case where a crime is committed in Sweden on a foreign vessel or aircraft by an alien<sup>28</sup> “against another alien or a foreign interest”, prosecution for the crime shall not be instituted without the authority of the Government or a person designated by the Government. Sweden indicates that the Government has designated the Prosecutor General for this purpose, but that where special reasons exist, a case can be handed over to the Government. The purpose of this requirement is to exclude from prosecution in Sweden, crimes that have nothing to do with Swedish interests or obligations. However, the Swedish authorities state that even where chapter 2, section 5 of the Penal Code is applicable, in order to comply with its undertakings under the Convention it would have to authorise prosecution of cases of bribery of foreign public officials covered by the Convention. Thus, in this respect chapter 2, section 5 has no practical application to cases of foreign bribery under the Convention.

### **4.2 Nationality and other Extraterritorial Jurisdiction**

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

Where certain requirements are satisfied, chapter 2, section 2 of the Penal Code establishes jurisdiction over the following persons for crimes committed outside of Sweden:

1. Swedish citizens and aliens domiciled in Sweden,

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<sup>27</sup> The Swedish authorities explain that the brevity of Swedish legal texts is largely possible because the lawmakers have expounded their views in pre-enactment reports, and are sure that these would be taken into account in interpreting the Penal Code provisions.

<sup>28</sup> The alien could have been the officer in charge or member of the crew or someone else travelling in the vessel or aircraft.

2.aliens not domiciled in Sweden who after committing the crime became Swedish citizens or domiciled in Sweden, or who are Danish, Finnish, Icelandic or Norwegian citizens and are present in Sweden, or

3.any other alien who is present in Sweden and the crime under Swedish law can result in imprisonment for more than 6 months.

The requirements that must be satisfied for jurisdiction to be established over the above persons are as follows:

1.the act is subject to criminal responsibility under the law of the place where it was committed (dual criminality), or

2.if the act was committed within an area not belonging to any state, the punishment for the act is more severe than a fine.

Where the act falls under the first category, “a sanction must not be imposed that is more severe than the severest punishment provided for the crime under the law in the place where it was committed”.

Pursuant to chapter 2, section 5, paragraph 2 prosecution cannot generally be instituted for a crime committed outside Sweden<sup>29</sup>, without the authority of the Government<sup>30</sup>. The Swedish authorities state that although there are no guidelines for deciding when to provide authorisation, it is provided in almost all cases. In addition, Sweden reiterates that chapter 2, section 5 of the Penal Code has no practical application to cases of foreign bribery covered by the Convention. Due to Sweden’s obligations under the Convention, these cases would have to be prosecuted even where section 5 applies.

Moreover, the discretion under chapter 2, section 5 must be exercised in accordance with procedural fairness. Decisions of the Government or the Prosecutor General in these matters cannot be appealed.

### **4.3 Consultation Procedures**

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

Sweden has well-established procedures for the purpose of consultations. Requests should be made through diplomatic channels. However, Nordic countries can make their requests directly to the Swedish prosecution authorities.

### **4.4 Review of Current Basis for Jurisdiction**

Article 4.4 requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

Sweden comments that in comparison to other countries its criminal jurisdiction is extensive, and that there is no rationale for extending it further.

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<sup>29</sup> Exceptions to this rule include offences committed abroad by Swedish, Danish, Finnish, Icelandic or Norwegian citizens against a Swedish interest, and crimes committed by a member of the armed forces in an area where a detachment was present.

<sup>30</sup> See discussion above under 4.1 on the designation of the Prosecutor General.

## 5. ARTICLE 5. ENFORCEMENT

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

### 5.1 Rules and Principles regarding Investigations and Prosecutions

#### *Investigations*

Chapter 23, section 1 of the Code of Judicial Procedure provides that a “preliminary investigation” shall be initiated as soon as there is “cause to believe” that an offence subject to public prosecution has been committed.

Section 1 states further that if an “accusation” is required for public prosecution the investigation may commence without it.<sup>31</sup> In this case the “aggrieved person” shall be notified as soon as possible, and if he/she does not make the accusation necessary for prosecution, the investigation shall be terminated. Pursuant to chapter 20, section 8 of the Code of Judicial Procedure, an “aggrieved person” is the person against whom an offence was committed or who was affronted or harmed by it. According to the Swedish authorities, an employer or principal of a person exposed to bribery would be considered an “aggrieved person” under section 8.

Pursuant to chapter 23, section 3 of the Code of Judicial Procedure, either the police authority or the prosecutor initiates a preliminary investigation. The prosecutor assumes responsibility for complicated investigations and in cases where “special reasons” require the prosecutor’s involvement.

An investigation shall be discontinued where, pursuant to chapter 23, section 4, “there is no longer reason for pursuing the investigation” or in the following cases listed in section 4a:

1. A continued inquiry would incur costs disproportionate to the seriousness of the offence, and the offence would not incur a penalty more severe than a fine.
2. It can be assumed that the prosecution would not be instituted pursuant to the provision on waiver in chapter 20 of the Code of Judicial Procedure and no public or private interest would be ignored by the discontinuance. Chapter 20, section 7 permits a waiver of prosecution in cases where, for instance, the offence would not result in a sanction other than a fine or psychiatric care is rendered.

Pursuant to chapter 23, section 4, there would no longer be a reason to pursue an investigation where there is a lack of evidence, the suspect is deceased or less than 15 years old, and in all cases where the prosecutor can foresee that there would be no conviction in court.

#### *Prosecutions*

The Swedish authorities explain that in Sweden there is a principle of mandatory prosecution. This principle is, however, subject to various exceptions set out in the law. For instance, as discussed above in relation to investigations, a prosecution may be waived in certain cases under chapter 20, section 7 of the

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31 . The reader will recall that pursuant to chapter 17, section 17 of the Penal Code, “in certain cases of bribery, a public prosecutor may prosecute only if the employer or principal of the person exposed to the bribery reports the crime for prosecution or if prosecution is called for in the public interest”.

Code of Judicial Procedure. Essentially, a waiver is possible under that section when the crime is not considered serious or psychiatric care has been rendered. Waiver of prosecution is also possible where the suspect has already committed an offence for which he/she will be receiving a sanction, and no further sanction is deemed necessary for the new offence.

Injured parties have a right to challenge a prosecutor's decision to not prosecute to a higher prosecutor. They may first appeal the decision to the Director of the Regional Prosecution Office, and if not satisfied with the outcome they have further recourse to the Prosecutor General. The Prosecutor General has issued guidelines on how these cases are to be processed.

## **5.2 Considerations such as National Economic Interest**

The Swedish authorities indicate that the only scope for considering any of the interests listed under Article 5 of the Convention is in chapter 2, section 5 of the Criminal Code. It would be possible for the Government to consider, for example, the potential effect of a prosecution upon relations with another State, in determining whether to grant authority to prosecute an offence.<sup>32</sup> However, according to Sweden, these considerations can no longer influence a decision under section 5 in relation to the offence of bribing a foreign public official, due to its commitments under the Convention.

Moreover, pursuant to chapter 11, sections 2 and 7 of the Swedish Constitution, the Government, a Minister or other government officer may not interfere with the application of the law to a particular individual by a subordinate authority. Thus, the prosecutor is completely independent from political influence in the exercise of the role of prosecutor.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

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

Chapter 35, section 1 of the Criminal Code provides that a sanction may not be imposed unless, in the case of a crime punishable by a maximum term of imprisonment of 2 years, "the suspect has been remanded in custody or received notice of prosecution for the crime within...5 years". Chapter 35, section 4 of the Penal Code states that the periods specified in section 1 shall begin to run from the date when the crime was committed. If the occurrence of a certain effect of the act is a prerequisite for the imposition of a sanction, the period shall be calculated starting from the date when such effect occurred.

## **7. ARTICLE 7. MONEY LAUNDERING**

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

### **7.1/7.2 Domestic and Foreign Bribery**

Pursuant to chapter 9, section 6a of the Penal Code, intentional and negligent money laundering is established as a criminal offence. Recent amendments<sup>33</sup> to this offence have broadened it to cover as predicate offences all crimes, by which anyone has enriched himself/herself, in addition to crimes involving a criminal acquisition, which were previously covered. Before the amendments money

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<sup>32</sup> As noted earlier, chapter 2, section 5 mainly deals with offences committed outside of Sweden.

<sup>33</sup> The amendments came into force on 1 July 1999.

laundering was criminalised in the Penal Code as the offence of “receiving”. This offence applied to such actions as taking possession of something of which another has been dispossessed by a crime, and procuring an improper gain from another’s proceeds of crime. It also covered the more traditional money laundering type activity of assisting in the removal, transfer, or sale of property that is derived from the proceeds of crime, with the intent of concealing the origin of the property. The amended section broadens the coverage of the traditional money laundering offence to cases where a person assists in the removal, etc. of property if the measure is “likely” to conceal that a person has enriched himself/herself through a criminal act. The Swedish authorities state that the latter offence applies not only if the person has knowledge of the property’s criminal origins, but also if he/she has reasonable grounds to assume that a crime was involved.

The Swedish authorities explain that the receiving of a bribe by a domestic or foreign public official is a “criminal acquisition”, and is thus a predicate offence to money laundering. Since there has to be a “criminal acquisition”, active bribery cannot be a predicate offence unless the bribe has been received. The proceeds of the crime that a briber obtains from bribing a foreign public official can also be the subject of the money laundering offence when obtained either before or after the bribe has been delivered.

The Swedish authorities add that the money laundering legislation applies regardless of where the predicate offence occurred. The only issue in this respect is whether a crime involving a “criminal acquisition” was committed according to the law of the country where the predicate offence was committed.

## **8. ARTICLE 8. ACCOUNTING**

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

### **8.1 Accounting and Auditing Requirements**

The Bookkeeper Act contains accounting obligations<sup>34</sup>. These include the requirement to maintain accounting records with information about the course of operations and business transactions currently recorded in a chronological and systematic manner. Vouchers must be available to support all accounting entries. Annual accounts are required to be drawn up at the end of the financial year for the purpose of providing information about the results and the financial position of the operation. Voucher, books of account and other accounting information must be retained. All transactions must be recorded correctly for identification purposes.

Pursuant to the Companies Act, all companies are required to have an external auditor, who shall render an audit report to the general meeting of shareholders for each financial year. Chapter 10, section 16 of the Companies Act states that an auditor cannot be a person who has a close relationship with the company, such as a board member or a managing director. In addition, the Auditors Act provides rules for maintaining the impartiality and independence of auditors. These include the rule that an auditor must never participate in the decisions within the company.

Furthermore, in accordance with the Companies Act and rules on professional ethics, an auditor is obligated to report to the board of directors any irregularities that are found when examining the annual report and bookkeeping. In certain cases, material accounting breaches must be mentioned in the audit

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<sup>34</sup> 1976:125.

report. When the auditor suspects that a crime such as the bookkeeping crime, bribery or money laundering has been committed, his/her suspicions must be reported to the prosecutorial authorities. In addition, the tax authorities are obligated to report suspected cases of active bribery to the public prosecutor.

## **8.2 Companies Subject to the Accounting and Auditing Requirements**

Pursuant to the Bookkeeping Act, persons carrying out business activities are required to maintain accounting records, as well as limited companies, partnerships, economic associations and European economic interest groupings with a registered office in Sweden that are not engaged in business activities. Persons carrying out agricultural activities, who are required to maintain accounting records in accordance with the Agricultural Bookkeeping Act are not required to maintain accounting records in accordance with the Bookkeeping Act. The Foundation Act and the Act on Securing Pension Commitments require foundations to maintain accounting records when certain conditions are satisfied.

The Companies Act requires all limited companies to be audited. In addition, the regulations published pursuant to the Annual Accounts Act also require partnerships and limited partnerships to be audited to the extent that they follow the Annual Accounts Act (whether compulsorily or voluntarily). Pursuant to the Associations Act, economic associations shall appoint at least one auditor. Companies following the Accounting Act, including private partnerships and sole traders, are required to appoint an auditor if they have more than 10 employees. In addition, in accordance with the Foundation Act, foundations are required to appoint at least one auditor.

## **8.3 Penalties**

Under chapter 11, section 5 of the Penal Code, a person is subject to up to 2 years imprisonment for a “bookkeeping crime”. This involves the intentional or careless neglect of the bookkeeping obligations under the Bookkeeping Act, the Foundation Act or the Act on Securing Pension Commitments (e.g. failing to enter business transactions in the accounts or to preserve accounting material) with the result that the financial status, etc. of a business cannot be assessed from its accounts. The term of imprisonment can be increased to up to 4 years where the crime is “gross”. Sweden indicates that most foreign bribery cases should be covered by this offence because obtaining international business advantages through bribery would normally involve rewards of a considerable value. If the bookkeeping offence is not applicable, other offences such as the offence of obstructing tax control under the Tax Crime Act may be applicable.

Other relevant crimes under the Penal Code in addition to the money laundering offence, include the crime of falsification<sup>35</sup>, which is punishable by a maximum of 2 years of imprisonment (up to 6 months where the crime is “petty” and up to 6 years where it is “gross”), and the use of a false document<sup>36</sup>, which is subject to the same penalties.

There is no specific penalty provision applicable to auditors, but the Swedish authorities point out that pursuant to chapter 23, section 4 of the Penal Code, a punishment provided for an offence under the Code shall be applicable to anyone who “furthered” the act by “advice or deed”. Thus an auditor could be convicted for furthering an act that constitutes a bookkeeping offence under chapter 11, section 5.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party co-operate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations

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<sup>35</sup> Chapter 14, section 1 of the Penal Code.

<sup>36</sup> Chapter 14, section 9 of the Penal Code.

and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

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

## **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

### **9.1.1/9.1.2 Criminal Matters/Dual Criminality**

The Swedish provisions concerning mutual legal assistance are contained in various statutes, and pursuant to these statutes<sup>37</sup> Sweden can provide certain types of mutual legal assistance to other countries, including the taking of evidence<sup>38</sup>, service of documents, search, and coercive measures<sup>39</sup>.

The legislation does not require an agreement between Sweden and the requesting country<sup>40</sup> in order to be able to provide mutual legal assistance, but there are other requirements that must be satisfied. In most cases the condition of dual criminality must be met, and this is the case regardless if there is an agreement. And where coercive measure are to be employed, there is an added requirement that the criminal action can lead to imprisonment for more than one year. Under most of the statutes mutual legal assistance cannot be rendered in relation to a political offence, and there are certain restrictions in relation to military offences.

The legislation does not contain a requirement of reciprocity. However, the principal reason that Sweden has entered into mutual legal assistance agreements with some countries was to address the reciprocity requirements of other countries.

The Swedish authorities state that the requirement of dual criminality shall be considered fulfilled where a request for mutual legal assistance is made in relation to an offence that is within the scope of the Convention.

The Swedish authorities indicate that Sweden can provide mutual legal assistance in relation to criminal proceedings against a legal person where the general conditions applicable to natural persons are fulfilled.

Mutual legal assistance is currently under review in the Ministry of Justice, partly due to commitments within the European Union, with the object of clarifying the rules.

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<sup>37</sup> This legislation includes The Act with Certain Provisions Concerning International Mutual Assistance in the Field of Criminal Cases (1991:435).

<sup>38</sup> The Act on Taking Evidence for a Foreign Court (1946:816).

<sup>39</sup> The Act on the Use of Coercive Measures at the Request of a Foreign State (1975:295).

<sup>40</sup> Although an agreement is not necessary to be able to provide mutual legal assistance, Sweden has ratified the 1959 European Convention on Mutual Assistance in Criminal Matters; the 1979 Additional Protocol to the 1959 Convention; the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. There are special agreements between the Nordic countries for simplifying the procedures and reducing the conditions for mutual legal assistance. Bilateral agreements have been concluded with Hungary (1983) and Poland (1989) for the provision of mutual legal assistance and a bilateral agreement has been concluded with the United Kingdom on restraint and confiscation of proceeds of crime.

### **9.1.2 Non-Criminal Matters**

Sweden states that mutual legal assistance “probably” cannot be provided in relation to non-criminal proceedings against a legal person.

### **9.3 Bank Secrecy**

Section 1 of the Act Concerning the Use of Certain Coercive Measures at the Request of a Foreign State provides for the seizure of “written documents available in Sweden” where a person in a foreign state is suspected, accused or convicted of an offence punishable in that state. Section 1 states that the provisions in chapter 27, sections 2 and 3 of the Code of Judicial Procedure on domestic investigations must be applied to an application made thereunder. Pursuant to chapter 27, section 2 of the Code of Judicial Procedure, if it can be assumed that a document contains information that an official or other person may not disclose under testimony under chapter 36, section 5, it cannot be seized from that person or the person who is owed the duty of confidentiality. Pursuant to chapter 36, section 5 the duty of confidentiality applies to persons such as advocates, physicians, dentists, midwives, psychologists, etc. who may not testify “concerning matters entrusted to, or found out by, them in their professional capacity unless the examination is authorized by law or is consented to by the person for whose benefit the duty of secrecy is imposed”. The same duty of secrecy applies to persons whom, pursuant to the Secrecy Act, chapter 8, section 4, may not provide the information therein referred to.

Pursuant to section 2 of the Act Concerning the use of Certain Coercive Measures at the Request of a Foreign State, “property which can be assumed to be of significance for an investigation into an offence or to have been taken from a person by the same offence, may be seized and delivered to the foreign state”. Section 3 paragraph 1 of the Act states that seizure under section 2 may not be effected in relation to a response from a state other than Denmark, Finland, Iceland or Norway if there is an impediment to extradition for the offence under section 4 paragraph 1, section 5 or section 10 of the Act on Extradition. Under section 4 paragraph 1 of the Act on Extradition, extradition is only available for an act that is punishable under Swedish law by imprisonment for more than 1 year. Section 5 of the Act on Extradition pertains to certain crimes committed by members of the armed forces and offences committed under the National Service Act. Section 10 of the Act on Extradition essentially protects suspects from double jeopardy (i.e. a second prosecution for the same offences after an acquittal or conviction).

The Swedish authorities explain that since there are no provisions on bank secrecy with regard to international requests for mutual legal assistance, the domestic system is applied in practice. They state that under the domestic system the rules on bank secrecy are suspended when a preliminary investigation has been initiated, and that banks are not prohibited from providing information in connection with a reported criminal offence. Furthermore, even if a criminal investigation has not been initiated, the banks are obliged under the Statute on Money Laundering<sup>41</sup> to provide the police with all information indicating money-laundering activities.

## **10. ARTICLE 10. EXTRADITION**

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

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

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<sup>41</sup> SFS 1993:768.

Pursuant to section 4 of the Act on Extradition of Offenders, extradition (except in the cases of Denmark, Finland, Iceland and Norway) can only be provided where the offence in question is punishable by “imprisonment for more than 1 year” in Sweden. The requirement of dual criminality shall be considered satisfied where a request for extradition concerns an offence that is within the scope of the Convention.

Further restrictions under the Act on Extradition of Offenders include the prohibition of rendering extradition for political offences<sup>42</sup>, and offences in respect of which the statute of limitations has expired. Extradition is also prohibited where a person could be subjected to persecution in the foreign state due to his/her origin, religious or social views, etc.<sup>43</sup>

The law does not require an agreement between Sweden and the country requesting extradition.<sup>44</sup> Furthermore, reciprocity is not required in order to be able to provide extradition.

### **10.3 Extradition of Nationals**

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

The extradition of Swedish nationals is prohibited under section 2 of the Act on Extradition of Offenders, except in relation to requests from the Nordic countries.

Sweden points out that it has extraterritorial jurisdiction in relation to offences committed abroad by its nationals. Additionally, Sweden states that where extradition is denied on the ground that the alleged offender is a Swedish national, the case would be submitted to a prosecutor to examine the possibility of initiating criminal proceedings in Sweden.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

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

On 7 June 1999, Sweden notified the OECD Secretary-General that the responsible authority is the Ministry of Foreign Affairs. The Legal Directorate confirmed the notification on 11 June 1999.

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<sup>42</sup> Section 6.

<sup>43</sup> Section 7.

<sup>44</sup> However, Sweden is a signatory to the European Convention on Extradition. Sweden also has extradition agreements with the U.S., Canada, Australia and France.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

According to the Swedish authorities, it was “questionable” whether the tax deductibility of bribes was previously denied under the Municipal Income Tax Act.<sup>45</sup> Thus an amendment to this statute came into force on July 1, 1999, expressly stating that “deductions may not be made for expenses for bribery or other improper award”. According to the preparatory work, the provision applies to bribes given to the same persons mentioned in chapter 17, section 7 of the Penal Code.

The Municipal Income Tax Act applies to all person with employment and business income.

A criminal conviction is not required as a condition for denying deductibility.

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<sup>45</sup> 1928:370

## EVALUATION OF SWEDEN

### General Remarks

The Working Group complimented the Swedish authorities for the rapid and careful implementation of the Convention into Swedish legislation. Delegates thanked the Swedish authorities for their co-operation in the evaluation process, including their complete and speedy replies to questions that had been raised.

The Working Group considered in light of the available documentation and explanations given by the Swedish authorities that the Swedish legislation conforms to the standards of the Convention. However, some concerns remained with regard to the “public interest” requirement to prosecute certain cases of bribery, and the effectiveness of sanctions.

### Specific Issues

#### 1. Definition of “foreign public officials”

From the text of chapter 17, section 7 in connection with chapter 20, section 2 of the Swedish Penal Code, it is unclear whether the definition of “foreign public officials” conforms to the requirements of the Convention. In particular, there is the issue whether the Swedish legislation covers all kinds of public employees in a foreign state.

The Swedish authorities explained that they interpret the term “employee” in chapter 17, section 7, in a very broad manner. It would cover both private and public employees, irrespective of whether they are employed in Sweden or abroad.

The Working Group was satisfied with this additional clarification.

#### 2. Public interest in prosecuting international bribery cases

According to chapter 17, section 17, of the Penal Code, there are a number of cases where a public prosecutor may prosecute only if the employer or principal of the person exposed to the bribery reports the crime for prosecution or if prosecution is called for in the public interest. In particular, this requirement exists where a foreign public official<sup>46</sup> is exposed to the bribe.

The Swedish authorities pointed out that the requirement of public interest would be fulfilled if “economic damage occurs or if the bribe is of significant value”. There would be no gap in the Swedish legislation because prosecution of bribery of foreign public officials would usually be in the public interest. The Swedish authorities also stressed that in deciding whether to put a case on trial or not, the prosecutor would take into account Sweden’s international commitments, including those under the Convention.

The Working Group expressed concern that the requirement of public interest may create a potential loophole with regard to prosecution, despite the fact that Article 5 of the Convention recognises the fundamental nature of national regimes of prosecutorial discretion. It agreed to evaluate in Phase 2 whether this requirement may be an obstacle for an effective implementation of the Convention.

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<sup>46</sup> Except: - a member of the European Commission, the European Parliament, the European Court of Auditors;  
- judges of the European Court of Justice;  
- a Minister or a member of the legislative assembly of a foreign state.

### **3. Effectiveness of sanctions**

Pursuant to chapter 17, section 7, the bribe of a domestic or foreign public official is punishable by a fine or imprisonment for at most two years. Concerns have been raised that this sanction is comparatively weak. The Swedish authorities pointed to the fact that the tradition in Sweden has for a long time been to avoid too lengthy periods of incarceration. They referred to the fact that a fixed term of imprisonment cannot exceed ten years in Sweden, even for severe crimes against life, liberty or health. They are of the opinion that considered in this context, the maximum term of imprisonment for bribery is sufficient.

At least with regard to cases of aggravated bribery, the Working Group expressed concern about whether the maximum penalty of two years complies with the requirement of Article 3 paragraph 1 of the Convention that the sanction be effective, proportionate, and dissuasive.

### **4. Forfeiture of bribe and pecuniary damages**

According to chapter 36, section 1, of the Penal Code, the proceeds of a crime shall be declared forfeited unless “manifestly unreasonable”. In this connection, the Swedish authorities may refrain from forfeiture if, *inter alia*, there is reason to believe that liability to pay damages as a result of the crime will be imposed. A person who causes financial damage through active bribery is liable to damages.

The Working Group considered that as far as abstention from forfeiture because of liability to damages is concerned, the Swedish legislation meets the requirements of Article 3 paragraph 3 of the Convention. Questions were raised as to what extent there may be other cases under chapter 36, section 1, of the Penal Code where forfeiture would be manifestly unreasonable, and whether non-forfeiture in these circumstances would be in accordance with the Convention. The Swedish authorities pointed out that there is very limited scope for non-forfeiture, given the fact that it is only permitted in the exceptional case that forfeiture would be manifestly unreasonable.

The Working Group was satisfied with this additional clarification.

### **5. Jurisdiction**

It was recognised that the Swedish legislation includes both territorial and nationality jurisdiction. It fulfils the requirements of Article 4 paragraph 2 of the Convention. With regard to the issue of nationality jurisdiction, the Working Group noted that, if the offence has been committed in the territory of a foreign state, Swedish 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, the Working Group agreed that this issue should be reviewed in Phase 2 of the evaluation process.