



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

Compilation of Recommendations made in The Phase 3 Reports

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

LAST UPDATE DECEMBER 2014

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ARGENTINA (DECEMBER 2014)

The Working Group is gravely concerned about Argentina's commitment to fight foreign bribery and how little progress Argentina has made since previous evaluations. Argentina is in serious non-compliance with key articles of the Convention by failing to provide for corporate liability for foreign bribery. It has not implemented other longstanding Working Group Recommendations from 2001 on nationality jurisdiction to prosecute foreign bribery and deficiencies in the foreign bribery offence. There has been little or no improvement on problems in the criminal justice system that were identified in Phase 2. Widespread delays continue to plague economic crime investigations. A new Criminal Procedure Code (CPC) that might address delay has yet to be implemented. Additional issues impinge upon the independence of the judiciary and prosecutors, including executive contact with judges and prosecutors in specific cases, the use of disciplinary processes to pressure judges and prosecutors, and the extraordinarily high number of judicial vacancies and surrogate judges.

The Working Group has further concerns about enforcement in actual foreign bribery cases. Judicial investigations have been opened into several of the ten foreign bribery allegations that have surfaced since 2001. This is a welcome development. These investigations, however, have progressed very slowly and have not yielded charges or convictions. In several instances, Argentine authorities did not proactively investigate foreign bribery allegations or effectively seek the co-operation of foreign authorities. This lack of foreign bribery enforcement has contributed to a low level of awareness of and interest in fighting this offence among companies and citizens.

In addition, prosecutors and investigative judges in charge of these actual foreign bribery cases did not attend the on-site visit. Their absence seriously undermined the effectiveness of the on-site visit and precluded a full assessment of Argentina's enforcement efforts in practice. It also deprived the Working Group of an opportunity to explore whether actual foreign bribery cases have been impacted by the numerous legislative and systemic criminal justice issues identified in this report, such as concerns about the foreign bribery offence; jurisdiction to prosecute; the use of anonymous information to open investigations; reporting and the opening of investigations; delay in complex economic crime cases; resources and specialisation of law enforcement bodies; the impact of judicial vacancies; executive contact with prosecutors and judges; the threat of judicial and prosecutorial disciplinary processes; use of special investigative techniques; the obtaining of MLA; and information sharing with other government agencies.

The Working Group recalls that the Phase 2 Report (paras. 277-278) already expressed serious concerns about Argentina and considered conducting supplementary evaluations. Given the absence of corporate liability and nationality jurisdiction as well as systemic deficiencies such as delay in economic crime cases, the Working Group decided to conduct a Phase 1bis evaluation of Argentina one year after the Phase 2 Report's adoption to assess legislative developments in these areas. Depending on its conclusions concerning progress in these and other areas, the Working Group would also decide whether to conduct a supplementary Phase 2bis evaluation or take other appropriate action. To date, supplementary evaluations have yet to be conducted.

The Working Group further notes that Argentina meets the criteria for supplemental Phase 3bis evaluations that are set out in its Phase 3 Evaluation Procedure (para. 68). The Working Group will consider conducting a Phase 3bis evaluation "in the event of inadequate implementation of the Convention". Argentina meets this criterion due to its continuing inability to impose corporate liability for foreign bribery and to implement other key Working Group Recommendations since Phases 1 and 2. The Working Group will also consider a Phase 3bis evaluation "where attendance at the Phase 3 on-site visit prevents the lead examiners from assessing whether the country has adequately implemented the

Convention”. As noted above, prosecutors and investigative judges who conducted actual foreign bribery cases did not attend the on-site visit. The Working Group therefore could not fully assess Argentina’s foreign bribery enforcement actions, which is a critical component of the Working Group’s Phase 3 evaluations.

For these reasons, the Working Group decides that Argentina should undergo a supplemental Phase 3*bis* evaluation by the end of 2016 which will include an on-site visit to Argentina in mid-2016. The evaluation will cover the implementation of the Recommendations set out below; relevant new legislation and developments, including those relating to follow-up issues below; and Argentina’s foreign bribery enforcement actions. The on-site visit will include meetings with investigative judges and prosecutors who have conducted Argentina’s foreign bribery enforcement actions. The Working Group will also conduct a high-level mission to Argentina in early 2016 to meet Ministers and senior officials, and to further engage with the Argentine authorities in order that they take the necessary steps to implement the Convention.

Regarding outstanding recommendations from previous evaluations (as set out in Annex 1 to this report), since Argentina’s Phase 2 Written Follow-Up Report, only Phase 2 Recommendation 12(c) has been fully implemented. Recommendations 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 3(c), 4, 5, 6, 9(a), 9(d), 10(a), 10(b), 10(c), 11 and 12(b) remain partially or not implemented.

In conclusion, based on the findings in this report on Argentina’s implementation of the Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Argentina to report back on the implementation of recommendations 3 and 5(c) orally within six months (i.e. by June 2015), and of recommendations 1, 2, 3, 4(a), 4(b), 4(c), 4(d), 5(c), 5(e), 6 and 8 within one year (i.e., by December 2015). Argentina is further invited to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by December 2016). This written follow-up report will form part of Argentina’s Phase 3*bis* evaluation, which as noted above is to take place by the end of 2016.

1. Recommendations of the Working Group

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

1. With regards to the foreign bribery offence, the Working Group recommends that Argentina:
 - a) introduce an autonomous definition of foreign public officials (Convention, Article 1(4); 2009 Recommendation III.ii and V);
 - b) ensure that the definition of foreign public officials covers, in a manner consistent with the Convention, officials of foreign public enterprises and public officials of organised foreign areas or entities that do not qualify or are not recognised as States (Convention, Article 1(4) and Commentaries 12-18; 2009 Recommendation III.ii and V); and
 - c) eliminate the vagueness in the offence resulting from the absence of a requirement that the advantage provided to an official be “undue”, or that the advantage obtained by the briber be “improper” (Convention, Article 1; 2009 Recommendation III.ii and V).
2. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Argentina adopt nationality jurisdiction to prosecute foreign bribery cases on a priority basis (Convention, Article 4(2); 2009 Recommendation V).

3. With regards to liability of legal persons, the Working Group recommends that Argentina adopt legislation on a priority basis to ensure that legal persons can be held liable for foreign bribery (Convention, Articles 2 and 3; 2009 Recommendation Annex I.B).

4. With regards to sanctions and confiscation, the Working Group recommends that Argentina:

- a) substantially increase the maximum fine available for foreign bribery (Convention, Article 3(1));
- b) take steps to ensure that fines are available where the gain obtained by a briber is not pecuniary or does not go to the briber but his/her company (Convention, Article 3(1) and Commentary 7);
- c) amend its legislation to provide for confiscation of property the value of which corresponds to that of the bribe and the proceeds of bribery, or that monetary sanctions of comparable effect are applicable (Convention, Article 3(3));
- d) take further steps to ensure (i) that confiscation is routinely ordered in foreign bribery cases, (ii) that the amount of confiscation represents the full benefits of the offence, and (iii) that confiscation orders are executed without unreasonable delay (Convention, Article 3(3)); and
- e) regarding debarment, (i) extend the grounds for debarment from public procurement to cover all offences falling within the scope of Article 1 of the Convention; (ii) ensure the effectiveness of the exclusion mechanism, including by routinely checking debarment lists of multilateral development banks in relation to public procurement contracting; and (iii) in conjunction with reform of the liability of legal persons for bribery, extend the disqualification to legal persons engaged in foreign bribery where appropriate (Convention, Article 3(4); 2009 Recommendation X).

5. Regarding investigations and prosecutions, the Working Group recommends that Argentina:

- a) take steps to ensure that its law enforcement authorities routinely and systematically assess credible foreign bribery allegations that are reported in the media on a timely basis; and ensure that foreign bribery cases may be commenced based on information provided anonymously (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- b) use proactive steps to gather information from diverse sources of allegations and enhance investigations (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- c) take steps to promptly implement the new CPC enacted on 4 December 2014, and ensure that the new law effectively reduces delay in practice (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- d) take steps to (i) ensure that prosecutors and investigative judges in economic crime cases act promptly and proactively without delay, and (ii) actively assess the effectiveness of its measures to reduce delay by maintaining and analysing statistics on delay and economic crime cases that have been time-barred (Convention, Articles 5 and 6, and Commentary 27; 2009 Recommendation Annex I.D);

- e) ensure that adequate resources, including specialised and experienced investigative judges, are made available for foreign bribery investigations and prosecutions (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- f) provide foreign bribery-specific training to all judges and prosecutors that have jurisdiction to investigate and prosecute this crime (Convention, Article 5 and Commentary 27; 2009 Recommendation III.(ii) and V); and
- g) accelerate efforts to implement an effective national register of information relating to all Argentine companies (2009 Recommendation II).

6. With regards to judicial and prosecutorial independence, the Working Group recommends that Argentina take steps to ensure that the exercise of investigative and prosecutorial powers, in particular for the foreign bribery offence, is not subject to improper influence by factors listed in Article 5 of the Convention, including concerns of a political nature. In particular, Argentina should take all necessary steps to ensure:

- a) actual or threatened disciplinary action against judges and prosecutors does not adversely affect the effectiveness of foreign bribery investigations and prosecutions, and is not motivated by considerations of national economic interest, potential effect upon relations with another State, or identity of the natural or legal person involved;
- b) government officials refrain from contacting judges and prosecutors about specific cases; and
- c) a substantial reduction in the number of judicial vacancies and surrogate judges, and increased continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D).

7. With regards to statistics, the Working Group recommends that Argentina maintain detailed statistics of sanctions (including confiscation) imposed in cases of bribery and other economic crimes (Convention, Articles 3(1)-(3)).

8. Regarding mutual legal assistance, the Working Group recommends that Argentina continue to take further steps to ensure that MLA requests from foreign authorities are executed without undue delay (Convention, Article 9.1; 2009 Recommendation XIII.v).

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

9. With regards to money laundering, the Working Group recommends that Argentina:

- a) extend money laundering reporting, due diligence and record keeping obligations to lawyers, *síndicos* and other legal professionals (subject to appropriate qualifications) (Convention, Article 7);
- b) further enhance AML measures for financial transactions involving PEPs, including by adding important political party officials to the definition of PEPs; ensuring that due diligence of former PEPs is based on an assessment of risk and not on prescribed time limits; and issuing guidelines on the handling of PEPs (Convention, Article 7; 2009 Recommendation III.i);
- c) raise awareness about foreign bribery as a predicate offence to money laundering, including by preparing typologies on foreign bribery-related money laundering (Convention, Article 7; 2009 Recommendation III.i); and

- d) take steps to ensure that UIF processes and forwards STRs to law enforcement without undue delay (Convention, Article 7; 2009 Recommendation IX.i).

10. With regards to accounting and auditing, corporate compliance, internal control and ethics, the Working Group recommends that Argentina:

- a) continue to strengthen accounting standards such as considering to allow all unlisted companies and SOEs to choose IFRS; take measures to enforce the accounting fraud offence and accounting requirements more effectively in bribery cases; and increase applicable sanctions where appropriate (Convention, Article 8; 2009 Recommendation X.A.i and iii);
- b) work with the accounting profession to raise awareness of the foreign bribery offence, and encourage the profession to develop specific training on foreign bribery in the framework of their professional education and training systems (Convention, Article 8; 2009 Recommendation III.i);
- c) further improve requirements to submit to external audit; ensure full ISA implementation in Buenos Aires and all 23 provinces; and continue efforts to improve audit quality standards, including with regard to certification of auditor qualifications and quality control of audits (Convention, Article 8; 2009 Recommendation X.B.i and ii);
- d) ensure that external auditors and audit firms take greater account of the risks of foreign bribery in the companies that they audit (Convention, Article 8; 2009 Recommendation III.i);
- e) continue its efforts to ensure that auditors and *síndicos* that are not in SOEs promptly report suspicions of foreign bribery by employees or agents of the company to the competent authorities, notably in the face of inaction after appropriate disclosure within the company (2009 Recommendation X.B.iii and v); and
- f) take more effective steps to promote corporate compliance, internal controls and ethics programmes to prevent and detect foreign bribery (2009 Recommendation X.C).

11. With regards to tax-related measures, the Working Group recommends that Argentina:

- a) explicitly disallow the tax deductibility of bribes to foreign public officials for all tax purposes in an effective manner (2009 Recommendation VIII.i; 2009 Tax Recommendation I);
- b) improve AFIP's ability to detect foreign bribery by disseminating the 2013 OECD Bribery Awareness Handbook for Tax Examiners and training AFIP officials on detecting bribery (2009 Recommendation III.i and VIII.i; 2009 Tax Recommendation II); and,
- c) promptly amend its legislation to allow tax information to be provided to foreign authorities for use in foreign bribery investigation (Convention Article 9(1); 2009 Recommendation XIII.iv; 2009 Tax Recommendation I.iii).

12. With regards to awareness-raising, the Working Group recommends that Argentina greatly increase its efforts to proactively raise awareness of foreign bribery within:

- a) the Argentine public administration, especially among agencies that can play an important role in preventing and detecting foreign bribery, such as overseas diplomats, *Fundación ExportAr* and trade promotion officials (2009 Recommendation III.i); and,
- b) the private sector, including through activities such as seminars, conferences, technical assistance and partnerships with business associations (2009 Recommendation III.i).

13. With regards to reporting and whistleblower protection, the Working Group recommends that Argentina:

- a) (i) further remind public officials, including diplomatic missions, trade promotion and tax officials of their obligation under Article 177(1) CPC and Article 2 of the Reporting Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; (ii) ensure that administrative reporting duties in other instruments reflect and are compatible with the CPC and Reporting Decree; and (iii) consider whether sanctions for non-reporting of alleged foreign bribery are appropriate and effective (2009 Recommendation IX.i and ii); and,
- b) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions (2009 Recommendation IX.iii).

14. With regards to export credits, the Working Group recommends that Argentina adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it resumes the provision of officially supported export credits (2009 Recommendation XII.i).

2. Follow-up by the Working Group

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

- a) Application of Article 258bis PC, including cases where a bribe is paid in order that an official acts outside his/her authorised competence (Convention, Article 1 and Commentary 19);
- b) Whether the solicitation or “illicit demand” of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber (Convention, Article 1; 2009 Recommendation Annex I.A);
- c) Application of territorial jurisdiction in foreign bribery cases (Convention, Article 4(1));
- d) Sanctions imposed for foreign bribery in practice, including whether the sentences imposed comply with Commentary 7 of the Convention (Convention, Article 3);
- e) Confiscation of indirect proceeds of foreign bribery, and confiscation against a legal person of the proceeds of offences committed by a *de facto* manager (Convention, Article 3);
- f) Issues arising from Argentina’s actual foreign bribery enforcement actions which the Working Group could not fully assess because of the absence from the on-site visit of the prosecutors and investigative judges who conducted these cases (Convention, Article 5; 2009 Recommendation Annex I);
- g) Effectiveness of measures taken to address delay in investigations and prosecutions of complex economic crimes, including the new CPC and the experts group in the federal courts (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);

- h) Functioning of the Judicial Council and disciplinary proceedings against judges and prosecutors arising out of foreign bribery cases (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- i) Application of the money laundering offence in Argentina, including: (a) whether the offence covers the laundering of a bribe and the laundering of indirect proceeds of crime, (b) whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred, and (c) enforcement of the money laundering offence in practice (Convention, Article 7);
- j) Whether Argentina can grant MLA requests submitted in the context of criminal and non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person (Convention, Article 9);
- k) Time needed to reach a final decision on extradition in corruption cases (Convention, Article 10); and,
- l) Whether Article 5 factors influence extradition or MLA in Argentina (Convention, Articles 5, 9 and 10, and Commentary 27; 2009 Recommendation Annex I.D).

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf>

AUSTRALIA (OCTOBER 2012)

While the Working Group on Bribery welcomes Australia's recent efforts, it notes that overall enforcement of the foreign bribery offence to date has been extremely low. Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are on-going. Out of 28 foreign bribery referrals that have been received by the Australian authorities, 21 have been concluded without charges. Australia recently began strengthening its enforcement efforts, such as by establishing a Foreign Bribery Panel of Experts to advise AFP investigation teams. The Working Group encourages Australia to continue these efforts, and looks forward to evaluating the impact of these developments on Australia's enforcement of its foreign bribery laws.

Regarding outstanding recommendations from previous evaluations, since its Phase 2 Written Follow-Up Reports, Australia has fully implemented Phase 2 Recommendations 2(a), 5(c), and 6(a). Australia has partially implemented Recommendations 1(b), 1(c), 2(b), 2(e), 4(a), and 6(b). Recommendation 1(d) has not been implemented.

In conclusion, based on the findings in this report on Australia's implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Australia to report orally on the implementation of recommendations 6 and 8(a) within one year (i.e., by October 2013). The Working Group invites Australia to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by October 2014).

In addition, the Working Group will continue to monitor Australia's foreign bribery enforcement efforts. This should include, if possible, exploration of the relevant issues in the *Securency/NPA* case that could not be discussed in this evaluation because of suppression orders and on-going investigations. Australia is also invited to provide information on its foreign bribery-related enforcement actions when it reports orally in October 2013 and in writing in October 2014.

1. Recommendations of the Working Group

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

1. The Working Group recommends that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention Article 1, 5; 2009 Recommendation V).
2. With respect to the foreign bribery offence, the Working Group recommends that Australia:
 - a) Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records (2009 Recommendation VI.ii);
 - b) Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence (Convention Article 1);

3. Regarding the liability of legal persons, the Working Group recommends that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases (Convention Article 2).
4. Regarding the false accounting offence, the Working Group recommends that Australia:
 - a) Increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework; or increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level (Convention Article 8(2));
 - b) Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention Article 8(1)).
5. Regarding confiscation, the Working Group recommends that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely considers confiscation in foreign bribery cases (Convention Article 3(3)).
6. Regarding the Australian Securities and Investment Commission (ASIC), the Working Group recommends that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).
7. With respect to co-ordination and information-sharing, the Working Group recommends that:
 - a) The AFP, ASIC, and APRA set out in writing with greater precision, following consultations with one another, their complementary roles and responsibilities in foreign bribery and related cases, and written rules for case referral and information sharing (Convention Article 5; 2009 Recommendation IX.ii);
 - b) Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).
8. With respect to investigations of foreign bribery, the Working Group recommends that:
 - a) The AFP (i) take sufficient steps to ensure that foreign bribery allegations are not prematurely closed; (ii) be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations; (iii) take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases; (iv) as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations with other Australian and foreign law enforcement agencies, especially when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia; and (v) routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven (Convention Articles 2, 5, 7 and 8; Commentary 27; 2009 Recommendation Annex I.C and I.D);

- b) The AFP Foreign Bribery Panel of Experts consider the Working Group’s recommendations to the AFP (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

9. Regarding plea bargaining and self-reporting, the Working Group recommends that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company’s co-operation; measures to monitor the company’s compliance with a plea agreement; and the prosecution of natural persons related to the company (Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D).

10. With respect to resources and priority, the Working Group recommends that:

- a) The AFP continue to provide its officers with additional training in foreign bribery, and training to law enforcement officials to implement the Cybercrime Legislation Amendment Act 2012 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- b) Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- c) The AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such by issuing written guidance or policy) to continue to ensure that they are not impermissibly influenced by factors listed in Article 5 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

11. With respect to mutual legal assistance (MLA), the Working Group recommends that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1); 2009 Recommendation XIII.iv).

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

12. With respect to awareness-raising, the Working Group recommends that Australia:

- a) Raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime (2009 Recommendation III.i);
- b) Continue to raise awareness among the private sector of the foreign bribery offence and the importance of developing and implementing anti-bribery corporate compliance programmes, including by (i) promoting Annex II of the 2009 Recommendation, (ii) targeting companies (particularly SMEs) that conduct business abroad, and (iii) co-ordinating efforts to promote corporate compliance, including those undertaken by the AFP (2009 Recommendation III.i, III.v, X.C and Annex II);
- c) Consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes (2009 Recommendation III.i and X.C);
- d) Adopt a “whole-of-government” approach to raise awareness of foreign bribery (2009 Recommendation III.i).

13. With respect to anti-money laundering measures, the Working Group recommends that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (2009 Recommendation III.i).

14. With respect to tax-related measures, the Working Group recommends that:

- a) Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act (2009 Recommendation VI.ii, VIII.i; 2009 Tax Recommendation I.i);
- b) The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);
- c) The ATO consider including periodically bribery and facilitation payments in its Compliance Programme (2009 Recommendation III.i, VIII.i; 2009 Tax Recommendation I.ii).

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- a) Australia extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner (2009 Recommendation III.iv, X.B.v);
- b) Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases (2009 Recommendation IX.ii);
- c) Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements (2009 Recommendation IX.ii);
- d) Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (2009 Recommendation IX.iii);
- e) AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP; and train its employees on this reporting obligation and procedure (2009 Recommendation IX.ii);
- f) Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade (2009 Recommendation X.C.i).

16. With respect to public advantages, the Working Group recommends that:

- a) Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery (Convention Article 3(4); 2009 Recommendation XI.i);

- b) EFIC (i) conduct due diligence on agent commission fees below 5% of large absolute value to ensure funds are not being provided as bribes; (ii) report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases; and (iii) reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery (2009 Recommendation XII.ii; 2006 Export Credit Recommendation).

2. Follow-up by the Working Group

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

- a) Outcome of Australia's public consultation on the facilitation payment defence and foreign bribery offence (Convention Article 1);
- b) Application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code (Convention Article 1; Commentary 9);
- c) Whether the foreign bribery offence requires the proof of an intention to bribe a particular foreign public official (Convention Article 1);
- d) Whether effective, proportionate and dissuasive sanctions (including confiscation) are imposed against natural and legal persons for (i) foreign bribery, and (ii) false accounting in connection with foreign bribery (Convention Articles 3(1), 3(3), 8(2));
- e) Choice of proceeding in foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive (Convention Articles 3, 5);
- f) Work of the AFP Foreign Bribery Panel of Experts, including the implementation of recommendations that the AFP (i) be more proactive in gathering information from diverse sources at the pre-investigative stage; (ii) ensure that future foreign bribery investigations consistently consider the involvement of related legal persons, and alternate charges such as money laundering and false accounting; and (iii) the implementation of the *aide mémoire* (Convention Articles 2, 5, 7, 8; 2009 Recommendation Annex I.C, I.D);
- g) AFP's statement to the Working Group in 2008 that they were "willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests" (Convention, Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- h) Whether the ATO re-assesses the tax returns of taxpayers convicted of foreign bribery (2009 Recommendation VIII.i; 2009 Tax Recommendation);
- i) Reporting of foreign bribery cases by the ATO to the AFP (2009 Recommendation IX.ii);
- j) Enactment and implementation of the Public Interest Disclosure Bill (2009 Recommendation IX.iii);
- k) Application of EFIC's procedures in two cases that involve EFIC support and which is the subject of on-going foreign bribery investigations (2009 Recommendation XII.ii).

Complete Phase 3 Report available at:
<http://oecd.org/daf/briberyininternationalbusiness/AustraliaPhase3en.pdf>

AUSTRIA (DECEMBER 2012)

The Austrian on-site visit was notably well-organised, distinguished by an extremely high level of transparency, and included a large number of participants from the private sector and civil society, including two media representatives. Throughout the Phase 3 process, the Austrian authorities provided access to all requested documents, and timely and comprehensive responses to questions from the examination team. The on-site visit by the evaluation team took place shortly after amendments were passed by Parliament, which will come into effect on 1 January 2013, for the purpose of amending the anti-bribery offences in the Penal Code, including offences that apply to the bribery of foreign public officials. The amendments, which are intended in part to implement certain Phase 2 Recommendations, also eliminate the dual criminality requirement to establish jurisdiction over foreign bribery offences committed abroad by Austrian nationals. While viewed overall positively by the Working Group, due to the timing, these amendments could not be assessed in practice for their impact on enforcement of Austria's foreign bribery offences.

Moreover, the Working Group regrets that there has not been a conviction of the bribery of foreign public officials since Austria ratified the Anti-Bribery Convention in 1999, although approximately 15 allegations have been noted. Of these allegations, one case involving five indictments is currently being tried; a second case has resulted in indictments, including against a legal person; a third is expected to result in an indictment at the beginning of 2013; and four have resulted in investigations that are ongoing. In view of the recent significant increase in law enforcement actions, and the new amendments to the foreign bribery offences, the Working Group invites Austria to report in writing one year after adoption of this Report on progress prosecuting foreign bribery cases. The report should also address cases of bribery through intermediaries, as described in follow-up issue 10 a) i) below, and progress on implementing the following recommendations: 1 a) on prosecuting legal persons; 1 d) on the study of the effectiveness of VbVG; 3 on confiscation; and 4 a) on addressing the routine use of remedial actions by financial institutions in response to court orders to provide access to bank records. In one year, Austria is also recommended to provide an oral report on implementation of the following recommendations: 1 c) on increasing the fines for legal persons; 4 e) i) on law enforcement's capacity for evaluating digitalised data; and recommendation 8 b) on the use of tax information in foreign bribery cases.

Austria has now fully implemented the following Phase 2 recommendations that remained outstanding in Phase 2: 3 c) on resource allocation, 5 a) on sanctions for natural persons, and 5 c) on diversion of criminal proceedings. However recommendations 3 a) on implementation of Article 5 of the Anti-Bribery Convention, 3 b) on mutual legal assistance, and 4 a) on accounting and auditing omissions, are partially implemented; and recommendations 2 b) on foreign bribery reporting, 3 e) on guidelines to prosecutors, and 5 b) on sanctions for legal persons, remain unimplemented. In addition, based on the findings in this Report on implementation by Austria of the Anti-Bribery Convention, 2009 Recommendations, and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below.

1. Recommendations of the Working Group

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

1. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Austria:

- a) Provide a written self-assessment of progress prosecuting foreign bribery cases involving legal persons one year after adoption of this report, which should include an assessment of the application in practice of the Federal Statute on Responsibility of Entities for Criminal Offences (VbVG) to foreign bribery cases, including whether in practice it meets the standards under paragraph B of Annex I of the 2009 Recommendation, and any procedural and legal obstacles to its effective application, with particular attention to the following potentially unclear aspects of the VbVG: i) its application to bribery through agents; ii) the standard of “due and reasonable care” that the prosecution must prove was not taken by a defendant legal person when foreign bribery was committed by a staff member of the legal person; iii) its application to bribery on behalf of related legal persons; and iv) the circumstances under which a legal person is considered a victim of a breach of trust; (Convention, Articles 2 and 5, 2009 Recommendation, par. V)
 - b) Issue and publicise guidelines to prosecutors clarifying that the prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under VbVG, subject only to clearly defined exceptions, and develop guidelines on organisational measures for business regarding the fight against foreign bribery, as was recommended already in Phase 2; (Convention, Articles 2 and 5);
 - c) Increase the fines for legal persons for the foreign bribery offence, given that they are substantially lower than the fines for natural persons, and in light of the size and importance of many Austrian companies, the location of their international business operations, and the business sectors in which they are involved; (Convention, Articles 2 and 3.2) and
 - d) Report in writing in one year on the study by the Austrian Government on the report by the Institute for Legal and Criminal Sociology on the effectiveness of the VbVG. (Convention, Article 2)
2. The Working Group recommends that Austria take appropriate steps within its legal system to ensure that nationality jurisdiction apply to Austrian companies that bribe abroad, including by using non-nationals as intermediaries. (Convention, Article 4.2)
 3. The Working Group recommends that Austria in writing in one year on application of its confiscation provisions to convictions of the bribery of foreign public officials. (Convention, Article 3.3)
 4. Concerning the investigation and prosecution of foreign bribery cases, the Working Group recommends that Austria:
 - a) Find a way that is appropriate and feasible within its legal system to remove the impediments to effective foreign bribery investigations caused by the routine use of remedial actions by financial institutions, and report in writing on progress in this regard in one year; (Convention, Article 5)
 - b) Consider establishing a system of penalties for addressing the situation where bearer shares are not registered pursuant to the rules requiring unlisted companies to convert bearer shares into registered shares by December 2013; (Convention, Article 5)
 - c) Find a way that is feasible and appropriate within its legal system to make it easier to identify beneficial owners of companies in which the beneficial owners are not the shareholders; (Convention, Article 5)

- d) Ensure that, in compliance with Article 5 of the Convention, investigations and prosecutions cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of natural or legal persons involved, particularly in view of the Minister of Justice's decision-making authority in foreign bribery cases; (Convention, Article 5) and
- e) Include as a matter of urgency in its strategy for coordinating anti-corruption bodies, concrete and substantial measures for: i) further improving the capabilities of its law enforcement authorities to effectively evaluate significant amounts of digitalised data, including emails; and ii) tracing the proceeds of foreign bribery. (Convention, Article 5)

5. The Working Group recommends that Austria take immediate measures to ensure that: i) Austria provide responses to requests for mutual legal assistance (MLA) from Parties to the Anti-Bribery Convention without unnecessary delay, regardless if the request is submitted to the central authority or to a public prosecutor's office; and ii) bank secrecy does not cause unnecessary delays in providing MLA. (Convention, Article 9)

Recommendations for ensuring effective prevention and detection of foreign bribery

6. The Working Group recommends that, where appropriate, the Federal Bureau of Anti-Corruption (BAK) provide feedback to the Austrian Financial Investigation Unit (A-FIU) about Suspicious Transactions Reports (STRs) regarding the laundering of the proceeds of foreign bribery. (Convention, Articles 5 and 7)

7. Regarding the use of accounting and auditing measures as well as internal controls, ethics and compliance to prevent and detect foreign bribery, the lead examiners recommend that Austria:

- a) Ensure its law and practice adequately sanction accounting omissions, falsifications and fraud related to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws; (Convention, Article 8)
- b) Encourage companies to actively and effectively respond to reports of suspected acts of foreign bribery from external auditors; (2009 Recommendation, para. X B iv)
- c) Consider requiring external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors making such reports reasonably and in good faith are protected from legal action; (2009 Recommendation, para. X B v)
- d) Raise awareness in the private sector of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance, including paragraph 11.ii) and iii) on effective measures for whistle blowing, and encourage companies to develop and adopt adequate internal controls, ethics and compliance measures to prevent and detect foreign bribery, taking into account the Good Practice Guidance; (2009 Recommendation, para. X C i)
- e) Ensure appropriate measures are in place to protect from discriminatory action private sector employees who report suspected acts of foreign bribery to the competent authorities in good faith and on reasonable grounds. (2009 Recommendation, para. X C v)

8. Regarding the use of tax measures to prevent and detect foreign bribery, the Working Group recommends that Austria:

- a) Continue efforts to provide training and awareness to the tax administration on detecting and reporting suspicions of foreign bribery detected in the course of performing their duties, including efforts to establish clear guidance on the level of suspicion that tax auditors need to make a report, and the kind of information that is needed to support the suspicion; (2009 Tax Recommendation, para. II)
 - b) Urgently take steps to significantly increase awareness of the law enforcement authorities of the value of tax information to assist them with their foreign bribery investigations; (Convention, Article 5)
 - c) Take measures that are feasible and appropriate in the Austrian legal system to restrict the routine practice of confronting tax payers about possible suspicious bribe payments before reporting them to the law enforcement authorities, to cases where there is a clear absence of risk that reporting will result in the destruction or concealment of evidence, and establish safeguards to ensure that taxpayers follow-through with their undertakings to self-report bribe payments to the law enforcement authorities. (Convention, Article 5; 2009 Tax Recommendation, para. II)
9. Concerning the prevention and detection of foreign bribery through the use of contracting opportunities for public advantages, the Working Group recommends that Austria:
- a) Raise awareness of the appropriate channels for making a report about foreign bribery in relation to official development assistance (ODA) contracting; (2009 Recommendation, para. IX)
 - b) Clarify the rules for the sharing of information by the Austrian Export Credit Agency (OeKB) with the law enforcement authorities on suspicions of foreign bribery by official export credit support applicants and clients; (2009 Recommendation, para. IX) and
 - c) Consider routinely checking debarment lists of multilateral financial institutions in relation to public procurement contracting. (2009 Recommendations, para. XI i)

2. Follow-up by the Working Group

10. The Working Group will follow-up the issues below as case law and practice develop:
- a) In light of recent amendments to the foreign bribery offences, application in practice of sections 307, 307a and 307b of the Penal Code, including: i) application of these provisions to the bribery of foreign public officials through intermediaries, when the intermediary acts abroad, and is not an Austrian national; ii) interpretation by the courts of the definition of “foreign public official” in the Penal Code; and iii) application of sanctions to natural persons to determine if they are “effective, proportionate and dissuasive”;
 - b) Whether in the future law enforcement authorities encounter difficulties investigating legal persons due to the existence of Treuhand trusts; and
 - c) Establishment and implementation of the strategy for coordinating the anti-corruption bodies, in particular to see if it enables the individual bodies to better utilise their resources.

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf>

BELGIUM (OCTOBER 2013)

The Working Group on bribery welcomes Belgium's efforts to bring its criminal and tax legislation in the field of anti-bribery into compliance with the Convention with the enactment of the Law of 11 March 2007. However, the Working Group remains seriously concerned with the lack of convictions for bribery of foreign public officials by Belgian nationals since the entry into force of the offence more than 14 years ago. The Group is seriously concerned by the flagrant lack of resources and by the lack of priority Belgium gives to the fight against bribery of foreign public officials by Belgian individuals and companies.

The Phase 2 evaluation report of Belgium, adopted in 2005, included recommendations and follow-up issues.¹ Of the 16 recommendations adopted by the Working Group in 2005, nine were considered as fully implemented at the time of the Phase 2 Written Follow-Up Report on Belgium in 2008. Three recommendations were considered to be partially implemented. Four recommendations were not implemented.

Based on the findings in this report on Belgium's implementation of the Convention and 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Belgium to make a written report on measures taken to implement recommendations 2, 3(a), 3(b), 3(d), 4(a), 4(b), 6 and 13(a) in one year (i.e. October 2014). The Working Group also invites Belgium to submit a written follow-up report on all recommendations and follow-up issues in two years (i.e., October 2015).

1. Recommendations of the Working Group

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

1. With respect to Belgian jurisdiction over the foreign bribery offence, the Working Group recommends that Belgium promptly raise awareness among the Belgian federal police, and especially the OCRC, of the existence of the extraterritorial jurisdiction of Belgian law in cases of foreign bribery [Convention, Article 4.2; 2009 Recommendation, V.].
2. With respect to the liability of legal persons, the Working Group recommends that Belgium, take the necessary measures to bring its legal framework into compliance with the Convention and 2009 Recommendation, as already recommended in Phase 2, (i) by clarifying the attribution of the intentional element of the foreign bribery offence and (ii) by eliminating the element of mutually exclusive liability between the natural and legal person [Convention, Article 2 ; 2009 Recommendation, Annex I.B.].
3. With respect to sanctions for foreign bribery and confiscation, the Working Group recommends that Belgium:
 - a) Increase the level of sanctions applicable to natural persons [Convention, Article 3];
 - b) For legal persons, (i) increase the amount of applicable fines, and (ii) carry out their current plans to introduce a criminal record for legal entities as soon as possible which would enable

¹ See Annex 1 of this report.

the practical application of additional sanctions of debarment from public procurement [Convention, Articles 2 and 3];

- c) Ensure that penalties imposed in practice in foreign bribery cases are effective, proportionate and dissuasive, and take steps to raise awareness among prosecutors, in particular in the framework of the ongoing drafting the circular on this point [Convention, Articles 2 and 3]; and
 - d) In relation to confiscation, make full use of the confiscation measures available in the law to ensure the application of effective, proportionate and dissuasive sanctions and, in this context (i) to ensure that its law enforcement authorities routinely consider confiscation of the instrument and the proceeds of bribery of a foreign public official; and (ii) continue its initiatives to train prosecutors and judges provide training in order to improve the implementation of confiscation, especially of the proceeds of active bribery of foreign public officials [Convention, Article 3].
4. With respect to investigations and prosecutions of foreign bribery cases, the Working Group recommends that Belgium:
- a) Give the necessary priority to the fight against foreign bribery, in particular (i) by urgently making available adequate human and material resources to the judicial and law enforcement authorities so that they can effectively investigate, prosecute and adjudicate cases in which foreign bribery is committed by Belgian nationals or companies, and (ii) by making foreign bribery a priority of its criminal justice policy [Convention, Article 5; 2009 Recommendation, V. and Annex I.D.];
 - b) Take a more proactive stance in foreign bribery cases, in particular by investigating information about foreign bribery disclosed in the context of international cooperation and not waiting for a formal referral before opening an investigation [Convention, Articles 5 and 9; 2009 Recommendation, V. and Annex I.D.];
 - c) Take all necessary measures to ensure that foreign bribery cases are not closed on the grounds of insufficient investigative resources, lack of priority or exceeding a ‘reasonable time limit’ solely because investigations, proceedings and judgments take too long [Convention, Article 5; 2009 Recommendation, V. and Annex I.D.]; and
 - d) Develop training for law enforcement authorities on the specific aspects of foreign bribery investigations and prosecutions [Convention, Article 5; 2009 Recommendation, V. and Annex I.D.].
5. With respect to settlement, the Working Group recommends that Belgium make public, as necessary and in compliance with the relevant rules of procedure, the most important elements of settlements concluded in foreign bribery cases, in particular the main facts, the natural or legal persons sanctioned, the approved sanctions and the assets that are surrendered voluntarily [Convention, Articles 1, 2, 3 and 5].
6. With respect to the limitation period the Working Group recommends that Belgium urgently take all necessary measures to extend the possibilities for suspending the limitation period to allow adequate time for foreign bribery investigations and prosecutions [Convention, Article 6].

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

7. With respect to statistics on the implementation of the Convention, the Working Group recommends that Belgium maintain detailed statistics on (i) investigations, prosecutions, closing of cases and convictions for the foreign bribery offence; (ii) sanctions; including in the framework of confiscation and settlement, imposed in foreign bribery cases; (iii) MLA requests received, sent, granted and rejected, in order to identify the proportion of such requests which concern bribery of a foreign public official, including in relation to requests from EU member countries [Convention, Article 3 and 9].
8. With respect to anti-money laundering, the Working Group recommends that Belgium step up its measures to raise awareness of the detection of facts that may constitute foreign bribery among the professions, including non-financial professions, subject to the requirement to report suspicious transactions [Convention, Article 7].
9. With respect to accounting requirements, external audit and corporate compliance and ethics programmes, the Working Group recommends that Belgium:
 - a) Draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the payment of a bribe to a foreign public official [Convention, Article 8];
 - b) Consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and, as appropriate, ensure that external auditors who make such reports in a reasonable manner and in good faith are protected against any legal action [2009 Recommendation, X.B(v)]; and
 - c) In cooperation with business organisations, take steps to encourage companies, especially small and medium-sized enterprises, to develop appropriate internal control and compliance systems [2009 Recommendation, X.C(i) and Annex II].
10. With respect to tax-related measures, the Working Group recommends that Belgium persevere in its efforts to raise awareness and train tax officials on issues related specifically to the detection of foreign bribery [2009 Recommendation, VIII; 2009 Tax Recommendation].
11. With respect to raising awareness of the foreign bribery offence, the Working Group recommends that Belgium:
 - a) Persevere in its efforts to raise awareness within its administration, treating more specifically the question of the risk of bribery of foreign public officials by Belgian nationals and companies, and in particular among officials in SPF Foreign Affairs and public procurement authorities, and other officials likely to play a part in the detection and reporting of acts of transnational bribery, and those coming into contact with Belgian businesses operating abroad [2009 Recommendation, III.(i) ; Phase 2 Recommendation 1(a)]; and
 - b) Take the necessary measures, in cooperation with business organisations, to raise awareness of Belgian companies, and particularly SMEs, of the offence of bribery of foreign public officials [2009 Recommendation, III.(i), (iv) and (v); Phase 2 Recommendation 1(b)].
12. With respect to reporting acts of foreign bribery, the Working Group recommends that Belgium:

- a) Remind all public officials, including officials at Belgian overseas missions, of their obligation under Article 29, paragraph 1 of the Criminal Investigation Code to inform the Prosecutor's Office of any offence of bribery of foreign public officials that comes to their knowledge in the performance of their functions, and examine the appropriateness of instituting a comprehensive system of sanctions for non-compliance with this obligation [2009 Recommendation, IX.(i) and (ii); Phase 2 Recommendation 3(b)]; and
 - b) Promptly take appropriate measures to protect public and private sector employees who report suspected acts of foreign bribery to the competent authorities from any discriminatory or disciplinary action [2009 Recommendation, IX.(i) and (iii)].
13. With respect to public advantages, the Working Group recommends that Belgium:
- a) Ensure that, in the framework of the bill to establish a central register of criminal records for legal persons, the agencies responsible for public procurement, ODA and export credit and all other public subsidies, have access to this register [Convention, Articles 2 and 3.4; 2009 Recommendation, XI.(i), (ii) and XII.]; and
 - b) Put in place a reporting requirement for officials of the Ducroire and Finexpo, similar to the one in place for Belgian public officials [2009 Recommendation, XII; 2006 Export Credit Recommendation].

2. Follow-Up by the Working Group

14. The Working Group will follow up the issues below as case law and practice develop:
- a) The exercise of Belgium's extraterritorial jurisdiction in foreign bribery cases and in particular the application of the distinction based on the origin of the bribed foreign public official [Convention, Article 4.2];
 - b) The application of the regime for corporate liability for foreign bribery to federal and local public enterprises, in order to ensure that the exemption of certain public entities from the application of criminal law in this area does not prevent full enforcement of the Convention [Convention, Article 2];
 - c) The practical application of settlement in foreign bribery cases, in order to ensure the predictable and transparent nature of the procedure and that the sanctions imposed in the context of the settlement procedure are effective, proportionate and dissuasive [Convention, Articles 3 and 5];
 - d) The application in practice of the offence of money laundering where foreign bribery is the predicate offence in order to ensure that the money laundering offence can be prosecuted and sanctioned "without regard to the place where the bribery occurred" [Convention, Article 7];
 - e) Belgium's ability to respond to MLA requests, to ensure (i) that Belgium promptly and effectively provides MLA, insofar as its laws and the relevant international instruments allow; (ii) that use of the exception of "Belgium's essential interests" as an exception to obligations to provide MLA is made in accordance with the obligations of Article 5 of the Convention; and (iii) that Belgium can provide prompt and effective MLA to States whose legal systems do not have criminal liability for legal persons [Convention, Article 9]; and

- f) The impact of provisions in article 219 CIR and the Law of 11 July 2013 on the effective detection and reporting of foreign bribery by tax officials [2009 Recommendation III (iii); 2009 Tax Recommendation II].

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/BelgiumPhase3ReportEN.pdf>

BRAZIL (OCTOBER 2014)

While the Working Group on Bribery welcomes the return of Brazil's first indictment of 9 individuals in a foreign bribery case, it remains seriously concerned about the extremely low level of enforcement of the foreign bribery offence. Only 14 allegations of foreign bribery have surfaced since Brazil became a party to the Convention in 2000 and only three investigations are ongoing. Brazil needs to be much more proactive in detecting and investigating foreign bribery, while taking concrete steps to increase awareness, reporting and detection. While the Working Group commends Brazil for the enactment of its new Corporate Liability Law, it is concerned that some aspects of the law are unclear and might hamper enforcement.

Regarding outstanding recommendations from previous evaluations, since its Phase 2 Written Follow-up Brazil has partially implemented recommendations 1(a), 2(a), 2(c), 2(e), 4 and 5(a), and has not implemented recommendations 1(c) and 5(b).

Based on the findings in this report on Brazil's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group requests that Brazil provide a written self-assessment report in six months (i.e. by March 2015) on the enactment and contents of the Implementing Decree on the Corporate Liability Law (covering Recommendations 2(a), 3(a), 3(d), 5(f) and 12) alongside detailed updates on its foreign bribery investigations and prosecutions. Brazil should report in writing in one year (i.e. by October 2015) on these issues if deemed necessary by the Working Group, as well as on progress made on the implementation of recommendations 4(a), 5(a), 5(b), 5(c), 8 and 14(c) and to submit a written report in two years (i.e., October 2016) on its implementation of all recommendations and follow-up issues.

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Brazil take all appropriate steps to clarify that the foreign bribery offence applies to bribes promised, offered or paid, in return for acts outside of the official's authorised competence. [Convention, Article 1]
2. Regarding the liability of legal persons, the Working Group recommends that Brazil:
 - (a) Issue, as a matter of priority, the announced Decree aiming at regulating several aspects of the Corporate Liability Law (CLL); [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]
 - (b) Take appropriate steps to clarify: (i) whether, in practice, the CLL covers bribery of foreign public officials in international business transactions, as defined under Article 1 of the Anti-Bribery Convention; (ii) the application of the law to all legal persons, including SOEs, as well as companies receiving financing from BNDES; (iii) the coverage under "undue advantage" of any incentive or advantage, pecuniary or not, received by the public agent from private agents, either to perform activities that go beyond his/her legal attributes, or to perform activities within his/her duties; and (iv) the interpretation of the "interest" and "benefit" criteria to ensure that it covers situations where, for instance, a legal person bribes on behalf of a related legal person (including a

subsidiary, holding company, or member of the same industrial structure); [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]

- (c) Ensure that if the draft Bill to establish the criminal liability of legal persons passes into law, it follows one of the two approaches recommended under Annex I B) of the 2009 Recommendation and either supersedes or operates in a manner that is consistent with the administrative CLL. [Convention Article 2; 2009 Recommendation III ii), V, Annex 1B]
3. With respect to sanctions, the Working Group recommends that Brazil:
 - (a) Review the CLL to clarify which sanctions are available to SOEs while ensuring that these are effective, proportionate and dissuasive, including for the largest SOEs; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (b) Re-consider including debarment as a possible administrative or civil sanction; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (c) Clarify by any appropriate means that: (i) mitigating factors, although inserted in the Chapter of the CLL that regulates administrative liability, will be taken into consideration in determining the judicial/civil liability; and (ii) that “the offender’s economic situation” (under article 7. VII) cannot encompass considerations forbidden under Article 5 of the Convention, in particular with regard to SOEs but also companies receiving financing from the State, notably through development banks; [Convention Article 3 and Article 5; 2009 Recommendation III (ii) and V]
 - (d) Take the necessary steps to ensure that the Decree implementing the CLL, to be issued by the Federal Executive Branch (i) clarifies that internal controls and compliance programs provided under article 7.VIII can only be taken into account as mitigating factors and cannot be used as a complete defence from liability by companies; (ii) provides a sufficient level of detail on “the parameters of evaluation of the mechanisms and procedures provided” to allow both the companies to anticipate what they may be able to expect from good internal controls and compliance and the CGU and the judiciary to make a consistent use of this mitigating factor; and (iii) clarifies that the impact of the ethics and compliance programs will not be limited to mitigating administrative sanctions and will also be taken into account when determining civil sanctions; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (e) (i) Review the range of sanctions available for successor companies and in case of joint liability under article 4 paragraphs 1 and 2 of the CLL with a view to providing more flexibility and, in particular, to allow for the confiscation of the profit of foreign bribery and the imposition of sanctions that will be better adapted to each company’s situation; and (ii) remove the limitation of the liability of the successor companies to the “transferred assets”. [Convention Article 3; 2009 Recommendation III (ii) and V]
4. Regarding confiscation, the Working Group recommends that Brazil:
 - (a) Adopt necessary measures, including reviewing its legislation as necessary: (i) to allow for the confiscation of a bribe or its monetary equivalent in cases of foreign bribery; (ii) to ensure that confiscation of the proceeds of foreign bribery is always available, including in the case of successor companies, companies held jointly liable, and when

concluding leniency agreements with cooperative offenders; [Convention Article 3; 2009 Recommendation III (ii) and V]

- (b) Make full use of the expertise available in the CGU by conferring on a specialised unit the responsibility for calculating the proceeds of bribery; and ensure this unit is promptly issued with the guidelines that have been prepared to determine how the proceeds of bribery should be calculated and that the unit receives training to this effect; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (c) Take the necessary steps to ensure that data and statistics are maintained at the federal level regarding the confiscation of the proceeds of foreign bribery and other corruption and serious economic crimes. [Convention Article 3; 2009 Recommendation III (ii) and V]
5. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Brazil:
- (a) Ensure cooperation between the prosecutors and the police as necessary for foreign bribery investigations and conclude an MOU between the CGU and the Federal Prosecution Service (FPS) providing a detailed framework for the enhanced cooperation between the two agencies in the context of the administrative proceedings, the judicial/civil proceedings and the criminal proceedings, including information on the initiation of proceedings against natural and legal persons; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (b) Intensify efforts to provide guidance and regular training to the Federal Police Department (DPF), the FPS, and the CGU on the foreign bribery offence, the CLL, the basis and method of calculation of the proceeds of the bribe, and, as necessary, the new investigative techniques available under the Organised Crime Law; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (c) Ensure that sufficient resources and skills are available within the DPF, the FPS, and the CGU in order to fight foreign bribery; and consider creating a national corruption-fighting unit within the Federal Prosecution Service and specialised police units within the Federal Police Department; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (d) Encourage law enforcement authorities to make full use of the broad range of investigative measures available in foreign bribery investigations, including special investigative techniques and access to financial information; and ensure by any appropriate means that the use of the general and special investigative techniques contained in the Code of Criminal Procedure is available in practice in the context of the administrative and civil proceedings under the CLL; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (e) Take necessary measures to: (i) ensure that all credible foreign bribery allegations are proactively investigated; and (ii) gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

- (f) Clarify in the implementing Decree to the CLL that factors forbidden under Article 5 of the Convention cannot be taken into account in the decision to initiate, conduct or close the proceedings against a legal person. [Convention Article 5]
6. Regarding cooperation agreements and leniency agreements, the Working Group recommends that Brazil: (i) make public, where appropriate, certain elements of leniency and cooperation agreements concluded in foreign bribery cases, such as the reasons why an agreement was deemed appropriate in a specific case and the terms of the arrangement; and (ii) take all necessary measures to ensure diversion (under Law 9.099), cooperation agreement (under the Organised Crime Law) and leniency agreements (under the CLL) are applied consistently, including by providing training to prosecutors and issuing guidance on the elements that may be taken into consideration in deciding whether to enter into such agreements. [Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D]
7. Regarding jurisdiction, the Working Group recommends that Brazil clarify by any appropriate means that the jurisdiction over legal persons under article 28 of the CLL should be broadly interpreted and cover, in particular (i) companies not incorporated in Brazil if their main seat is in Brazil; and (ii) companies that have their main management and control situated in Brazil even if some part of this function is located outside of Brazil. [Convention Article 4]
8. Regarding the statute of limitations, the Working Group recommends that Brazil (i) urgently take steps to ensure that the statute of limitations for natural and legal persons for foreign bribery allows adequate time for investigation, prosecution, sanctioning, and the completion of the full judicial process, including in cases where the final sentence is at the lower end of the scale; and (ii) clarify its ability to extend the timeframe for administrative proceedings against legal persons. [Convention Article 6]
9. With respect to mutual legal assistance, the Working Group recommends that Brazil take steps to ensure bank secrecy does not cause unnecessary delays in providing MLA in foreign bribery cases. [Convention Article 9; 2009 Recommendation XIII.i]

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

10. Regarding money laundering, the Working Group recommends that Brazil:
- (a) Take the necessary measures to ensure that offenders cannot escape liability when laundering the proceeds of foreign bribery through legal persons; [Convention, Article 7; 2009 Recommendation V]
 - (b) Maintain statistics on investigations, prosecutions and sanctions for money laundering, including data on whether foreign bribery is the predicate offence; [Convention, Article 7 and 2009 Recommendation, III (i)];
 - (c) Ensure that institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities receive appropriate directives, including typologies on money laundering related to foreign bribery and training on the identification and reporting of information that could be linked to foreign bribery. [Convention, Article 7; 2009 Recommendation III.i]

11. Regarding accounting and auditing, the Working Group recommends that Brazil:

- (a) In regards to false accounting (i) ensure that the full range of conduct described in Article 8(1) of the Convention is prohibited; (ii) ensure that both natural and legal persons can be held liable for false accounting; (iii) raise awareness of the false accounting offence among accounting professionals and law enforcement; and (iv) ensure false accounting is vigorously investigated and prosecuted, where appropriate; [Convention Article 8(1); 2009 Recommendation X.A.i]
- (b) Raise awareness of foreign bribery among accountants and auditors, including by providing training on foreign bribery indicators and auditors' reporting obligations in respect of foreign bribery; [2009 Recommendation X]
- (c) Require auditors to report all suspicions of foreign bribery to corporate monitoring bodies, where appropriate, and consider requiring them to report to the competent law enforcement authorities. [2009 Recommendation X.B.iii and v]

12. Regarding corporate compliance, internal controls and ethics, the Working Group recommends that Brazil continue to encourage companies, particularly unlisted companies and SMEs, to (i) develop, and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by providing guidance in the context of the implementing Decree to the CLL and by promoting the OECD Good Practice Guidance, and (ii) to develop monitoring bodies. [2009 Recommendation X.C.i]

13. In respect of tax measures to combat bribery of foreign public officials, the Working Group recommends that Brazil:

- (a) Take appropriate measures to ensure that the denial of tax deductibility is not contingent on the opening of an investigation by law enforcement authorities or on court proceedings; [2009 Recommendation III. iii, VIII; 2009 Tax Recommendation I]
- (b) Provide adequate guidelines and training on the types of expenses that constitute bribes to foreign public officials, including through disseminating the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors, and extend such dissemination to relevant taxpayers; [2009 Recommendation VIII; 2009 Tax Recommendation I]
- (c) Remind tax auditors of their obligation to report to law enforcement authorities any instances of bribery of foreign public officials that come to their knowledge in the performance of their functions; [2009 Recommendation III. iii, VIII; 2009 Tax Recommendation II]
- (d) Consider ratifying the Convention on Mutual Administrative Assistance in Tax Matters and consider systematically including the language of Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not signatories to the Convention on Mutual Administrative Assistance in Tax Matters. [2009 Recommendation VIII; 2009 Tax Recommendation I].

14. With respect to awareness-raising and reporting of foreign bribery, the Working Group recommends that Brazil:

- (a) Increase civil society's awareness of foreign bribery, and continue its foreign bribery awareness-raising efforts within the public and private sectors, across all states, and particularly amongst SMEs; [2009 Recommendation VIII, IX.i and ii; 2009 Tax Recommendation II]
- (b) Continue to systematically provide clear guidance to officials in foreign representations on their reporting obligations in respect of foreign bribery and take steps to increase detection efforts; [2009 Recommendation VIII, IX.i and ii]
- (c) Regarding whistleblowing, put in place appropriate measures to ensure that private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action [2009 Recommendation IX.iii and Annex I.A]

15. Regarding public advantages, the Working Group recommends that Brazil:

- (a) Establish formal guidelines for all three export credits agencies addressing (i) the conduct of due diligence of potential exporters and applicants; (ii) the consequences of a client or applicant being the subject of credible allegations or convictions of foreign bribery, either before or after approving support; and (iii) the disclosure of credible evidence of foreign bribery to law enforcement authorities; [2009 Recommendation XII.ii; 2006 Export Credit Recommendation]
- (b) Extend its Registry of Ineligible and Suspended Companies to cover enterprises that are determined under Brazilian law to have committed foreign bribery; [2009 Recommendation III.vii; XII.ii]
- (c) Encourage public contracting authorities to consider, as appropriate, internal controls, ethics and compliance programs in their decisions to grant public procurement contracts. [2009 Recommendation X.C]

2. Follow-up by the Working Group

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

- (a) Whether the foreign bribery offence in the Penal Code (i) covers all elements of the definition of foreign public official; and (ii) covers all bribes offered, promised or paid in return for acts which provide an advantage in the conduct of international business.
- (b) Brazil's offence of *concussão* to ensure it cannot be used as a basis to preclude the prosecution of a perpetrator for the offence of bribery of a foreign public official.
- (c) Whether the sanctions imposed in practice for foreign bribery are effective, proportionate and dissuasive, including with regard to (i) the use of post-sentencing cooperation agreements; (ii) the sanctions imposed on companies which receive financing from the State, mainly through development banks; (iii) the use of leniency agreements under the CLL; and (ii) the application of civil sanctions and confiscation that may result from a separate civil action.

- (d) The performance of the DPF and the FPS with regard to foreign bribery allegations, including decisions not to open investigations.
- (e) Whether the complexity of the administrative proceedings and the number of actors potentially involved may constitute an obstacle to the establishment of the liability of legal entities.
- (f) The application of judicial pardons in cases of foreign bribery, and whether they are used appropriately.
- (g) Whether the FPS exercises the control provided under article 20 of the CLL to apply both administrative and civil sanctions in the case of omission of the CGU.
- (h) How jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad.
- (i) Whether requirements on companies to submit to external audits are adequate; and whether the independence of auditors is sufficiently ensured, particularly for companies which are economically significant but are not listed.
- (j) The enforcement of the non-tax deductibility of foreign bribes, particularly whether Brazilian courts promptly inform the tax authorities of convictions related to foreign bribery, and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery.
- (k) Whether tax information can effectively be shared in the course of foreign bribery investigations and prosecutions.
- (l) Brazil's ability to promptly and effectively respond to foreign bribery-related MLA requests, including those related to legal persons, and those related to Brazil's declaration on Article 9(3).
- (m) Brazil's extradition practices to ensure that the consideration of Article 5 factors does not impede Brazil's ability to provide extradition in foreign bribery cases.
- (n) Whether Brazil engages the private sector in future development aid projects including through BNDES or a future BRICS's Multilateral Development Bank.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>

BULGARIA (MARCH 2011)

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

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

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

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Bulgaria:
 - a) amend its foreign bribery offence to cover all cases of bribery in order that an official act outside his/her authorised competence, and to expressly cover bribes given to third party beneficiaries (Convention Article 1);
 - b) take steps to ensure that judges, prosecutors and investigators are aware that the Penal Code bribery offences cover bribes of a non-material nature (Convention Article 1; 2009 Recommendation III(i)).
2. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Bulgaria substantially amend the regime in the Law on Administrative Offences and Sanctions (LAOS) to ensure that:
 - a) there is jurisdiction to prosecute Bulgarian companies when a non-Bulgarian national commits foreign bribery outside Bulgaria (Convention Articles 2 and 4);

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

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

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

Recommendations for ensuring effective prevention and detection of foreign bribery

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

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

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

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

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

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

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

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

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

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

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

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

2. Follow-up by the Working Group

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

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

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Bulgariaphase3reportEN.pdf>

CANADA (MARCH 2011)

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

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

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

1. Recommendations of the Working Group

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

1. The Working Group recommends that Canada amend the offence of bribing a foreign public official in the CFPOA so that it is clear that it applies to bribery in the conduct of all international business, not just business 'for profit' (Convention, Article 1).

2. The Working Group recommends that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with the Government or

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

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

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

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

Recommendations for ensuring effective prevention and detection of foreign bribery

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

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

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

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

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

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

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

2. Follow-up by Working Group

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

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

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf>

CHILE (MARCH 2014)

While the Working Group welcomes Chile's efforts to implement the Convention, it is concerned about insufficient foreign bribery enforcement and detection in Chile. Since the Convention entered into force in Chile in 2001, only six foreign bribery allegations have surfaced. There have not been convictions and only one case has led to charges. Of even greater concern, some cases have been provisionally filed without sufficient investigation. In one case, an investigation was not opened at all. In one major case, the Chilean authorities did not take any steps to gather evidence in the US and made insufficient efforts in Chile, despite the case's strong and evident connections with both jurisdictions. In another case, poor coordination meant a decision not to investigate was made without thoroughly considering all relevant evidence. Chilean embassies and diplomatic missions did not inform prosecutors of any of the foreign bribery allegations that had been widely circulated in the foreign media. In the Working Group's view, Chile must substantially improve its record of detecting, reporting and investigating foreign bribery.

After the on-site visit, Chile re-opened investigations into two of the foreign bribery allegations that had previously been filed. Just before the adoption of this report, Chile informed the Working Group that on-going Penal Code reform would address issues such as *media prescripción*, confiscation, jurisdiction, corporate liability, and penalties for foreign bribery and failure to report offences. The Working Group welcomes these developments, and will assess any relevant new legislation only if and when it is enacted.

Regarding outstanding recommendations from previous evaluations, since Chile's Phase 2 Written Follow-Up Report, Phase 2 Recommendations 1(c), 1(d), 1(e), 2(a), 2(d), 3(a), 3(d), 3(e), 4(a), 4(b), 6(a), 6(c), 6(e) and 8 have been fully implemented. Recommendations 1(a), 1(b), 2(b), 2(c), 3(b), 3(c), 3(f), 5, 6(b), 6(d), 6(f) and 7 are partially or not implemented.

In conclusion, based on the findings in this report on Chile's implementation of the Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Chile to provide a written self-assessment report within one year (i.e., by March 2015) on (1) all of its foreign bribery investigations and prosecutions, and (2) the implementation of recommendations 1, 2, 4(c) and 4(f). Chile is further invited to submit a written follow-up report within two years (i.e., by March 2016) on all recommendations, follow-up issues, and foreign bribery investigations and prosecutions.

1. Recommendations of the Working Group

Recommendations Concerning Investigation, Prosecution and Sanctioning of Foreign Bribery

1. With regards to the liability of legal persons and offence prevention model defence, the Working Group recommends that Chile:

- (a) Provide guidance on the elements of an effective model for preventing foreign bribery as required by Law 20 393 and (i) train judges, prosecutors on police on this guidance; and (ii) encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance; and
- (b) Ensure that under Art. 3 of Law 20 393 the requisite independence of prevention officers is determined based on all relevant factors, and not solely the size of the company's revenues (Convention, Art. 2; 2009 Recommendation Annex I.B and Annex II).

2. With regards to the liability of legal persons and certification of offence prevention models, the Working Group recommends that Chile take immediate steps to:

- (a) Clarify the legal effect of certification of an offence prevention model under Law 20 393; and
- (b) Strengthen and enforce rules and standards that apply to certifying entities, including those regarding qualifications, certification requirements (Convention, Art. 2; 2009 Recommendation Annex I.B and Annex II).

3. With regards to sanctions and confiscation, the Working Group recommends that Chile:

- (a) Eliminate mandatory reductions of sanctions for foreign bribery (i) where a foreign public official solicits the bribe; and (ii) where the case begins more than half way through the limitation period (Convention, Art. 3(1));
- (b) Amend the Penal Code to ensure equivalence between the fines applied to domestic and foreign bribery cases (Convention, Art. 3(1));
- (c) Take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice (Convention, Art. 3(1));
- (d) Increase the maximum fine available against legal persons for foreign bribery to a level that is effective, proportionate and dissuasive (Convention, Art. 3); and
- (e) Amend its legislation without delay to provide for confiscation of property, the value of which corresponds to that of the proceeds of a foreign bribery offence, where the bribe and the proceeds of foreign bribery cannot be confiscated, or monetary sanctions of comparable effect (Convention, Art. 3(3)).

4. Regarding investigations and prosecutions, the Working Group recommends that Chile:

- (a) Take steps to ensure that the overall limitation period for the foreign bribery offence, including the two-year period for formalised investigations, is sufficient for proper investigation and prosecution (Convention, Arts. 5 and 6);
- (b) Periodically review its laws implementing the Convention and its approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention, Art. 5 and 2009 Recommendation V);
- (c) (i) Take steps to ensure that foreign bribery allegations are thoroughly investigated and not prematurely filed, and that corporate liability is fully explored; (ii) use proactive steps to gather information from diverse sources to increase sources of allegations and enhance investigations; (iii) seek co-operation and MLA from foreign countries whenever appropriate, including through the Working Group's Informal Meetings of Law Enforcement Officials, and solicit the assistance of Chilean embassies and other international fora to facilitate MLA; (iv) take steps to ensure that Chilean authorities thoroughly explore territorial links with Chile in foreign bribery cases, including by issuing guidance to law enforcement authorities on the jurisdiction to prosecute foreign bribery; and (v) take appropriate steps to further investigate the foreign bribery cases that have been provisionally filed or where a decision had been taken to not open an investigation (Convention, Arts. 2, 4(1), 5, Commentary 27; 2009 Recommendation XIII, Annex I.D);

- (d) Improve its internal co-ordination and intelligence gathering in foreign bribery cases by (i) ensuring that prosecutors and law enforcement authorities systematically inform the UNAC of any foreign bribery allegation which comes to their knowledge, including via incoming MLA requests; and (ii) consider establishing a national database of all foreign bribery cases (Convention, Art. 5; 2009 Recommendation V);
- (e) Raise awareness of Art. 5 of the Convention among Chilean judges, prosecutors, investigators and relevant government officials, including by adding references to factors enumerated in Art. 5 to the relevant prosecutor instructions (Convention Art. 5, Commentary 27; 2009 Recommendation III.i);
- (f) Align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases, tax offences and money laundering; and take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases (Convention, Arts. 5 and 9(3));
- (g) Align the investigative tools available in investigations of foreign bribery and money laundering, so that special and covert investigative techniques are available in foreign bribery investigations (Convention, Art. 5, Commentary 27); and
- (h) Take urgent steps to ensure that expertise in corporate investigations, evaluation of offence prevention models, forensic accounting and information technology is available in foreign bribery investigations (Convention, Arts. 2, 5; 2009 Recommendation III.ii).

5. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Chile amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for the foreign bribery offence (Convention, Art. 4(4)).

6. With regards to statistics, the Working Group recommends that Chile maintain detailed statistics on (i) sanctions imposed against natural and legal persons in domestic and foreign bribery cases; (ii) enforcement of false accounting offences; (iii) format, regularity, audience and impact of its awareness-raising seminars and events (Convention Arts. 3(3), 8; 2009 Recommendation II).

Recommendations Concerning Prevention, Detection, and Reporting of Foreign Bribery

7. With regards to money laundering, the Working Group recommends that Chile:

- (a) Take appropriate measures to enforce the money laundering offence more effectively in connection with foreign bribery cases, and ensure that its law provides that an individual is simultaneously convicted of money laundering and foreign bribery where appropriate; and
- (b) Require appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions, develop typologies on money laundering related to foreign bribery, and further encourage reporting entities to make STRs (Convention Art. 7; 2009 Recommendation III.i).

8. With regards to accounting and auditing, corporate compliance, internal control and ethics, the Working Group recommends that Chile:

- (a) Regarding the false accounting offence, (i) amend its legislation to prohibit both natural and legal persons from engaging in the full range of conduct described in Art. 8(1) of the Convention, and subject such conduct to effective, proportionate and dissuasive sanctions;

and (ii) vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention, Arts. 3, 5, 8(1); 2009 Recommendation X.A.i); and

- (b) Regarding external auditors, (i) consider requiring “external audit firms” to report crimes to competent authorities; (ii) ensure that auditors who report suspected wrongdoing reasonably and in good faith to competent authorities are protected from legal action; (iii) take steps to encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit; and (iv) improve audit quality standards, including with regard to certification and independence (2009 Recommendation X.B.i, ii, v).

9. With regards to tax-related measures, the Working Group recommends that Chile:

- (a) Update Circular 56/2007 to refer to PC Art. 251bis and Law 20 393 (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);
- (b) Ensure that SII is routinely informed of foreign bribery convictions and systematically re-examines the relevant tax returns of convicted taxpayers to determine whether bribes have been deducted (2009 Recommendation III.iii, VIII.i; 2009 Tax Recommendation II);
- (c) Incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors into the SII’s Standard Plan for Tax Audits, and examine why SII has failed to detect proven cases of bribery (2009 Recommendation III.i, III.iii, VIII.i; 2009 Tax Recommendation II);
- (d) Promptly ratify the Convention on Mutual Administrative Assistance in Tax Matters, and consider systematically including the language of Art. 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not parties to the multilateral Convention (2009 Recommendation VIII.i; 2009 Tax Recommendation I.iii).

10. With regards to international co-operation, the Working Group recommends that Chile:

- (a) Take all necessary measures to ensure that it will not deny MLA in foreign bribery cases on grounds of bank secrecy (Convention, Art. 9(3));
- (b) Ensure that it can provide MLA for confiscation of property the value of which corresponds to the bribe and the proceeds of foreign bribery (Convention, Arts. 3(3) and 9).

11. With regards to awareness-raising and reporting, the Working Group recommends that Chile:

- (a) Continue to raise awareness in a more co-ordinated manner, involving all relevant government bodies that interact with Chilean companies which are active in foreign markets, and make greater efforts to raise awareness among enterprises, particularly SMEs (2009 Recommendation III.i);
- (b) Regarding reporting, (i) analyse why Chilean overseas missions failed to report foreign bribery allegations and take appropriate remedial action; and (ii) enforce the obligation on public officials to report suspicions of crimes (2009 Recommendation IX.ii); and
- (c) Enhance and promote the protection from discriminatory or disciplinary action of public and private sector employees who report in good faith and on reasonable grounds to competent authorities suspected acts of foreign bribery (2009 Recommendation IX.iii).

12. With regards to public advantages, the Working Group recommends that Chile:
- (a) Ensure that all government procuring agencies verify whether an individual or company has been convicted of foreign bribery before granting a procurement contract, and consider routinely checking debarment lists of multilateral development banks in relation to public procurement contracting (Convention Art. 3(4); 2009 Recommendation XI.i); and
 - (b) Adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it provides officially supported export credits (2009 Recommendation III.i, IX.i, XII; 2006 Export Credit Recommendation).

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as case law and practice develop:
- (a) The foreign bribery offence, particularly (i) coverage of bribes to induce an official to perform his/her duty; (ii) coverage of bribery by a company that was the best qualified bidder or otherwise could properly have been awarded the business; (iii) whether the definition of a foreign public official is interpreted as autonomous; and (iv) whether the prevalence of bribery in a foreign jurisdiction can constitute a defence or mitigating factor (Convention, Art. 1, Commentaries 3, 4 and 7; 2009 Recommendation III.ii);
 - (b) Law 20 393, particularly (i) the interpretation of the term “directly and immediately” in the interest or for the benefit of the legal person and (ii) the application of the offence prevention model defence by Chilean courts, including the burden of proof (Convention, Art. 2; 2009 Recommendation Annex I.B and I.C, and Annex II);
 - (c) Sanctions against natural and legal persons (Convention, Art. 3(1));
 - (d) Application of conditional suspensions and expedited procedures (Convention, Art. 5; 2009 Recommendation V);
 - (e) The Convention as a basis for MLA for confiscation (Convention, Arts. 3(3) and 9);
 - (f) AGCI engagement with the private sector in future development projects, and its measures relating to prevention, detection, reporting and debarment (2009 Recommendation XI.ii).

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/ChilePhase3ReportEN.pdf>

CZECH REPUBLIC (MARCH 2013)

The Working Group on Bribery welcomes the adoption by the Czech Republic of a comprehensive corporate liability regime. It also appreciates the clarification of the role of the law enforcement bodies in charge of the investigation and prosecution of corruption and the overall responsibility for foreign bribery entrusted to the UOKFK and the HPPO, which appear well-armed to tackle allegations of foreign bribery. The Working Group therefore looks forward to seeing the ongoing foreign bribery investigations as well as any future ones actively pursued. The Working Group is, however, concerned that the current institutional framework for the prosecuting authorities could lead to investigations and prosecutions of foreign bribery being influenced by considerations prohibited under Article 5 of the Convention. Furthermore, the Working Group is concerned by the lack of attendance of Czech companies at the on-site visit and what this reveals in terms of the Czech private sector's low awareness of foreign bribery issues. The Working Group considers that the prevention and detection of foreign bribery could be improved through increased engagement with Czech companies, as well as with the accounting and auditing profession, tax profession, money laundering authorities and reporting entities. Current plans to adopt legislation to protect whistleblowers could also enhance detection.

Regarding outstanding recommendations from previous evaluations, the Czech Republic has fully implemented Phase 2 recommendations 4(a) and (b), 8(c), 9(a), 13, 16(a) and (b) and 17. The Czech Republic has partially implemented recommendations 1(a), (b) and (c), 5(a), 6(a), 8(b), 14(b), and 15(a), and (b). Recommendations 2 and 6(c) have not been implemented.

In conclusion, based on the findings in this report on the Czech Republic's implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invites the Czech Republic to report orally on implementation of recommendations 1, 2, 9 and 10 in one year (i.e., in March 2014). The Working Group invites the Czech Republic to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., in March 2015). In addition, the Working Group will continue to closely monitor the Czech Republic's foreign bribery enforcement efforts. In this regard, the Czech Republic is invited to provide information on its foreign bribery-related enforcement actions when it reports orally in March 2014 and in writing in March 2015.

1. Recommendations of the Working Group

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

1. Regarding the offence of bribing a foreign public official, the Working Group recommends that the Czech Republic ensure that, if the defence of effective regret is reintroduced, it is not applicable in foreign bribery cases, and keep the Working Group on Bribery informed of developments concerning this possible re-introduction [Convention, Article 1].

2. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that the Czech Republic:

- a) Continue to develop its proactive approach with respect to the ongoing foreign bribery investigations, as well as regarding any future foreign bribery allegations which may arise [Convention, Articles 1, 2, 3 and 5];

- b) Take steps to more proactively detect foreign bribery, in particular by engaging with stakeholders in the anti-money laundering authorities, accounting and auditing profession, tax profession, and private business [Convention, Articles 1, 2, 3 and 5];
- c) Provide training to prosecutors on how to assess whether compliance programmes put in place by companies amount to “justly required measures”, as provided in the Czech corporate liability legislation [Convention, Articles 2 and 5]; and
- d) Pursue efforts to increase the confiscation of proceeds of crime and apply them in foreign bribery cases where appropriate [Convention, Articles 3 and 5].

3. Regarding Article 5 considerations, the Working Group recommends that the Czech Republic take steps to guarantee greater independence of prosecutors so that considerations prohibited under Article 5 of the Convention are never taken into account in respect of any investigative and prosecutorial decisions in foreign bribery cases, including where there are instructions in specific cases [Convention, Article 5].

4. Regarding the provision of mutual legal assistance in cases of transnational bribery, the Working Group recommends that the Czech Republic maintain statistics on the number of formal mutual legal assistance requests sent and received, including on the offence underlying the requests, and the outcome and time required for responding [Convention, Article 9].

5. Regarding sanctions in cases of transnational bribery, the Working Group recommends that the Czech Republic:

- a) With respect to agreements on guilt and punishment, make public, where appropriate and in conformity with the applicable rules, as much information as possible, including on the reasons why the agreement was appropriate, the legal or natural persons convicted, the sanctions agreed, and the terms of the agreement [Convention, Articles 1, 2, 3 and 5]; and
- b) Continue to compile statistics on sanctions imposed in bribery cases, including in the context of agreements on guilt and punishment, with a view to allowing the Working Group to assess whether sanctions imposed in foreign bribery cases are effective, proportionate and dissuasive [Convention, Article 3].

Recommendations for ensuring effective prevention and detection of foreign bribery

6. Regarding money laundering, the Working Group recommends that the Czech Republic

- a) Provide better guidance to reporting entities, for instance by developing up-to-date typologies on money laundering where the predicate offence is foreign bribery, and by providing training on politically exposed persons (PEPs) [Convention, Article 7; 2009 Recommendation III.(i)]; and
- a) Take appropriate measures to enforce the money laundering offence more effectively in connection with foreign bribery cases [Convention, Article 7].

7. Regarding accounting requirements, external audit and corporate compliance, the Working Group recommends that the Czech Republic:

- a) Ensure that the criminal and administrative penalties for false accounting in connection with foreign bribery cases are effective, proportionate and dissuasive, including with respect to shell entities [Convention, Article 8; 2009 Recommendation X.A.(iii)];

- b) Make full use of its financial specialist network to enforce more effectively false accounting offences in connection with bribery cases [Convention, Article 8; 2009 Recommendation X.A.(iii)];
 - c) Raise awareness of the foreign bribery offence among accounting and auditing professionals including by providing training (i) on detection of indications of suspected acts of foreign bribery; and (ii) clarifying foreign bribery reporting obligations of Czech auditors, in particular vis-à-vis law-enforcement authorities [2009 Recommendation X.B.]; and
 - d) Take urgent steps to promote internal controls, ethics and compliance programmes or measures to prevent and detect foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation X.C. (i) and (ii), and Annex II].
8. With respect to tax-related measures, the Working Group recommends that the Czech Republic:
- a) Increase efforts to raise awareness of foreign bribery and the non-tax deductibility of bribes among the Tax Administration and the private sector [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)]; and
 - b) Provide further training to tax examiners on the detection of bribe payments disguised as legitimate allowable expenses [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)].
9. Regarding awareness-raising, the Working Group recommends that the Czech Republic:
- a) Take urgent steps to raise awareness and provide training to Czech public officials on the foreign bribery offence and their role in reaching out to the business community, in particular in institutions well-positioned to reach out to the business community, such as the Ministry of Foreign Affairs, the Ministry of Industry and Trade, and the Czech trade promotion agencies [2009 Recommendation III.(i)]; and
 - b) Take urgent steps to raise awareness of the foreign bribery offence among Czech businesses operating abroad, including SMEs, in coordination with business organisations as appropriate [2009 Recommendation III.(i)].
10. With respect to the reporting of foreign bribery, the Working Group recommends that the Czech Republic promptly proceed with its intention to adopt appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities [2009 Recommendation IX.(iii)].
11. Regarding public advantages, the Working Group recommends that the Czech Republic consider adopting a systematic approach to allow its public agencies to easily access information on companies sanctioned for foreign bribery, such as through the establishment of a national debarment register [2009 Recommendation XI. (i)].

2. Follow-up by the Working Group

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

- a) The application of provisions in the foreign bribery offence requiring that bribery be committed in connection (i) with the “competence” of the official, and (ii) with “procuring matters of general interest”;

- b) The application of the Czech foreign bribery offence to ensure that perpetrators who pay bribes through intermediaries are held liable;
- c) Whether Czech authorities are relying on the trading in influence offence to avoid difficulties in establishing a bribery offence and what consequences this may have on effective enforcement of the foreign bribery offence;
- d) The proposal to re-instate the defence of effective regret, to ensure that it is not applicable in foreign bribery cases;
- e) The application of the liability of legal persons in particular (i) the application of the law to all legal persons, including state-owned and state-controlled entities; (ii) the interpretation of acts of lower level employees committed “while fulfilling [their] duties/tasks”; (iii) the standard of “justly required measures” that must be proven were not taken by the defendant legal person; (iv) the liability of legal persons for acts committed by related legal persons; and (v) the impact of the defence of effective regret on the liability of legal persons, in the event the defence is reinstated;
- f) The application in practice of sanctions and confiscation measures in on-going and future foreign bribery cases to ensure that they are effective, proportionate and dissuasive, including for legal persons conducting activities “having strategic or hardly replaceable significance for the national economy”;
- g) The use of agreements on guilt and punishment in foreign bribery cases;
- h) Whether the Czech Republic can fully provide mutual legal assistance in foreign bribery cases; and
- i) The enforcement of money laundering offences predicated on foreign bribery.

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/CzechRepublicphase3reportEN.pdf>

DENMARK (MARCH 2013)

The Working Group welcomes Denmark's recent efforts to implement the Convention but is seriously concerned about the lack of enforcement of the foreign bribery offence. Only 13 foreign bribery allegations have surfaced, and sanctions have been imposed in just one case that falls within Article 1 of the Convention. The case resulted in a settlement with a company, but not for foreign bribery. The individuals responsible for the crime escaped prosecution. Nine of the remaining cases have been terminated without prosecution. Several were closed without adequate investigation or sufficient efforts to secure foreign evidence. A tendency to terminate cases in the absence of parallel investigations by foreign authorities is troubling. There are concerns that the Danish authorities may not prosecute companies for foreign bribery, given the general lack of corporate prosecutions for intentional economic crimes. The current prosecutorial guidelines on corporate prosecutions raise further questions.

The Working Group is also concerned that Denmark has fully implemented only 2 of the 13 Recommendations from Phase 2. To date, Phase 2 Recommendations 1, 3(c), 5(b), 6(b) and 7(b) remain partially implemented. Phase 2 Recommendations 2, 3(a), 4, 5(a), 6(c), and 7(a) have not been implemented.

In conclusion, based on the findings in this report on Denmark's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invites Denmark to report orally on its implementation of Recommendations 1(a) and 5 in one year (i.e., by March 2014). It also invites Denmark to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e., by March 2015). Denmark is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these reports.

1. Recommendations of the Working Group

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

1. With respect to the foreign bribery offence, the Working Group recommends that Denmark:
 - a) Take immediate and conclusive steps to ensure that its small facilitation payments defence is clearly defined, has the force of law, and is consistent with Article 1 of the Convention and the 2009 Recommendation [Convention Article 1; 2009 Recommendation VI.ii];
 - b) Ensure that the relevant authorities (i) send a co-ordinated and consistent message on the facilitation payments defence to the private sector; (ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records; and (iii) periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon [2009 Recommendation III.ii, and VI.i and ii].
2. Regarding the liability of legal persons, the Working Group recommends that Denmark:
 - a) Enhance the usage of, and train law enforcement authorities on, the corporate liability provisions in foreign bribery cases [Convention Articles 2, 5; Commentary 27; 2009 Recommendation Annex I.D];

- b) Ensure that the application of the DPP Guidelines on the liability of legal persons does not reduce the scope of the jurisdictional rules provided by the Criminal Code, and amend the Guidelines to (i) clarify the circumstances under which a company may be held liable for crimes committed by a subsidiary and joint venture, and for failure to prevent foreign bribery, and (ii) ensure that subordinate employees are not exempted from prosecution in foreign bribery cases [Convention Article 2; 2009 Recommendation Annex I.C].

3. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that:

- a) Denmark review its overall approach to enforcement, especially with regard to corporate liability, in order to effectively combat the bribery of foreign public officials [Convention Articles 1, 2, 5; 2009 Recommendation V];
- b) Denmark take steps to ensure that local law enforcement authorities refer all foreign bribery cases to SØIK [Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D];
- c) Denmark adopt a clear framework for out-of-court settlements and make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible [Convention Articles 1, 3, 8];
- d) SØIK (i) thoroughly investigate and prosecute foreign bribery allegations, (ii) proactively gather information from diverse sources to increase the number of allegations and to enhance investigations; (iii) routinely and promptly co-ordinate with foreign law enforcement authorities, and make greater efforts to obtain evidence from these authorities, including through Eurojust and formal treaty-based MLA where appropriate; (iv) make greater efforts to investigate and prosecute even in the absence of parallel investigations in foreign jurisdictions; and (v) ensure that both natural and legal persons are prosecuted in a foreign bribery case whenever appropriate, including when a settlement is discussed or reached with a corporate defendant [Convention Articles 5, 9; Commentary 27; 2009 Recommendation Annex I.D];
- e) Denmark issue guidelines to raise awareness of Article 5 of the Convention and to ensure that the factors enumerated in the Article do not influence foreign bribery investigations and prosecutions [Convention Article 5];
- f) Denmark (i) take steps to ensure that the statute of limitations for foreign bribery allows adequate time for investigating and prosecuting the offence; and (ii) increase the statute of limitations for providing MLA and broaden the basis for extraditing Danish nationals in foreign bribery cases [Convention Articles 6, 9];
- g) Denmark (i) ensure that SØIK has sufficient human resources, including experts in forensic accounting and information technology, to investigate and prosecute foreign bribery cases; (ii) train SØIK and other law enforcement officials specifically on foreign bribery and related issues; (iii) provide guidance to investigators and prosecutors on the definition of foreign public officials, including those of public international organisations; and (iv) allow the use of special investigative techniques in foreign bribery investigations [Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D].

4. Regarding jurisdiction, the Working Group recommends that Denmark:

- a) Ensure that it prosecutes all cases where a Danish national commits foreign bribery wholly outside Denmark if both the country of the bribed official and the country where the bribery took place have criminalised domestic bribery [Convention Article 4];
 - b) Ensure that its law enforcement authorities thoroughly explore territorial links to Denmark in foreign bribery cases [Convention Article 4].
5. Regarding sanctions, the Working Group recommends that Denmark promptly increase the maximum penalties for (a) foreign bribery committed by natural persons, and (b) false accounting for the purpose of committing or concealing foreign bribery, to ensure that sanctions for these offences are effective, proportionate and dissuasive [Convention, Articles 3, 8; 2009 Recommendation X.A.iii].
6. With respect to statistics, the Working Group recommends that Denmark maintain detailed statistics on (i) asset seizure and restraint; (ii) sanctions including confiscation imposed in practice; (iii) incoming and outgoing MLA and extradition requests, including those to and from Greenland and the Faroe Islands; and (iv) tax offences and reporting by tax officials to law enforcement authorities [Convention Articles 3(3), 5, 9; 2009 Recommendation VIII.i; 2009 Tax Recommendation II].
7. Regarding Greenland and the Faroe Islands, the Working Group recommends that Denmark promptly adopt as a matter of priority a roadmap setting forth specific goals, concrete steps and deadlines for implementing the Convention at the earliest possible date in these territories [Convention Article 1].

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

8. With respect to money laundering, the Working Group recommends that Denmark (i) raise awareness of foreign bribery as a predicate offence to money laundering and develop bribery-related anti-money laundering measures, such as typologies and training for MLS officials and reporting entities; and (ii) take steps to ensure that the MLS is adequately resourced to effectively detect money laundering cases predicated on foreign bribery [Convention, Article 7; 2009 Recommendation III.i].
9. Regarding accounting and auditing, the Working Group recommends that Denmark promptly issue guidance to auditors on the scope of their reporting obligations, and raise awareness of foreign bribery among accountants and auditors, including by providing foreign bribery indicators [Convention, Article 8; 2009 Recommendation III.i].
10. Regarding awareness-raising, the Working Group recommends that:
- a) Denmark (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in co-operation with the private sector; and (ii) encourage companies, especially SMEs, to develop and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance [2009 Recommendation III.i, X.C.i and ii, and Annex II];
 - b) TCD consult with the MOJ or SØIK to ensure the soundness of its guidance. [2009 Recommendation III.i].
11. With respect to the reporting of foreign bribery, the Working Group recommends that Denmark:
- a) Ensure that public servants, including those in the MFA, Trade Council, Danida and Danish International Investment Funds, are clearly required to report all credible suspicions of foreign bribery involving Danish individuals or companies detected in the course of their work to Danish law enforcement authorities [2009 Recommendation IX.i and ii];

- b) Put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities [2009 Recommendation IX.iii].

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

- a) Denmark (i) issue guidance to its contracting authorities to ensure that exclusion from public procurement due to foreign bribery is effectively implemented in practice; and (ii) specify the maximum period of debarment that can be imposed and ensure that records of criminal convictions are maintained for at least as long as this period [2009 Recommendation XI.i];
- b) EKF (i) conduct enhanced due diligence on agent commission fees of large absolute value, even if such fees are below both EUR 4.5 million and 5% of the contract; and (ii) consider adopting written guidance on factors to be considered when determining whether evidence alleging foreign bribery is credible; and whether to interrupt support if bribery is proven after support has been approved [2009 Recommendation XI.i; 2006 Export Credit Recommendation].

2. Follow-up by the Working Group

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

- a) Whether in practice legal or procedural obstacles are encountered in proceeding against a legal person where the natural person who bribes a foreign public official has not been or cannot be proceeded against [Convention Article 2; 2009 Recommendation Annex I.B];
- b) Sanctions and confiscation imposed in practice for foreign bribery [Convention Article 3];
- c) Updates made to anti-money laundering legislation in Greenland and the Faroe Islands [Convention Article 7];
- d) The application of the non-tax deductibility of bribes in practice, particularly on whether SØIK promptly informs SKAT of convictions related to foreign bribery, and whether SKAT re-assesses the tax returns of taxpayers convicted of foreign bribery [2009 Recommendation VIII.i; 2009 Tax Recommendation I.i and ii].

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf>

ESTONIA (JUNE 2014)

The Working Group on Bribery commends the Estonian authorities for their high level of transparency and cooperation throughout the Phase 3 process. Due to previous amendments in 2008, Estonia's foreign bribery offence is now self-contained and largely conforms to the requirements of the Convention. The Working Group also welcomes the draft amendments to the Penal Code and Code of Criminal Procedure currently before Parliament, further streamlining the offence and increasing sanctions against natural persons. Also before Parliament is draft legislation strengthening the offence of arranging a bribe or gratuity. The Working Group is however concerned by other draft amendments to the Criminal Procedure Code (draft law SE 295) which, if passed, could seriously undermine investigative capacities and prosecutorial powers, thus impacting effective enforcement of the foreign bribery offence. The Working Group also regrets that, since Estonia's foreign bribery offence came into force in January 2005, it has not investigated nor prosecuted any cases of bribery of foreign public officials. Since the Phase 2 evaluation of Estonia, two foreign bribery allegations have come to light, but neither has led to any proceedings. Further, the Working Group remains concerned that Estonia's corporate liability regime, despite the recent amendments fixing many legislative deficiencies, remains largely untested in cases of complex financial crimes and may still have shortcomings that could impede the effective prosecution of legal persons in foreign bribery cases, particularly where a natural person cannot be identified. The Working Group also considers that the prevention and detection of foreign bribery could be improved through increased engagement with Estonian companies, as well as with the accounting and auditing profession, tax authorities, money laundering authorities and reporting entities, and through clarification of whistleblower protection in the private sector.

Regarding outstanding recommendations from previous evaluations, Estonia has fully implemented Phase 2 recommendations 7(a), (c) and (d), and 14(a). Estonia has partially implemented recommendations 1(a) and (b), 2(a) and (b), 3, 6, 7(b), 13(b) and 14(b). Recommendations 4(a), 10, 12 and 13(a) remain unimplemented.

In conclusion, based on the findings in this report on the implementation by Estonia of the Anti-Bribery Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below. The Working Group invites Estonia to report orally on implementation of recommendations 1(a), 2(a), 3, 9 and 10(b) in one year (i.e., in June 2015). The Working Group invites Estonia to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., in June 2016).

1. Recommendations of the Working Group

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

1. Regarding the offence of bribing a foreign public official, the Working Group recommends that Estonia:
 - a) Proceed with the adoption of legislation strengthening the offence of arranging a bribe or gratuity by increasing the applicable sanctions and allowing the use of special investigative techniques [Convention, Article 1];
 - b) Provide appropriate guidance to the relevant authorities, once the new legislation has been passed, on the difference between arranging a bribe or gratuity and aiding and abetting, in particular when one offence should be applied over the other [Convention, Article 1].

2. Regarding the investigation and prosecution of foreign bribery, taking into account the increasing risk of foreign bribery by Estonian companies, the Working Group recommends that Estonia:
 - a) Take steps to more proactively gather information at the pre-investigation stage to increase the sources of allegations and enhance investigations by considering all available sources and engaging with stakeholders involved in anti-money laundering, accounting and auditing, tax, as well as in private business [Convention, Article 5; 2009 Recommendations III, IX and X];
 - b) Ensure that the level of resources, training and expertise among law enforcement authorities is sufficient to allow for effective investigation and prosecution of foreign bribery cases [Convention, Article 5];
 - c) Provide appropriate guidance on, inter alia, factors to be taken into account when considering whether to enter into settlement agreements and the degree of mitigation of sanctions, to ensure that plea-bargaining does not impede the effective enforcement of foreign bribery [Convention, Article 5];
 - d) Amend its legislation to allow MLA requests to toll the statute of limitations in foreign bribery cases [Phase 2 recommendation 10; Convention, Articles 5, 6 and 9];
 - e) Ensure that any amendments envisaged to the Code of Criminal Procedure do not affect the effective investigation and prosecution of the foreign bribery offence, in particular as concerns (1) the availability of special investigative techniques for all foreign bribery offences; (2) the time limit set on investigation periods; and (3) the possibility for prosecutors to appeal court decisions on grounds of misvaluation of evidence [Convention, Article 5].
3. Regarding the liability of legal persons, the Working Group recommends that Estonia:
 - a) Take steps, including by clarifying existing procedure and legislation as necessary, to ensure that in practice, proceedings against a natural person are not a prerequisite to proceedings against a legal person involved in a foreign bribery scheme [Convention, Article 2; Annex I to the 2009 Anti-Bribery Recommendation];
 - b) Take all necessary steps to clarify the terminology on “competent representatives” and “in the interest of the legal person”, whether by issuing an interpretive note to the draft amendment or through other means as appropriate under Estonian law, with a view to ensuring that interpretation of these provisions is harmonized and in conformity with the Convention and 2009 Anti-Bribery Recommendation [Convention, Article 2; Annex I to the 2009 Anti-Bribery Recommendation];
 - c) Address as a matter of urgency the potential loopholes in Estonia’s corporate liability framework through which a company might delay court proceedings and avoid liability [Convention, Article 2].
4. Regarding the provision of mutual legal assistance in cases of transnational bribery, the Working Group recommends that Estonia proceed with its expressed intention to amend its legislation to clarify that international cooperation shall not be denied based on considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved [Convention, Articles 5 and 9].
5. Regarding sanctions and confiscation in cases of transnational bribery, the Working Group recommends that Estonia :

- a) Take the necessary steps, such as through providing guidance and training, to ensure that its law enforcement authorities routinely consider confiscation in foreign bribery cases [Convention, Article 3];
- b) Maintain comprehensive statistics on the application of sanctions and confiscation measures imposed against natural and legal persons in cases of foreign bribery and false accounting offences [Convention, Articles 3 and 8].

Recommendations for ensuring effective prevention and detection of foreign bribery

- 6. Regarding money laundering, the Working Group recommends that Estonia:
 - a) Increase awareness and training among the Financial Intelligence Unit and reporting entities on mechanisms to detect transactions that could potentially involve the laundering of proceeds of foreign bribery [Convention, Article 7; 2009 Recommendation III.(i)];
 - b) Increase resources dedicated to the analysis of STRs to more effectively make use of collected information [Convention, Article 7; 2009 Recommendations III.(iv) and IX.(ii)].
- 7. Regarding accounting requirements, external audit and internal controls, ethics and compliance, the Working Group recommends that Estonia:
 - a) Amend its Penal Code to ensure (i) that the false accounting offences cover all of the activities described in Article 8(1) of the Convention; and (ii) that sanctions for false accounting are effective, proportionate and dissuasive [Phase 2 recommendation 12; Convention, Article 8];
 - b) Engage with the accounting and auditing profession to raise awareness of the foreign bribery offence, and encourage the profession to develop specific training [Phase 2 recommendation 2(a); Convention, Article 8];
 - c) Promote among Estonian companies active in foreign markets, including SMEs, the adoption of effective internal controls, ethics and compliance measures designed to prevent and detect foreign bribery, for instance by disseminating the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation X.C. and Annex II].
- 8. With respect to tax-related measures, the Working Group recommends that Estonia:
 - a) Increase awareness and training of tax officials on detection and reporting of foreign bribery [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)];
 - b) Provide clear guidance to tax officials on the reporting of foreign bribery suspicions to law enforcement authorities, and disseminate the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)].
- 9. Regarding awareness-raising, the Working Group recommends that Estonia:
 - a) Raise the awareness of and provide training on foreign bribery within the public sector agencies involved with Estonian companies operating abroad, including overseas diplomatic representations, as well as the Ministries of Justice, Internal Affairs, Finance and Economic Affairs and Communications [Phase 2 recommendations 1(a) and 1(b); 2009 Recommendation III.(i)];

- b) Actively and promptly raise awareness within the private sector, in particular SMEs, on foreign bribery risks in international business transactions, in coordination with business organisations as appropriate [Phase 2 recommendations 2(a) and 2(b); 2009 Recommendation III.(i)].
10. With respect to the reporting of foreign bribery and whistleblower protection, the Working Group recommends that Estonia:
- a) Ensure that (i) all public officials who could play a role in detecting acts of foreign bribery, including in overseas representations, are made aware of their duty not to conceal suspected acts of foreign bribery involving Estonian individuals or companies, and encourage them to report such acts; and, (ii) easily accessible channels are in place for the reporting to law enforcement authorities of suspected acts of foreign bribery [2009 Recommendation IX.(iii)];
 - b) (i) Amend its legislation or otherwise expressly clarify the application of whistleblower protection provisions to private sector employees with a view to ensuring that appropriate measures are in place to protect them from discriminatory or disciplinary action where they report suspicions of foreign bribery, and (ii) raise awareness of the public and private sector on the protection afforded to them under the law [2009 Recommendations III.(i) and IX.(iii)].
11. Regarding public advantages, the Working Group recommends that Estonia:
- a) Consider adopting more streamlined processes, including systematic checking of the Registry of Convictions in public procurement procedures and when considering applications for export credit support [2009 Recommendation XI.(i); 2006 Export Credit Recommendations 1(f) and 1(g)];
 - b) Consider requiring the consultation of international financial institutions debarment lists in the granting of public advantages, including public procurement and ODA [2009 Recommendation XI.(i)];
 - c) Provide training and information, including written guidelines and awareness-raising activities, on the modalities for the denial of benefits, as well as detection and reporting of suspicions of foreign bribery [Phase 2 recommendation 13(b), Convention, Article 3(4); 2009 Recommendation VI];
 - d) Raise awareness of the new policy on the reporting obligations of (i) KredEx staff to law enforcement authorities where they encounter suspicions of foreign bribery, and (ii) the management board to law enforcement authorities [Phase 2 recommendation 4(a); 2009 Recommendation XII.(ii); 2006 Export Credit Recommendation 1(h)].

2. Follow-up by the Working Group

12. The Working Group will follow-up the issues below as case law and practice develops:
- a) The status of draft legislation changing the language of Penal Code section 288(4) from “taking advantage of [...] official position” to “use of official position” and subsequent judicial interpretation of this phrase;
 - b) The application of the foreign bribery offence in practice to ensure that reliance on foreign law is not the only element relied upon to establish the foreign public official’s position;

- c) The application in practice of the liability of legal persons for acts committed by intermediaries, including related legal persons;
- d) The application of nationality jurisdiction over legal persons, particularly where (i) the legal person only offered or promised to bribe abroad, or (ii) where Estonia does not have jurisdiction over the natural person;
- e) The exercise of jurisdiction over natural persons through the newly broadened universality principle;
- f) The flow of information to the relevant investigative authorities to ensure that foreign bribery allegations are effectively investigated, in particular in light of the recent reorganisation within the Police;
- g) That investigations and prosecutions of foreign bribery cases are not influenced by the factors prohibited under Article 5 of the Convention, notably to assess whether recent amendments to the Prosecutor's Office Act are sufficient to ensure the independence of prosecutors;
- h) The application of the "reasonable time" criteria, to ensure that it does not result in the premature termination of foreign bribery cases;
- i) The application of section 205 of the CPC on co-operating offenders to ensure that its application does not prevent effective prosecution of an Estonian active briber who cooperated with foreign authorities;
- j) The application of plea bargaining ("settlement agreements") in foreign bribery cases;
- k) The detection of foreign bribery allegations through money laundering cases;
- l) The application of the non-tax deductibility of bribes in practice, particularly whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery; and,
- m) The application of whistleblower protection in the public sector.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/EstoniaPhase3ReportEN.pdf>

FINLAND (OCTOBER 2010)

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

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

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

1. Recommendations of the Working Group

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

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

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

3. Regarding the limitation period, the Working Group recommends that Finland take action to ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to ensure adequate investigation and prosecution, including that mechanisms for extension of the limitation period are sufficient and reasonably available (Convention, Article 6).

4. Regarding false accounting, the Working Group recommends that Finland amend the Criminal Code to expressly provide for corporate liability in respect of the accounting and auditing offences in

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

Chapter 30, as well as for the accounting offences in the Accounting Act (Convention, Article 8; 2009 Recommendation X.A).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding awareness-raising, the Working Group recommends that Finland:
 - a) Take urgent steps to raise awareness within the public and private sectors that the bribery offences under § 16:13 and § 16:14 of the Criminal Code include: (i) bribery of a foreign public official, including of a person holding a legislative office in a foreign country; and (ii) bribery through an intermediary, including through a related legal person abroad [Convention, Article 1(1) and 1(4)(a); 2009 Recommendation III(i)];
 - b) Take concrete steps to raise awareness of the Convention and the foreign bribery offence in key government agencies, including FINNVERA, MFA, and the Tax Administration [2009 Recommendation III(i)];
 - c) Take concrete steps to raise awareness of Finland's framework for combating foreign bribery in the private sector, including within high risk sectors such as the defence industry and with SOEs, SMEs and the legal, accounting and auditing professions [2009 Recommendation III(i)];
 - d) Take concrete steps to raise awareness of the responsibility of legal persons for the foreign bribery offence, including amongst SOEs and their auditors [Convention, Article 2; 2009 Recommendation III(i)];
 - e) Promote the Good Practice Guidance in Annex 2 of the 2009 Recommendation to all Finnish enterprises, business organisations and professional associations, including through Finnish missions abroad (2009 Recommendation X.C).
6. Regarding the reporting of foreign bribery, the Working Group recommends that Finland introduce appropriate measures to facilitate reporting by public officials to law enforcement authorities of suspected acts of foreign bribery detected in the course of their work [2009 Recommendation III(iv) and IX(ii)];
7. Regarding whistleblower protection, the Working Group recommends that Finland introduce mechanisms to ensure that public and private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action, along with appropriate measures for raising awareness of these mechanisms [2009 Recommendation IX(iii)].
8. Regarding external auditing, the Working Group recommends that Finland:
 - a) Take measures to ensure that the significant number of companies released from the obligation to carry out an external audit, following amendments to the Auditing Act, continue to voluntarily submit to an external audit and are aware of the foreign bribery offence and related accounting and auditing offences [Phase 2 Evaluation, Recommendation 5; 2009 Recommendation X.B(i)];
 - b) Amend the Auditing Act to require external auditors who discover indications of a suspected act of foreign bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies [Phase 2 Evaluation, Recommendation 3; 2009 Recommendation X.B(iii)];

- c) Consider requiring external auditors who discover indications of a suspected act of foreign bribery to report to competent authorities independent of the company [2009 Recommendation X.B(v)].

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

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

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

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

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

2. Follow-up by the Working Group

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

- a) Case law concerning the differentiation between aggravated and non-aggravated bribery;
- b) The reliance by Finland on the aggravating feature in § 16:14(1) of the Criminal Code (bribes intended to make an official act in service contrary to his or her duties), in particular whether this non-autonomous element of the offence causes difficulties in the investigation and prosecution of the offence;
- c) The application of effective, proportionate and dissuasive sanctions against natural and legal persons, in particular concerning: (i) the lapse of sanctions; (ii) the use of provisions on exclusion

from competition for public procurement; and (iii) bans on engaging in commercial activities under the Business Prohibition Act;

- d) The confiscation of the instrument of the bribe and its proceeds (or their equivalents), including pre-trial seizure and confiscation measures;
- e) Experience of cooperation with competent authorities in other countries concerning the identification, freezing, seizure, confiscation or recovery of bribes, and the proceeds of bribes, to foreign public officials;
- f) The proposal to introduce a system of plea bargaining in Finland, and any impact this system may have on the investigation and prosecution of foreign bribery cases;
- g) The application of money laundering offences in cases where foreign bribery is the predicate offence;
- h) The adequacy of the monetary thresholds that determine the application of the HILMA information system to public tenders.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Finlandphase3reportEN.pdf>

FRANCE (OCTOBER 2012)

The Working Group on Bribery welcomes France's efforts to enact a legal framework, modified in particular in 2007 and 2011, designed to comply with the requirements of the Convention and the 2009 Recommendation. However, the Working Group continues to be concerned by the very low number of convictions in France for bribery of foreign public officials since the entry into force of the offence more than twelve years ago – a total of five of which just one, under appeal, holds a legal person liable. In view of the very important role its companies play in the international economy, France appears particularly exposed to the risk of bribery of foreign public officials. The Working Group's concern is all the more acute insofar as, despite foreign judgments involving certain French companies, France does not seem to have pursued criminal action in such cases as vigorously as expected.

The Phase 2 evaluation of France, adopted in 2004, included recommendations and issues for follow-up, as indicated in Annex 1 of this report. Twelve out of the 13 recommendations adopted by the Working Group in 2004 were deemed to have been implemented at the time of the Phase 2 written follow-up report. Only Recommendation 9 was deemed to have been only partially implemented.

Based on this report concerning France's application of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations in Part I to reinforce implementation of the Convention; and (2) will follow up the issues identified in Part II. The Working Group invites France to make an oral report to the Working Group on implementation of the recommendations 1(b), 3 and 4(a) in one year's time (October 2013). It also invites France to submit a written follow-up report on all the recommendations and issues for follow-up in two years' time (October 2014).

1. Recommendations of the Working Group

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

1. Regarding the offence of bribery of foreign public officials, the Working Group recommends that France:
 - (a) review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials [Convention, Article 1 and 5; 2009 Recommendation, V]
 - (b) eliminate, as soon as possible, the dual criminality requirement set out in article 113-6 CP in relation to bribery of foreign public officials committed by French nationals outside French territory (that the acts are “punishable by the law of the country where the acts were committed”); [Convention, Article 1; 2009 Recommendation, III. ii) and V]
 - (c) clarify by all appropriate means that no element of proof, other than those set out in Article 1 of the Convention is required to constitute an offence under articles 435-3 et seq. CP with regard to bribery of foreign public officials, and in particular that the case-law principle of "corruption pact" does not, in practice, constitute such an element or an obstacle to the criminalisation of (i) the offer or promise of pecuniary or other advantages; (ii) acts of bribery involving intermediaries; and (iii) payments to third parties; [Convention, Article 1; 2009 Recommendation, III. ii) et V]

- (d) to ensure by all appropriate means that the interpretation of the principle of non-retroactivity of criminal law does not impede the prosecution and sanctioning of bribery of foreign public officials occurring after the entry into force of the offence; [Convention, Article 1; 2009 Recommendation, V.]
 - (e) examine the possibility either of criminalising the bribery of a foreign public official sufficiently broadly, or of extending the offence of trading in influence, to avoid a difference of approach for the same acts of bribery based whether the intended recipient is a French or a foreign public official; [Convention, Article 1; 2009 Recommendation, III. ii) and V]
2. Concerning the criminal liability of legal persons, the Working Group recommends that France:
- (a) clarify the requirements for the criminal liability of legal persons to: (i) ensure that their approach fully takes into account Annex I of the 2009 Recommendation; and (ii) that a legal person cannot escape liability for acts of bribery by making use of an intermediary, including a related legal person; [Convention, Article 2; 2009 Recommendation, Annex I(B)]
 - (b) introduce ongoing training for the French law enforcement authorities relating specifically to enforcement of the criminal liability of legal persons in foreign bribery cases. [Convention, Article 2; 2009 Recommendation, III(i), Annex I(D)]
3. Concerning sanctions in cases of transnational bribery, the Working Group recommends that France:
- (a) with regard to the penalties applicable to natural persons, (i) raise the maximum amount of the fines set out in article 435-3 CP, in particular to bring it into line with the amount of available fines for the offence of misuse of corporate assets; and (ii) ensure that the penalties imposed in practice are effective, proportionate and dissuasive; [Convention, Article 3; 2009 Recommendation]
 - (b) with regard to the penalties applicable to legal persons, (i) raise the maximum amount of the available fine to a level that is effective, proportionate and dissuasive; and (ii) make full use of the additional penalties available in the law, in particular debarment from public procurement, in order to contribute to the application of sanctions that are effective, proportionate and dissuasive; [Convention, Articles 2 and 3; 2009 Recommendation, III.vii) and XI.i)]
 - (c) make full use of the confiscation measures available in the law in order to contribute to the application of penalties that are effective, proportionate and dissuasive and, in this context: (i) develop a proactive approach to seizure and confiscation of the instrument and proceeds of the bribery of foreign public officials or assets of equal value, including in the context of proceedings involving legal persons; (ii) raise awareness among judges and law enforcement authorities of the importance of confiscating the proceeds of bribery of a foreign public official (especially where the perpetrator is a legal person); and (iii) develop and disseminate guidelines on methods for quantifying the proceeds of corruption offences. [Convention, Article 3.3]
4. Concerning investigation and prosecution, the Working Group recommends that France:
- (a) pursue the changes initiated by the two circulars by the Minister of Justice concerning new relationships between the Ministry of Justice and prosecutors by progressing to amendment of the legal framework to (i) ensure that the Public Prosecutor's Office monopoly on the instigation of investigations and prosecutions, together with its role in the conduct of judicial investigations and the procedure for appearance on prior admission of guilt (CRPC), are exercised independently of the executive in order to guarantee that investigations and

prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention; and (ii) to break with past practices of individual instructions, as announced by the circular; [Convention, Article 5 and 2009 Recommendation, V. and Annex 1(D)]

- (b) accord the same rights to all victims of the bribery of foreign public officials, without differentiating between States, with regard to the instigation of criminal proceedings and bringing civil party claims and to and to eliminate the requirement of a prior complaint by a victim or his/her legal representatives or an official complaint by the country where the acts were committed, contained in article 113-8 CP; [Convention, Articles 4 and 5, 2009 Recommendation, Annex 1(D) and Phase 2 Recommendation 8]
- (c) as necessary and in compliance with the relevant rules and procedures, make public by all appropriate means, and respecting the fundamental rights of the Defendant, certain elements of the CRPC, such as the terms of the agreement, especially the approved penalty or penalties; [Convention, Article 3]
- (d) formally clarify, by circulars or any other official means, France's criminal justice policy with regard to bribery of foreign public officials in order to ensure a determined commitment on the part of public prosecutors and judicial police officers placed under their authority to systematically investigate the liability of persons suspected of committing the offence, including on the basis of information spontaneously transmitted by foreign authorities, mutual legal assistance requests and credible allegations that are reported to them or that come to their attention in the performance of their duties; [Convention, Article 5; 2009 Recommendation, XIII i) and ii) and Annex 1(D)]
- (e) issue a comprehensive reminder to all jurisdictions that the Paris jurisdiction and the Central Anti-Corruption Brigade have jurisdiction over all cases of bribery of foreign public officials and, in this context, (i) ensure that resources are in place in each appellate jurisdiction such as to allow Prosecutors General to identify cases suitable for referral to the Paris jurisdiction, including by holding regular meetings with the relevant decentralised units of the judicial police; and (ii) ensure that sufficient resources are allocated to investigations and prosecutions, in particular to the Financial Section of the Paris Regional Court and to the Central Brigade, including for processing mutual legal assistance requests; [Convention, Articles 5 and 9; 2009 Recommendation, II, V and XIII, Annex 1(D) 2) and 3); Phase 2 Recommendation 10]
- (g) within the overall review of the remit of the Public Prosecutor's Office, give thought to the status of the judicial police in order to ensure its capacity to conduct investigations that are not influenced by the considerations mentioned in Article 5 of the Convention; [Convention, Article 5 and Commentary 27; 2009 Recommendation, Annex 1(D)]
- (h) clarify by all means that the law governing classification of information covered by defence secrecy cannot impede the investigation and prosecution of foreign bribery cases and that the provisions of Article 5 of the Convention are taken into account in the decision to classify or, even more so, to declassify information necessary for investigations and prosecutions of foreign bribery; [Convention, Article 5]
- (i) take all appropriate steps, including potentially amending the “blocking statute”, to ensure that the conditions governing access to information in the possession of French companies under this law do not stand in the way of foreign authorities’ ability to investigate and prosecute the bribery of foreign public officials. [Convention, Article 5]

5. Concerning the statute of limitations, the Working Group recommends that France take necessary measures to extend, to an appropriate period, the statute of limitations applicable to the offence of bribery of foreign public officials. [Convention, Article 6; Phase 2 Recommendation 9]
6. Concerning mutual legal assistance, the Working Group recommends that France take all necessary measures to ensure that investigations conducted by the judicial police under the supervision and direction of the Public Prosecutor's Office before the opening of a formal criminal proceeding are not influenced by the identity of the natural or legal persons involved and, more generally, that decisions to grant mutual legal assistance in foreign bribery cases are not influenced by considerations of national economic interest under the guise of protecting "the fundamental interests of the nation". [Convention, Articles 5 and 9]

Recommendations for ensuring the effective prevention and detection of transnational bribery

7. Concerning money laundering, the Working Group recommends that France:
 - (a) pursue and increase its efforts to raise awareness of professions required to detect acts that may involve foreign bribery; [2009 Recommendation, III i)]
 - (b) consider a review of the money laundering methods and schemes that could be used in instances of transnational bribery review and share, if appropriate, the results of this review with private-sector professionals who are in a position to detect foreign bribery. [Convention, Article 7]
8. Concerning accounting rules, external audit and corporate compliance programmes, the Working Group recommends that France:
 - (a) support existing initiatives to train statutory auditors in the detection of bribery and the obligation to report criminal acts, ensuring that, in accordance with the provisions of ISA 500, such training also extends to criminal acts committed by the foreign subsidiaries of companies that they are responsible for auditing; [2009 Recommendation, III i), X B. v)]
 - (b) increase efforts to raise awareness among French companies of the need to take account, in their compliance programmes, of the role of their foreign subsidiaries and promote the adoption and implementation of compliance programmes in SMEs involved in international trade, according to the specific circumstances of each one. [2009 Recommendation X. C. i) and v); Annex II]
9. Concerning tax measures to combat bribery of foreign public officials, the Working Group recommends that France:
 - (a) urge French Polynesia and Saint Pierre and Miquelon to apply the principle of the non-deductibility of bribes as soon as possible; [2009 Tax Recommendation I(i) and Phase 2 Recommendation 13]
 - (b) pursue efforts to raise the awareness of tax agents on their role of detecting illicit transactions related to the bribery of foreign public officials, both in mainland France and in the overseas territories, and take all appropriate steps to promote the exchange of information in the possession of tax authorities for use by law enforcement authorities, notably through reporting under article 40 CPP. [2009 Tax Recommendation VIII(i)]
10. Concerning raising awareness of the offence of bribery of foreign public officials, the Working Group recommends that France reinforce its existing activities in order to ensure that officials of the

Ministry of Foreign Affairs and of the General Directorate of the Treasury are suitably aware of the offence and of their role in raising awareness of the risks among companies. [2009 Recommendation III i) and iv)]

11. Concerning the reporting of transnational bribery, the Working Group recommends that France:
 - (a) persevere in its efforts to raise awareness of large, medium-sized and small companies, of the protection the law affords private-sector whistleblowers; [2009 Recommendation, III (i) and IX i) and iii)]
 - (b) ensure that appropriate measures are in place to encourage reporting under article 40.2 CPP, in particular by concluding protocols for reporting bribery offences between law enforcement authorities and relevant government sectors, accompanied by ongoing training for officials; [2009 Recommendation, IX]
 - (c) reinforce the reporting framework in place in the French Development Agency (AFD), COFACE, and UBIFRANCE and work towards aligning this with article 40 CPP. [2009 Recommendation, IX]
12. Concerning public advantages, the Working Group recommends that France:
 - (a) take the necessary steps to give all authorities mandated to approve public procurement contracts access to the criminal records of legal persons; [2009 Recommendation XI i)]
 - (b) provide specific training to the staff of agencies mandated to provide public advantages on the due diligence procedures that need to be undertaken when providing such advantages; [2009 Recommendation XI i)]

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as case law and practice develop, to ensure:
 - (a) that the definition of “without right” is not interpreted more restrictively than the definition of “improper advantage” in the Convention and therefore does not require proof that a law in force in the country of the recipient of the bribe prohibits that person from receiving a bribe; [Convention, Article 1]
 - (b) (i) the extent of recourse to the offence of misuse of corporate assets in cases involving elements of transnational bribery, on the basis of data that France should collect and analyse; and

(ii) whether liability of legal persons can be established, in practice, in foreign bribery cases where natural persons are prosecuted for misuse of corporate assets, to determine whether this represents an obstacle to liability of legal persons in France for the offence of bribery of foreign public officials; [Convention, Articles 1 and 2]
 - (c) the development of ongoing foreign bribery cases against legal persons; [Convention, Article 2]
 - (d) that sanctions applied in the context of the procedure of appearance on prior admission of guilt are effective, proportionate and dissuasive; [Convention, Article 1]

- (e) the application of the procedure of appearance on prior admission of guilt in foreign bribery cases; [Convention, Articles 3 and 5; and 2009 Recommendation, Annex 1, D]
- (f) that statistics are collected on incoming and outgoing requests for mutual legal assistance executed directly between prosecutors; [Convention, Article 9]
- (g) measures taken to encourage reporting under article 40 of the Code of Criminal Procedure. [2009 Recommendation, XI ii)]

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf>

GERMANY (MARCH 2011)

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

The Phase 2 evaluation report on Germany adopted in June 2003 included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented, at the time of Germany's written follow-up report, in December 2005, the Working Group concludes that: recommendation 3 has been partially implemented, recommendation 1 remains partially implemented and recommendation 7 remains not implemented. Of the recommendations that have been deemed "considered" at the time of the written follow-up, recommendation 5.1 has been partially implemented and recommendation 8 is partly not implemented and partly no longer relevant.⁴

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

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Germany:
 - a) Take any appropriate measures to clarify (i) that the criteria in the Convention and its Commentaries defining a foreign public official are to be interpreted broadly, (ii) that no element of proof beyond those contemplated in Article 1 of the Convention is required and (iii) that, in determining whether a public function was being exercised by a person, elements of information available from foreign authorities are given due consideration [Convention, Article 1; 2009 Recommendation III. (ii) and V.];
 - b) Ensure, through any appropriate means, that its legal treatment of facilitation payments is clearly defined and that it complies with the requirement of Commentary 9 that such payments be "small" [Convention, Article 1; 2009 Recommendation III. (ii) and VI.(i) and (ii).];

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

c) Encourage companies to prohibit or discourage the use of facilitation payments.

2. Regarding the responsibility of legal persons, the Working Group recommends that Germany further increase the effectiveness of the liability of legal persons including through raising awareness among the prosecuting authorities at the *Länder* level to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently in all *Länder* (Convention, Article 2, Phase 2 Evaluation, recommendation 7).

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

a) Raise awareness among prosecuting authorities on the importance of (i) requiring sanctions against natural persons that are effective, proportionate and dissuasive, including in cases of solicitation, and (ii) making full use of the range of criminal sanctions available in law (Convention, Article 3);

b) Compile statistical information on sanctions of natural persons in a manner that differentiates between (i) sanctions imposed for the offence of foreign bribery and for other criminal offences, in particular commercial bribery and breach of trust, (ii) procedures applied (court decision with a full hearing, arrangement under section 153a CCP, penal order under section 407 CCP, or negotiated sentencing agreement under section 257c CCP) (Convention, Article 3);

c) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements under section 153a CCP, such as the reasons why they were used in a specific case and the arrangements' terms (Convention, Article 3);

d) Increase the maximum level of the punitive component of administrative fines available in law for legal persons, to a level that is effective, proportionate and dissuasive (Convention, Articles 2 and 3; 2009 Recommendation V.; Phase 2 Evaluation, Recommendation 7);

e) Consider making available to courts additional sanctions for legal persons to ensure effective deterrence [Convention, Articles 2 and 3; 2009 Recommendation III.(vii) and XI.(i)].

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

a) Further ensure that judges and prosecutors in those *Länder* with less experience in foreign bribery cases are offered specific training with regard to the technicalities linked to the complexity of the foreign bribery offence in Germany for both natural and legal persons [2009 Recommendation III.(ii) and V.];

b) Strengthen its efforts to compile at the federal level, for future assessment, information and statistics relevant to monitoring and follow-up of the enforcement of the German legislation implementing the Convention [Convention, Article 12; 2009 Recommendation III.(ii) and V.];

c) Clarify the criteria by which the prosecutors may dispense with prosecutions, with a view to provide a uniform application of section 153a CCP [2009 Recommendation III. (ii) and V.; Phase 2 Evaluation, recommendation 8];

d) Clarify, through any appropriate means, that the “predominant public interest”, provided under subsection 153c(3) among the grounds for dispensing with prosecution, does not include factors

contrary to Article 5 of the Convention such as the national economic interest (Convention, Article 5).

Recommendations for ensuring effective prevention and detection of foreign bribery

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

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

2. Follow-up by the Working Group

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

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

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Germanyphase3reportEN.pdf>

GREECE (JUNE 2012)

The Working Group on Bribery appreciates the preparations made by the Greek authorities for the Phase 3 on-site visit and their co-operation during the Phase 3 evaluation. However, the Working Group was not able to adequately and fully assess Greece's implementation of the Convention. The failure of the Greek authorities to provide timely information, detailed statistics and translated legislation precluded a proper examination of numerous matters. For example, the Working Group could not fully assess the serious issues raised by the *Magyar Telekom* case, including Greece's possible non-compliance with Article 5 of the Convention and 2009 Recommendation Annex I.D (para. 2). Also unanswered are broader questions regarding Greece's enforcement efforts and capacity, and concerns over duplicative legislation in multiple areas. In some cases, the lack of information was exacerbated by the unsatisfactory representation of the Greek authorities at the on-site visit. There are also recent and upcoming legislative and institutional developments in Greece because of the on-going financial crisis. The impact of these developments on Greece's implementation of the Convention can only be assessed after practice has accumulated. For these reasons, the Working Group decides that Greece should undergo and complete a Phase 3bis evaluation. The Working Group will decide the precise timing and scope of the Phase 3bis evaluation in June 2013. The evaluation should include an on-site visit of Greece. It should cover the issues which the Working Group could not fully assess in this evaluation as identified throughout this report. The evaluation should also cover issues that are affected by recent and upcoming developments. As well, Greece has commenced investigations in the *Magyar Telekom* case. The Phase 3bis evaluation will also examine this enforcement action.

In addition, the Phase 2 evaluation report on Greece adopted in April 2005 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of Greece's 2007 Written Follow-Up Report, the Working Group concludes that Recommendations 1(b), 1(d), 5(a) and 6(c) remain partially implemented and Recommendations 1(e), 6(b), 6(d) and 7 remain not implemented.

In conclusion, based on the findings in this report, regarding implementation by Greece of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Greece to report orally on the implementation of Recommendations 1, 4(a), 4(b), 4(f), 4(g), 5(a), 9 and 14(c) within one year (i.e., by June 2013). The Working Group invites Greece to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by June 2014).

1. Recommendations of the Working Group

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

1. Regarding duplicate statutory provisions, the Working Group recommends that Greece rationalise and eliminate its multiple legislative provisions that apply to (i) the offence of foreign bribery, (ii) liability and fines against legal persons for foreign bribery, (iii) confiscation in foreign bribery cases, and (iv) accounting misconduct described in Article 8(1) of the Convention (Convention Articles 1, 2, 3 and 8).

2. With regard to the offence of foreign bribery, the Working Group recommends that Greece clarifies that its foreign bribery offence covers (i) all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the official's competence, and (ii) bribery committed by a best-qualified bidder (Convention Article 1).

3. With regard to the liability of legal persons for foreign bribery, the Working Group recommends that Greece:

(a) ensure consistency in its laws on liability of legal persons for foreign bribery by replacing “the fault of the legal person’s manager” in Article 5 of the OECD Convention Law with alternate language found in other laws (Convention Article 2; 2009 Recommendation, Annex I.B);

(b) issue guidance on what amounts to adequate supervision and control to prevent foreign bribery (Convention Article 2; 2009 Recommendation, Annex I.B);

(c) clarify that the liability of legal persons is not restricted to cases where the natural person(s) who perpetrated the offence is prosecuted or convicted, and that proceedings against legal persons may be commenced in the absence of criminal charges against a natural person (Convention Article 2 and 2009 Recommendation, Annex I.B); and

(d) clarify that the Joint Decision of the Ministers of Finance and Justice to ensure that proceedings against legal persons may be commenced in the absence of criminal charges against a natural person, and that the Decision applies to all laws that could result in corporate liability for foreign bribery, including the OECD Convention Law (Convention Article 2 and 2009 Recommendation, Annex I.B).

4. With respect to investigation and prosecution, the Working Group recommends that Greece:

(a) take all necessary measures to ensure that it assesses credible allegations of foreign bribery and seriously investigates complaints of this crime, and proceed proactively and without delay against both natural and legal persons in a foreign bribery-related case whenever appropriate (Convention Article 5 and 2009 Recommendation, Annex I.D));

(b) provide additional training to judges, prosecutors and law enforcement officials on the Convention and the foreign bribery offence, including the practical aspects of foreign bribery investigations (Convention Article 5);

(c) take steps to ensure that the limitation period for foreign bribery offences qualified as misdemeanours is sufficient to allow adequate investigation and prosecution (Convention Article 6);

(d) amend its legislation to exclude the application of Article 30(2) of the Code of Penal Procedure from all foreign bribery offences (Convention Article 5);

(e) make the special investigative techniques in Article 253A CPC available to all foreign bribery offences and take steps to ensure that its prosecutors and law enforcement officials have the capacity to investigate complex financial crimes (Convention Article 5);

(f) ensure that foreign bribery allegations provided to Greek officials through MLA or in multilateral fora on international co-operation (e.g. Eurojust), or otherwise, are promptly forwarded to Greek law enforcement authorities and that domestic investigations are subsequently opened as appropriate (Convention Article 5 and 2009 Recommendation, Annex I.D).

5. Regarding the attribution and assignment of cases, the Working Group recommends that Greece:

(a) take all necessary measures to ensure that foreign bribery can be investigated by SDOE, Hellenic Police and EPS where appropriate, and establish procedures for co-ordination, sharing information and resolving conflicts of competence among these authorities (Convention Article 5); and

(b) consider issuing guidelines to prosecutors on how to decide which investigative body should have conduct of specific foreign bribery investigations (Convention Article 5).

6. With respect to sanctions, the Working Group recommends that Greece:

(a) increase the maximum fines available against natural persons for foreign bribery and ensure that fines are available in all foreign bribery cases, regardless of whether the crime “emanates from causes of profit” (Convention Article 3);

(b) lower the felony threshold for foreign bribery offences, and allow the consideration of other mitigating and aggravating factors in determining whether an offence is a misdemeanour or felony (Convention Article 3);

(c) ensure that a fine may be imposed against a legal person for foreign bribery irrespective of whether a benefit is achieved or intended, or whether the benefit is a contract or other types of business advantages (Convention Article 3); and

(d) ensure that law enforcement authorities and prosecutors routinely seek confiscation in corruption cases (Convention Article 3(3)).

7. Regarding mutual legal assistance (MLA), the Working Group recommends that Greece improve its system for seeking and providing MLA, and clarify the types of assistance available for requests that are based on the Criminal Procedure Code rather than a treaty (Convention Article 9).

8. Regarding statistics, the Working Group recommends that Greece maintain detailed statistics on (i) enforcement actions against natural and legal persons in foreign corruption; (ii) sanctions, confiscation and interim measures against natural and legal persons, especially in corruption and foreign bribery cases; (iii) criminal cases (particularly those involving corruption) that are barred by the statute of limitations; and (iv) MLA requests, including the offence underlying requests, time required for execution, and nature of assistance sought (Convention Articles 3, 9).

Recommendations for ensuring effective prevention and detection of foreign bribery

9. With respect to detection generally, the Working Group recommends that Greece increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention, Article 5 and Commentary 27; 2009 Recommendation IX.i and Annex I.D).

10. With respect to money laundering, the Working Group recommends that Greece ensure that all stakeholders involved in fighting money laundering are adequately aware that foreign bribery is a predicate offence for money laundering, and provide guidance and training to the FIU on detecting and reporting foreign bribery (Convention Article 7).

11. Regarding accounting requirements, external audit, and corporate compliance, the Working Group recommends that Greece:

(a) give, SDOE, the EPS and Economic Crime Prosecutor concurrent jurisdiction to investigate and prosecute foreign bribery-related accounting offences under the OECD Convention Law, and raise awareness of the offences and ensure co-ordination among all law enforcement agencies that may investigate and prosecute this offence (Convention Article 8 and 2009 Recommendation X.A);

(b) raise awareness of Greece's foreign bribery laws among Greek accountants and auditors, with particular emphasis on detecting and reporting foreign bribery among all Greek companies, and clarify that the Company Law does not impede external auditors from reporting foreign bribery to law enforcement authorities (Convention Article 8 and 2009 Recommendation X.A and X.B.v);

(c) encourage companies (especially SMEs) to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance (2009 Recommendation X.C.i).

12. With respect to tax-related measures, the Working Group recommends that Greece:

(a) expressly prohibit Greek shipping companies from deducting bribe payments from their taxes, and establish a written policy of re-examining the tax returns of all individuals and companies that have engaged in bribery to verify whether bribes had been deducted (2009 Recommendation VIII.i);

(b) ensure that its tax authorities include bribery in their risk assessments and audits and that measures to detect bribes are incorporated into future tax amnesties (2009 Recommendation VIII.i);

(c) consider translating and distributing the OECD Bribery Awareness Handbook to all tax examiners (2009 Recommendation VIII.i);

(d) ensure that all law enforcement officials who could be involved in foreign bribery cases may access information protected by tax secrecy in the course of a foreign bribery investigation or prosecution (Convention Article 5); and

(e) fully and promptly implement and ratify the Convention on Mutual Administrative Assistance in Tax Matters of the OECD and Council of Europe (2009 Recommendation VIII.i).

With respect to awareness-raising, the Working Group recommends that Greece (including its overseas diplomatic missions) proactively raise awareness of foreign bribery among Greek individuals, businesses and public officials, with particular emphasis on the shipping, export, and SME sectors (2009 Recommendation III.i).

13. Regarding reporting foreign bribery, the Working Group recommends that Greece:

(a) clarify that Article 26 of the Civil Service Code does not hinder the reporting of crimes, including foreign bribery, by Greek public officials (2009 Recommendation IX.ii);

(b) remind its officials in overseas diplomatic missions of their obligation to report foreign bribery, and re-issue the guidance on how to make such reports (2009 Recommendation IX.ii); and

(c) put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery (2009 Recommendation IX.iii).

14. Regarding public advantages, the Working Group recommends that Greece:

(a) amend its legislation to require a legal person seeking a public procurement contract to certify that it has not been found guilty of foreign bribery; and train all authorities involved in procurement to impose debarments in practice whenever appropriate (2009 Recommendation XI.i);

(b) ensure that the Export Credit Insurance Organisation (ECIO) implements all aspects of the 2006 Export Credits Recommendation, including measures concerning preventing, detecting, reporting and sanctioning foreign bribery, as well as raise awareness of these measures among its staff and the private sector, including by training its new and existing staff (2009 Recommendation XII.i);

(c) ensure that future funding to NGOs or companies for ODA projects are accompanied by adequate measures to prevent, detect and report foreign bribery, and that NGOs and companies that have engaged in foreign bribery are denied ODA funding where appropriate (2009 Recommendation XI.ii); and

(d) amend its legislation or provide guidelines to clarify how the provisions on administrative sanctions in various laws that apply to foreign bribery are implemented in practice, and clarify that “permanent exclusions” under Article 8 of the EC Financial Interests Law are not limited to two years in duration (2009 Recommendation XI.i).

2. Follow-up by the Working Group

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

(a) whether Greece imposes liability against a legal person for foreign bribery where (i) the legal person benefits indirectly from the bribery, (ii) the legal person obtains a non-pecuniary benefit such as an improved competitive situation, (iii) the principal offender committed foreign bribery in the interest of him/herself or a third party but the legal person benefits coincidentally, and (iv) whether a parent company would be liable if its subsidiary commits foreign bribery (Convention Article 2; 2009 Recommendation, Annex I.B);

(b) whether sanctions imposed against natural persons for foreign bribery are effective, proportionate and dissuasive, in light of Greece’s system of converting and suspending sentences of imprisonment (Convention Article 3); and

(c) the FIU’s functioning, including the priority and resources given to corruption cases (Convention Article 7).

**Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Greecephase3reportEN.pdf>**

HUNGARY (MARCH 2012)

The Working Group on Bribery welcomes the steps Hungary has taken to enforce its foreign bribery offence, which has resulted in the recent conviction of 26 individuals. The Working Group remains concerned, however, that the legal framework in Hungary is not sufficient to effectively enforce the offence against legal persons, particularly when they act through intermediaries.

The Phase 2 evaluation report on Hungary adopted in May 2005 included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented, at the time of Hungary's written follow-up report, in September 2007, the Working Group concludes that recommendations 2 (a), 2(e), 3(a), 3(b) and 5(b) have been implemented; recommendations 1(d), 4(a), 4(b) and 2(d) have been partially implemented; recommendations 2 (b), 3(c), 3(d), 3(e) and 3(f) remain partially implemented; recommendations 1 (a), 1(c) and 1(e) that were deemed partially implemented are not implemented; and recommendations 2(c) and 6(b) remain not implemented.

In conclusion, based on the findings in this report, regarding implementation by Hungary of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites Hungary to report orally on the implementation of recommendations 1, 2(a) and 2(b) within one year of this report (i.e. in March 2013). It further invites Hungary to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in March 2014).

1. Recommendations of the Working Group

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

16. With regard to the offence of foreign bribery, the Working Group recommends that Hungary take steps to ensure that its foreign bribery offence covers bribery through intermediaries, particularly in cases involving legal persons [Convention, Article 2; 2009 Recommendation, Annex I.C];
17. With regard to the criminal liability of legal persons for foreign bribery, the Working Group recommends that Hungary:
 - (a) amend its law on the criminal liability of legal persons for foreign bribery to eliminate the requirement that a natural person must usually be convicted and punished as a prerequisite to the imposition of sanctions on a legal person [Convention, Article 2; 2009 Recommendation, Annex I.B];
 - (b) remove the requirement that a bribe must have aimed at giving or have actually given a benefit to the specific legal entity subject to prosecution [Convention, Article 2; Phase 2 recommendation 4(a)(3)];
 - (c) consult with Hungarian businesses to establish minimum standards with regard to appropriate supervision by the persons whose actions can subject a legal person to liability [Convention, Article 2; 2009 Recommendation, Annex I.B; Phase 2 recommendation 4(b)]; and

- (d) provide additional training to prosecutors, judges and law enforcement regarding the application of the foreign bribery offence to legal persons [Convention, Article 2; 2009 Recommendation III and Annex I.B].
18. With regard to investigation and prosecution of foreign bribery, the Working Group recommends that Hungary:
- (a) establish a centralised bank account database in order to ease the task of investigators to map all bank accounts held by a particular person [2009 Recommendation, Annex I.D];
 - (b) consider taking appropriate measures, within the constitutional principles of the state, to ensure that (i) immunities are lifted in the context of foreign bribery investigations and prosecutions and (ii) immunity does not prevent the effective investigation and prosecution of foreign bribery offences [Convention, Article 5; 2009 Recommendation, Annex I.D; Phase 2 recommendation 3(f)];
 - (c) consider allowing those indirectly affected by decisions not to prosecute offences of foreign bribery, such as competitors or foreign states, to challenge such decisions [Convention, Article 5; 2009 Recommendation, Annex I.D; Phase 2 recommendation 3(d)]; and
 - (d) gather statistics regarding the number of foreign bribery investigations that lead to prosecution or are discontinued, along with information about investigatory measures taken in and grounds for discontinuance of any foreign bribery investigation [Convention, Article 5; 2009 Recommendation, Annex I.D];
 - (e) increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage, both to increase sources of allegations and to enhance investigations [Convention, Article 5; 2009 Recommendation IX and Annex I.D]; and
 - (f) extend the two-year investigation time limit in cases of foreign bribery [Convention, Article 6; Phase 2 recommendation 3(e)].
19. With regard to mutual legal assistance (MLA), the Working Group recommends that Hungary put in place a mechanism to compile comprehensive annual statistics on all MLA and extradition requests, including requests relating to freezing, seizing and confiscation, that are sent or received, relating to the foreign bribery offence, including the nature of the request, whether it was granted or refused and the time required to respond [Convention, Articles 9(1) and 10(3); 2009 Recommendation XIV(vi)].

Recommendations for ensuring effective prevention and detection of foreign bribery

20. Regarding accounting standards, external audit and corporate compliance programs, the Working Group recommends that Hungary:
- (a) consider requiring external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and, where appropriate, ensuring that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation X.B(v)];
 - (b) take appropriate steps to raise awareness of the foreign bribery offence among auditors and accountants, including by ensuring that auditors and accountants benefit from regular training specifying the nature and accounting and auditing aspects of the offence in order to

facilitate the detection of such acts [2009 Recommendation X.B(v); Phase 2 recommendation 2(c)]; and

- (c) take measures to encourage companies, and especially the SMEs, to develop internal control, ethics and compliance programmes and measures for the prevention and detection of foreign bribery [2009 Recommendation X.C (i),(ii), Annex II].

21. With regard to tax measures, the Working Group recommends that Hungary:

- (a) provide, on a regular basis, training for tax officials with respect to hidden commissions and detection techniques to help detect concealed bribes in practice [2009 Recommendation VIII(i)]; Phase 2 recommendation 2(b)]; and
- (b) consider signing the Multilateral Convention on Mutual Assistance in Tax Matters and including the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties [2009 Recommendation VIII(i); 2009 Tax Recommendation I (ii)-(iii)].

7. Regarding awareness-raising, the Working Group recommends that Hungary:

- (a) ensure that foreign bribery is addressed in the national anti-corruption strategy as an explicit priority in order to promote a proactive and coordinated approach to combating this type of corruption, and ensure a clear allocation of responsibility to specific agencies for prevention and combating of foreign bribery [2009 Recommendation II]; and
- (b) (i) reinforce measures to raise awareness about foreign bribery targeting the private sector (including private companies) and the public agencies and (ii) ensure that the HITA, MFA and other public agencies working with the Hungarian companies operating abroad develop training programmes focusing on foreign bribery for their own staff and provide practical guidance about risks of and measure to prevent foreign bribery to the private sector [2009 Recommendation III(i); Phase 2 recommendation 1(a)].

8. Regarding reporting foreign bribery, the Working Group recommends that Hungary:

- (a) raise awareness of the new obligation for public officials to report foreign bribery offences and develop appropriate policies and procedures to be followed in reporting to law enforcement authorities [2009 Recommendation III(iv), IX (i)-(ii)];
- (b) clarify that the new legislation on whistleblowers provides protection to persons reporting foreign bribery, ensure that responsibility for the enforcement of this legislation is clearly allocated, and raise awareness of the new protection provided by the law, in particular, among those persons (both public and private) who could play a role in detecting and reporting acts of foreign bribery [Recommendation IX(iii)].

9. Regarding public advantages, the Working Group recommends that Hungary:

- (a) take the necessary measures to put in place systematic mechanisms allowing for the effective exclusion of companies convicted of bribery of foreign public officials in violation of national law from public procurement contracts [2009 Recommendation XI (i)]; and
- (b) establish (i) mechanisms to prevent risks of foreign bribery in contracts funded by official development assistance (ODA), including during the selection and monitoring phase of

ODA funded projects, and (ii) sanctions to allow suspension from such contracts of companies convicted of bribery of foreign public officials [2009 Recommendation XI (i)-(ii)].

2. Follow-up by the Working Group

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

- (a) the application of the foreign bribery provisions with regard to the definition of a foreign public official, including in cases involving employees of state enterprises [Convention, Article 1];
- (b) jurisdiction over cases of bribery of foreign public officials, notably as regards legal persons and offences committed in whole or part abroad [Convention, Article 4];
- (c) with regard to the liability of legal persons, (i) the absence of case law dealing with the liability of legal persons in foreign bribery cases and (ii) how the requirement that the bribe must have aimed at or resulted in the legal entity gaining a “benefit” is interpreted in practice in foreign bribery cases [Convention, Article 2];
- (d) the application of sanctions by the courts in cases of bribery of foreign public officials, to ensure they are effective, proportionate and dissuasive, especially in cases against legal persons [Convention, Article 3; Phase 2 follow-up issue 7(f)];
- (e) whether, in practice, (i) both the bribe and the proceeds of the bribe are subject to seizure and confiscation or (ii) monetary sanctions of comparable effect are applicable [Convention, Article 3]; and
- (f) (i) the training of CIOPPS with regard to the foreign bribery offence, particularly the confiscation of assets and (ii) the number of reports of suspected foreign bribery received by CIOPPS [Convention Article 3; 2009 Recommendation III(i)];
- (g) the measures taken by Hungary’s FIU to monitor suspicious transaction reports (STRs) and improve quality of reports, including by taking steps to make sure that it receives relevant feedback on the STRs disseminated [Convention, Article 7];
- (h) the measures taken by Hungary to make MLA available to all Parties to the Convention in cases involving administrative or civil proceedings against legal persons for foreign bribery [Convention Article 9(1); Phase 2 recommendation 3(c)];
- (i) the implementation of the new whistleblower protection provisions [2009 Recommendation X.C]; and
- (j) the effectiveness of the new requirement under Governmental Decree No. 310/2011 for contracting authorities to examine criminal records for individuals and the company register for companies.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/Hungaryphase3reportEN.pdf>

ICELAND (DECEMBER 2010)

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

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

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

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that Iceland explicitly cover bribery of officials employed by state-owned and state-controlled companies, and specifically consider this recommendation in drafting its new Bill amending the foreign bribery offence in Iceland's General Penal Code (GPC) (Convention, Article 1; Phase 2 Report, recommendation 9).⁶
2. Regarding sanctions for foreign bribery, the Working Group recommends that Iceland:
 - a) Raise imprisonment sanctions against natural persons for foreign bribery, as provided under section 109 of the GPC, to ensure that they are effective, proportionate and dissuasive (Convention, Article 3.1); and

⁵ See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

⁶ The [OECD anti-bribery instruments](http://www.oecd.org/daf/nocorruption) (OECD Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation, the 2009 Tax Recommendation, the 2006 Export Credit Recommendation and 1996 DAC Recommendation) can be downloaded from the OECD website: www.oecd.org/daf/nocorruption.

- b) Consider the imposition of additional administrative sanctions for legal persons, similar to those applicable to individuals (Convention, Article 3.4).

3. Regarding confiscation of the bribe and proceeds of foreign bribery, the Working Group recommends that Iceland provide training to its prosecutors on the new confiscation regime introduced in 2009, and encourage them to request confiscation in foreign bribery cases, where appropriate [Convention, Article 3.2; 2009 Recommendation III.(i)].

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

- a) Promptly and seriously proceed with its ongoing reflection on the structure and resource allocation for fighting economic and financial crime in Iceland, to ensure that there are sufficient resources for and effective coordination of the different law enforcement authorities for the investigation and prosecution of economic and financial crimes, including foreign bribery [2009 Recommendation III.(ii) and V.];
- b) Promptly provide specialised training to law enforcement authorities, including the police, prosecutors and judges, on the investigation and prosecution of foreign bribery [2009 Recommendation III.(ii) and V.];
- c) Make available, where appropriate, special investigative means, such as interception of communications, video surveillance and undercover operations, in foreign bribery investigations [2009 Recommendation III.(ii) and V].

Recommendations for ensuring effective prevention and detection of foreign bribery

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

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

6. Regarding detection and reporting of foreign bribery, the Working Group recommends that Iceland:

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

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

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

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

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

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

2. Follow-up by the Working Group

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

- a) The interpretation of the foreign bribery offence under Icelandic law, to ensure that it covers bribery through intermediaries, and the offering, promising or giving of both pecuniary and non-pecuniary advantages;

- b) The application in practice of the corporate liability regime for foreign bribery, notably to ensure that a legal person cannot avoid responsibility for foreign bribery by using intermediaries, including related legal persons;
- c) Whether sanctions for foreign bribery are sufficiently effective, proportionate and dissuasive in practice;
- d) The application in practice of the recently amended anti money laundering legislation and its effect on enforcement of money laundering offences predicated on economic crime; and
- e) Whether Iceland's Export Credit Guarantee Department, "Tryggingardeild Utflutnings" (TRU), if and when its practice develops in the granting of officially supported export credits, takes steps to adhere to the OECD Council Recommendation on Bribery and Officially Supported Export Credits.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Icelandphase3reportEN.pdf>

IRELAND (DECEMBER 2013)

The Working Group commends the Irish authorities for their cooperation and disclosure throughout the Phase 3 process. However, Ireland's failure to organise robust participation of the private sector during the on-site visit – with only one company attending this portion of the meetings – indicates a lack of engagement with the private sector on the bribery of foreign public officials.

Ireland has made progress on the following Phase 2 recommendations that remained partially or unimplemented at the end of Phase 2: Recommendation 4 on nationality jurisdiction is now fully implemented, and the following recommendations which were unimplemented are now partially implemented: 2(a) on whistleblower protections, 2(b) on reporting by public sector employees, 5(a) and 5(b) on the foreign bribery offence, 7(b) on false accounting offences, and 7(d) on statistics. Recommendation 8(b) on sanctions has been converted to a follow-up issue. In addition, Ireland has made progress on the following Phase 2bis Recommendations that remained partially or unimplemented at the end of Phase 2 and are now partially implemented: 2(a) on reporting by public sector employees, 2(b) on whistleblower protections, and 3(a) on the foreign bribery offence.

Despite progress in certain areas, Ireland continues to have significant issues regarding its implementation of the Anti-Bribery Convention. Ireland has not prosecuted a foreign bribery case in the twelve years since its foreign bribery offences came into force. One investigation and three assessments of cases were ongoing at the time of the on-site visit. Ireland took few proactive investigative steps in these cases. This appears to be largely due to an inadequacy of resources for detecting and investigating foreign bribery cases, due to their depletion by non-bribery cases related to the financial sector. In addition, Ireland's legislative framework for criminalising foreign bribery retains significant weaknesses identified in Phase 2 and Phase 2bis. The two foreign bribery offences contained in two separate statutes have still not been consolidated and harmonised in a manner that is in compliance with Article 1 of the Convention, and the liability of legal persons for the foreign bribery offences is still based on the common law identification theory, which was assessed as inadequate by the Working Group. The Working Group considers that the Draft Scheme 2012 could provide a suitable vehicle to address these issues.

In conclusion, based on the findings in this report on Ireland's implementation of the Anti-Bribery Convention, 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group also invites Ireland to report back in writing within 12 months (December 2014) on implementation of the following Phase 3 Recommendations: 1(a) on the foreign bribery offence, 2(a) and (b) on the liability of legal persons, and 5 on enforcement. The Working Group will closely re-examine foreign bribery enforcement efforts when Ireland makes its one-year Phase 3 written follow-up report in December 2014, and two-year written follow-up report in December 2015.

1. Recommendations of the Working Group

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

1. Regarding Ireland's offences of bribing a foreign public official in POCA 2010 and CJOA 2001, the Working Group recommends that Ireland:
 - a) As previously recommended in Phase 2, consolidate and harmonise the foreign bribery offences in the two statutes in a manner that is in compliance with Article 1 of the Anti-

Bribery Convention, without further delay, including by removing reference to the term “agent” in POCA 2010 (Convention, Article 1); and

- b) Consider making the definition in POCA 2010, which is meant to describe a person performing a public function for a foreign public enterprise, completely autonomous, without need to refer to the definition of “person” in the Interpretation Act (Convention, Article 1).
2. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Ireland:
 - a) Review on a high priority basis, the law on the liability of legal persons for foreign bribery with a view to codifying it, and to expand the scope of the liability to cover bribery committed by a lower level person with the express or implied permission of a senior person, as previously recommended in Phase 2 and Phase 2bis, and further expand the liability to meet the standards in the Good Practice Guidance in Annex I of the 2009 Anti-Bribery Recommendation (Convention, Article 2; 2009 Recommendation Annex I.B); and
 - b) Expressly provide for the liability of unincorporated legal persons for foreign bribery as recommended in Phase 2. (Convention, Article 2)
 3. Regarding sanctions for foreign bribery, the Working Group recommends that Ireland:
 - a) Ensure that legal persons are subject to effective, proportionate and dissuasive criminal sanctions, as previously recommended in Phase 2 (Convention, Article 3); and
 - b) Consider the imposition of exclusion from tendering for awards of public contracts upon conviction of foreign bribery, regardless if the person bribed is an official from a Member State of the European Union, as previously recommended in Phase 2. (Convention, Article 3.4; 2009 Recommendation XI)
 4. The Working Group recommends that Ireland as a matter of priority, take proactive and concrete steps to determine whether it is possible to establish a territorial link in credible allegations of foreign bribery by Irish companies and individuals, including in cases where an MLA request or request through Interpol has been sent and Ireland is waiting for a response (Convention, Article 4; 2009 Recommendation XIII).
 5. Concerning enforcement of the foreign bribery offences, the Working Group recommends that Ireland:
 - a) Urgently reorganise law enforcement resources in such manner that credible allegations of foreign bribery will be investigated and prosecuted in a timely and effective manner (Convention, Article 5; 2009 Recommendation IV, V and Annex I.D); and
 - b) Consider how to apply cost effective and simple detection and investigative steps at the earliest opportunity (Convention, Article 5; 2009 Recommendation IV, V and Annex I.D).
 6. Concerning anti-money laundering (AML) measures and foreign bribery, the Working Group recommends that Ireland:
 - a) Amend the dual criminality exception for the money laundering offence in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the

bribery occurred, as previously recommended in Phase 2 in relation to the Criminal Justice Act 1994 (Convention, Article 7; Commentary 28);

- b) Maintain more detailed statistics on: i) sanctions in money laundering cases, including the size of fines and forfeited assets; ii) whether foreign bribery is a predicate offence in suspicious transaction reports (STRs); and iii) the number of STRs that result in or support bribery investigations and prosecutions (Convention, Article 7); and
- c) In the review of Ireland's AML/CFT System, the Money Laundering Steering Committee specifically look at how the AML system can be strengthened for the purpose of detecting foreign bribery and supporting foreign bribery investigations and prosecutions, and facilitate the effective detection, investigation and prosecution of money laundering cases where foreign bribery is the predicate offence (Convention, Article 7).

Recommendations for ensuring effective prevention and detection of foreign bribery

- 7. Regarding accounting requirements, external audit and internal controls, ethics and compliance as they relate to foreign bribery, the Working Group recommends that Ireland:
 - a) Ensure that false accounting offences are sanctioned in an effective, proportionate, and dissuasive manner, as previously recommended in Phase 2, and also: i) increase the penalties for false accounting, as suggested in the current draft of the Companies Bill 2012, and ii) raise the awareness of, and provide training to, AGS investigators on the detection and investigation of fraudulent accounting offences related to foreign bribery in the CJOA 2001 (Convention, Article 8; 2009 Recommendation III.i);
 - b) Raise awareness of the accounting and auditing profession of the foreign bribery offence, as previously recommended in Phase 2 (Convention, Article 8; 2009 Recommendation III.i, III.v, and X);
 - c) Require external auditors to report all suspicions of foreign bribery to management and, as appropriate, to corporate monitoring bodies, regardless if the suspected bribery would have a material impact on financial statements, as previously recommended in Phase 2 (Convention, Article 8; 2009 Recommendation X.B);
 - d) Consider clarifying any inconsistencies between the S.I. No. 220/2010 and the Companies Bill 2012 (before it enters into force) concerning required internal company controls (Convention, Article 8; 2009 Recommendation X.A); and
 - e) Raise awareness in the private sector of the OECD Anti-Bribery Convention and the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (2009 Recommendation X.C.i).
- 8. Regarding the detection of foreign bribery through tax measures, the Working Group recommends that Ireland:
 - a) Continue to provide ongoing training for the Revenue Commissioners on the detection of foreign bribery through tax information (2009 Recommendation III and VIII; 2009 Tax Recommendation II);
 - b) Provide training to members of AGS to encourage them to contact the Revenue Commissioners if they have relevant tax information when investigating foreign bribery

cases, where appropriate (2009 Recommendation III and VIII; 2009 Tax Recommendation II); and

- c) Consider including the language in Article 26 paragraph 2 of the OECD Model Tax Convention in its bilateral treaties (2009 Recommendation VIII; 2009 Tax Recommendation I.iii).

9. Concerning awareness and reporting foreign bribery, the Working Group recommends that Ireland:

- a) Increase the awareness of public agencies that interact with companies operating abroad and to improve awareness of Ireland's foreign bribery offence among companies, in particular small- to medium-sized enterprises active in foreign markets, as previously recommended in Phase 2 (2009 Recommendation III);
- b) Establish procedures for public sector employees, including employees of DFAT and trade promotion and development aid agencies, to encourage and facilitate the reporting of suspected foreign bribery offences that they may uncover in the course of their work, as previously recommended in Phase 2 (2009 Recommendation IX.i-ii);
- c) Consider maintaining statistics on the number of reports that are made by DFAT employees under the DFAT reporting guidelines and of the reports filed with AGS by both public and private sector employees pursuant to section 19 of the Criminal Justice Act 2011 (2009 Recommendation IX.i-ii);
- d) Raise greater awareness in the public and private sectors of available channels for reporting suspected cases of foreign bribery, and raise greater awareness of whistleblower protections in legislation, once the Protected Disclosure Bill 2013 enters into force (2009 Recommendation III and IX.i-ii); and
- e) Harmonise to the greatest extent possible the current whistleblower protections in legislation in the Protected Disclosures Bill 2013 (2009 Recommendation IX.iii).

10. Regarding public contracting opportunities for Irish entrepreneurs, the Working Group recommends that Ireland:

- a) Revisit the policies of agencies responsible for development aid, public procurement and public-private partnerships, to take due consideration of prior convictions of foreign bribery in their contracting decisions, as previously recommended in Phase 2 (Convention, Article 3.4; 2009 Recommendation XI); and
- b) Consider routinely checking publicly available debarment lists of multilateral financial institutions in relation to public procurement contracting (Convention, Article 3.4; 2009 Recommendation XI).

2. Follow-up by the Working Group

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

- a) Application of the foreign bribery offence in POCA 2010 to the bribery of persons performing a public function for a foreign public enterprise (Convention, Article 1);

- b) Level of sanctions for foreign bribery imposed on natural and legal persons (Convention, Article 3);
- c) Imposition of disqualification orders under the Companies Act 1990 upon conviction for foreign bribery (Convention, Article. 3.4);
- d) Imposition of confiscation measures for foreign bribery (Convention, Article 3.3);
- e) Enforcement of the foreign bribery offence against companies incorporated in Ireland that have a limited connection to Ireland;
- f) Whether factors prohibited by Article 5 of the Anti-Bribery Convention may influence decisions of whether to investigate or prosecute foreign bribery cases (Convention, Article 5);
- g) Application of the ‘reasonable grounds’ standard required to obtain search warrants in the investigation of foreign bribery cases pursuant to POCA 2001 (Convention, Article 5; 2009 Recommendation III, V, and Annex 1);
- h) The threshold for external audit requirements, and required internal company controls under S.I. No. 220/2010 and, once it enters into force, the Companies Bill 2012 (Convention, Article 8; 2009 Recommendation X.A); and
- i) Application of the non-tax deductibility provision in section 41(1) of the Finance Act, to ensure that it effectively implements Paragraph I(i) of the 2009 Tax Recommendation (2009 Recommendation III and VIII; 2009 Tax Recommendation I).

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/IrelandPhase3ReportEN.pdf>

ITALY (DECEMBER 2011)

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

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

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

1. Recommendations of the Working Group

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

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

- a) Consider making available to judges both the imposition of imprisonment and fines in cases of offences of foreign bribery perpetrated by natural persons as a useful additional deterrent [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];
 - b) Increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through *patteggiamento* procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];
 - c) Strengthen its efforts to compile at the national level, for future assessment, information and statistics on cases concluded and sanctions imposed for the foreign bribery offence in a manner that differentiates between (i) sanctions imposed on natural and legal persons for the offence of foreign bribery and (ii) the procedures applied (court decision with a full hearing, *patteggiamento* or other procedural step), in order to allow Italy to effectively review its laws implementing the Convention and its approach to enforcement [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V, Phase 2 evaluation, follow-up issue 8(e)];
4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Italy:
- a) Further develop and deliver a consistent foreign bribery training module to police services that may become involved in investigating foreign bribery cases, in particular to the Guardia di Finanza, and continue to deliver a foreign bribery training module to all prosecutors and judges likely to be involved in foreign bribery cases throughout the country [2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 1(a)];
 - b) Use proactive steps to gather information from diverse sources at the pre-investigation stage both to increase sources of allegations and enhance investigations, in addition to having Italian embassies and consular offices report suspicions of crime and acquire information about related legal proceedings in the foreign jurisdictions;
 - c) Considering taking the following steps to ensure effective investigations and prosecution: (i) establishing specialised divisions where highly skilled police forces would work together and specialise in foreign bribery as was done for other crimes in Italy; (ii) establishing working groups specialised in the foreign bribery offence within the Public Prosecutor's Offices that are the most likely to be involved in foreign bribery; (iii) raising awareness at national level about the need to prioritise the investigation of foreign bribery offence; and (iv) reinforcing the resources available in PPOs and tribunals to deal with foreign bribery; and [2009 Recommendation III(ii) and V];
 - d) Consider the establishment of a national database for all on-going cases, in line with private data protection legislation, with a view to ensure coordination of foreign bribery investigations nationally and to avoid intelligence gaps [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V];
 - e) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements reached through *patteggiamento*, such as the reasons why *patteggiamento* was deemed appropriate in a

specific case and the terms of the arrangement, in particular, the amount agreed to be paid [Convention, Article 3, Phase 2 evaluation, follow-up issue 8(e)]; and

- f) Urgently (i) take the necessary steps to significantly extend, including for “first time offenders,” the length of the “ultimate” limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means; and (ii) re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals (as extended according to (i) above) [Convention, Article 6, Phase 2 recommendation 7(b)].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Italy (a) in relation to the public sector, further improve training programmes that address foreign bribery, including among foreign embassies abroad, with a view to assist public officials to be alert to instances of foreign bribery; and (b) in relation to the private sector, continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence [2009 Recommendation III(i), IX and X.C.].

6. Regarding reporting suspicions of foreign bribery, the Working Group recommends that Italy (a) continue to remind public officials of their obligation under article 331 CCP to report suspicions of foreign bribery detected in the course of performing their duties to law enforcement; and (b) create and publicize a clear means by which private individuals can report suspicions of foreign bribery [2009 Recommendation IX(ii); Phase 2 evaluation, recommendation 1(b)].

7. Regarding whistleblower protection, the Working Group recommends that Italy (a) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery; and (b) take steps to raise awareness of these mechanisms [2009 Recommendation IX(iii), Phase 2 evaluation, recommendation 2].

8. Regarding money laundering, the Working Group recommends that Italy maintain statistics on (a) sanctions in money laundering cases; (b) the predicate offence for money laundering, with a view to identifying cases where foreign bribery is a predicate offence; and (c) STRs that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].

9. Regarding accounting and auditing requirements, the Working Group recommends that Italy:
- a) Ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (i) monetary thresholds, (ii) whether the offence is committed in relation to listed or non-listed companies, and (iii) whether the offence causes damage to shareholders or creditors [2009 Recommendation X.A(iii); Phase 2 recommendation 3]; and
 - b) Engage in awareness-raising activities with auditors, including through providing training regarding (i) the detection of indications of suspected acts of foreign bribery; (ii) the obligation under LD 58/1998 to report such acts to company management and criminal law enforcement authorities; and (iii) the legal protections that may be available to auditors who report suspicions of wrongful conduct [2009 Recommendation X.B];

10. Regarding corporate compliance, internal controls and ethics programs, the Working Group recommends that Italy encourage companies, particularly SMEs, (a) to adopt or further develop adequate internal controls, ethics and compliance programmes or measures for preventing and detecting foreign

bribery; and (b) to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programs or measures for preventing and detecting bribery [2009 Recommendation X.C, Annex II].

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

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

2. Follow-up by the Working Group

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

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

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

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Italyphase3reportEN.pdf>

JAPAN (DECEMBER 2011)

1. Recommendations of the Working Group

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

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

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

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

1. The Working Group recommends that Japan take appropriate steps according to its legal system to ensure that sanctions imposed on natural and legal persons in practice are sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the Convention.

2. The Working Group recommends that Japan take appropriate steps within its legal system to urgently establish the necessary legal basis for confiscating the proceeds of bribing foreign public officials upon conviction of foreign bribery, to ensure that Japan is in compliance with Article 3.3 of the Convention. (Convention, Article 3.3)

3. The Working Group recommends that Japan find an appropriate way to balance the emphasis on prevention with facilitating enforcement of the foreign bribery offence by the Ministry of Economy, Trade and Industry (METI), or alternatively, that METI increase coordination with relevant ministries and agencies, such as the Ministry of Justice, to achieve this balance. (Convention, Article 5; Commentary 27; 2009 Recommendation, Annex I, para. D)

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Japan immediately take appropriate steps to actively detect and investigate foreign bribery cases, and the Working Group further recommends that Japan:

- a) Continue to use non-compulsory investigative measures and seek MLA at the earliest possible stage where appropriate, and provide a progress report to the Working Group in 24 months on consideration by Japan of the use of new investigative techniques for foreign bribery, such as wire-tapping and grants of immunity from prosecution, including through the special advisory body established by the Ministry of Justice to review Japan's criminal justice system;
- b) Further strengthen the framework for investigating foreign bribery cases by ensuring that special investigative divisions in district prosecutors' offices with special responsibility for economic and financial crimes: i) expressly include foreign bribery within the crimes they cover; ii) are adequately resourced and equipped to detect, investigate and prosecute foreign bribery cases; and iii) coordinate effectively with police and other relevant agencies, including the National Tax Agency and the Securities and Exchange Surveillance Commission; and
- c) Take appropriate steps to ensure that the law enforcement authorities systematically follow-up with JAFIC, Japan's financial intelligence unit, on how they are utilising information from JAFIC in their foreign bribery investigations. (Convention, Article 5; Commentary 27; 2009 Recommendation V and Annex I, para. D)

5. The Working Group recommends that Japan take urgent steps to adopt the necessary amendments to the Act on Punishment of Organized Crimes and Control of Crime Proceeds (AOCL) to make it an offence to launder the proceeds of bribing a foreign public official. (Convention, Article 7; Commentary 28)

6. The Working Group recommends that Japan continue to conclude MLA treaties, particularly with its trade partners.

7. The Working Group recommends that Japan consider including in its bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows the sharing of tax information by tax authorities with other law enforcement authorities and judicial authorities on foreign bribery. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)

Recommendations for ensuring effective prevention and detection of foreign bribery

8. The Working Group recommends that Japan periodically review its policies and approach on small facilitation payments and urgently take steps to encourage companies to prohibit the use of such

payments in their internal company controls, ethics and compliance programmes or measures. (2009 Recommendation, para. VI)

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

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

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

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

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

13. The Working Group recommends that Japan update the Working Group on any progress, on which it can publicly report, regarding research by the Consumer Affairs Agency on the effectiveness of the Whistleblower Protection Act and the number of cases brought to court under the Act and, where possible, the outcomes of these cases. Japan could consider including in this research an analysis of the

possible application of the Act to Japanese private-sector employees overseas. [2009 Recommendation, para. IX iii)]

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

2. Follow-up by the Working Group

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

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

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf>

KOREA (OCTOBER 2011)

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

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

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

1. Recommendations of the Working Group

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

1. Concerning the offence of bribing a foreign public official in the FBPA, the Working Group recommends that Korea:

- a) Take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime, or the Kaesong Industrial Zone, are covered by the FBPA as the bribery of a foreign public official, or by the Korean Penal Code as the bribery of a domestic public official (Convention, Article 1, Commentary 18);
- b) Continue to periodically review its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, and consider in its review: i) whether guidelines on the defence would be beneficial, and ii) the practical value of maintaining the defence in Korea [2009 Recommendation VI i)]; and
- c) Encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures [2009 Recommendations, para. VI. (ii)].

2. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Korea raise awareness among law enforcement authorities and the private sector on the liability of legal persons for violations of the FBPA (Convention, Article 2).

3. Regarding sanctions for the offence of bribing a foreign public official, the Working Group recommends that Korea: i) take appropriate steps according to its legal system to ensure that sanctions imposed in practice on natural and legal persons are effective, proportionate and dissuasive; and ii) make full use of the authority to confiscate the bribe and proceeds where appropriate, and consider whether the complicated nature of the legislation on confiscation has been a hindrance to the effective imposition of confiscation as a sanction (Convention, Article 3.1, 3.3).

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

- a) Ensure that the investigation records on transnational bribery cases are not destroyed before Korea has had an opportunity to provide a full report on those cases to the Working Group, and that case records are kept for a reasonable period to provide prompt and effective mutual legal assistance to other Parties for proceedings under the scope of the Anti-Bribery Convention (Convention, Articles 9.1, 12);
- b) Strengthen the new information and intelligence gathering capacity coordinated by the Ministry of Justice, which involves the Ministry of Foreign Affairs and Trade and the Supreme Prosecutor's Office (SPO), by making the Korean Financial Supervisory Commission and the National Tax Service (NTS) part of the new system (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D);
- c) Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention, Article 5, Commentary 27, 2009 Recommendation, IX. i), Annex I, para. D); and
- d) Establish clear criteria for requiring the Anti-Corruption and Civil Rights Commission (ACRC) to transfer reports of FBPA violations to the law enforcement authorities, and that such criteria are established as a matter of priority given that a statutory amendment extending whistleblower protections to persons who report FBPA violations came into force on 30 September 2011 (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D).

Recommendations for ensuring effective prevention and detection of foreign bribery

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

6. The Working Group recommends that Korea take the following steps to improve the prevention and detection of foreign bribery through its accounting and auditing framework: i) consider amending the Board of Audit and Inspection Act to require external auditors to report suspected acts of foreign bribery to competent and independent authorities, such as law enforcement or regulatory authorities; ii) ensure that

auditors making such reports reasonably and in good faith are protected from legal action; and iii) encourage awareness-raising and training on the FBPA in the accounting and auditing profession (2009 Recommendation X.B.).

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

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

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

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

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

2. Follow-up by the Working Group

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

- a) Application of the FBPA to cases where the bribe is transmitted directly to a third party, and the application of the law on co-principals and accessories to intermediaries (Convention, Article 1);
- b) How "international business" is interpreted in practice, including whether it covers employment with a foreign government (Convention, Article 1);
- c) Regarding sanctions i) application of the provision in the FBPA that results in no sanctions for a legal person that "has paid due attention or exercised proper supervision to prevent" foreign bribery; ii) application of the revised sentencing guidelines for bribery, including how the profit is determined when calculating fines to be imposed for foreign bribery; and iii) impact on

confiscation in foreign bribery cases of the newly established specialised confiscation units in prosecutors' offices (Convention, Articles 1, 2, 3.1, 3.3);

- d) Whether natural and legal persons are subject to effective, proportionate and dissuasive penalties when cases of foreign bribery are prosecuted under other penal provisions (Convention, Article 3.1);
- e) Provision of MLA by Korea to other Parties to the Anti-Bribery Convention (Convention, Article 9.1); and
- f) Implementation of an amendment to the Commercial Act, due to come into force in April 2012, requiring listed companies to establish “compliance guidelines”, and appoint a “compliance officer” to carry out compliance duties in the guidelines, monitor compliance with the guidelines, and report the results to the board of directors (2009 Recommendation C, and Annex II).

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Koreaphase3reportEN.pdf>

LUXEMBOURG (JUNE 2011)

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

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

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

1. Recommendations of the Working Group

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

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

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

- a) Ensure by all means that the liability system instituted by the Act of 3 March 2010 adopts one of the two approaches described in Annex 1 B) of the 2009 Recommendation concerning the level of managerial authority and the type of act that may cause that liability to be incurred [Convention, Article 2; 2009 Recommendation, Annex 1 B)];

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

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

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

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

Recommendations to ensure effective prevention and detection of transnational bribery

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

- a) Take the necessary steps to raise employee awareness, in the private and public sectors alike, of the importance of reporting suspicions of bribery of foreign public officials, as well as of new provisions for the protection of whistleblowers [2009 Recommendation, IX. and III. i)];

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

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

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

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

- a) Take appropriate steps to increase the intensity and frequency of on-site inspections by the tax authorities [2009 Recommendation, III. iii); 2009 Recommendation on Tax Measures, I. ii) and II.];
- b) Facilitate international exchanges of information in accordance with the 2009 Recommendation of the Council on Tax Measures notably by considering including the option provided for in paragraph 12.3 of the Commentary on Article 26 of the OECD Model Tax Convention in their bilateral tax conventions [2009 Recommendation on Tax Measures, I. iii)];
- c) Do more to raise awareness among its tax authorities of the need to make full use of the new measures made available to them in the 2008 law on inter-agency and judicial co-operation in order to detect illegal transactions linked to bribery of foreign public officials, and to encourage the reporting of such transactions [2009 Recommendation on Tax Measures, I. iii)];

- d) Raise awareness among the tax authorities of the importance of making more stringent use of the administrative sanctions available to them to discourage tax deductibility of expenses likely to constitute bribes [2009 Recommendation on Tax Measures, I. ii); Phase 2 Recommendation 16].

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

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

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

2. Monitoring by the Working Group

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

- a) The scope of the exemption from liability in the event of "constraint", so as to ensure that the exemption does not include the fact that in the event of coercion the immediate perpetrator may have been "coerced" by a foreign public official to pay a bribe in order to obtain or retain a contract;
- b) Employees of public enterprises are covered by Article 247 of the Penal Code;
- c) The level of penalties applicable to natural persons, with a view to ensuring that they are sufficient to be effective, proportionate and dissuasive;
- d) The impact on the dissuasive effect of sanctions of the application of mitigating circumstances, notably in cases of reclassification of the offence of bribing a foreign public official;
- e) The progress of current discussions about the introduction of a plea bargaining procedure, especially as regards its impact on the level of sanctions imposed in practice in this context;
- f) The level of sanctions and the use of confiscation in cases of bribery of foreign public officials, and especially the criminal penalties imposed on legal persons to ensure that they are effective, proportionate and dissuasive;

- g) Implementation of the new provisions contained in Articles 66.2 to 66.5 of the Code of Criminal Procedure, and in particular to the scope of the term “exceptionally” contained in the law in connection with obtaining information from banks and financial institutions;
- h) Efforts to detect and prosecute facts of transnational bribery related to money laundering;
- i) Establishment of statistics on (i) the number of investigations, prosecutions and sentences imposed by jurisdictions in respect of the bribery of foreign public officials and related offences; and (ii) mutual legal assistance requests related to transnational bribery, including the number of requests received and executed.

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Luxembourgphase3reportEN.pdf>

NETHERLANDS (DECEMBER 2012)

The Working Group on Bribery commends the Netherlands for its recent efforts to raise awareness of the foreign bribery offence within the public and private sectors. It also welcomes the measures put in place within the Ministry of Foreign Affairs to facilitate the reporting of suspicions of foreign bribery, as well as the Netherlands' commitment to an efficient confiscation regime. However, the Working Group remains seriously concerned that the overall results of foreign bribery investigations and prosecutions are too low, with no convictions to date. Furthermore, the Working Group finds that the current level of financial sanctions for legal persons for foreign bribery is not sufficiently effective, proportionate and dissuasive, although draft legislation may soon remedy this. The Working Group will also closely monitor foreign bribery enforcement actions involving Dutch mailbox companies.

Regarding outstanding recommendations from previous evaluations, the Netherlands has not fully implemented recommendations 2(a) on public servants' reporting obligations, and 5(a) on increasing the maximum level of sanctions for legal persons. Recommendation 7 is no longer relevant in view of the dissolution of the Netherlands Antilles. A revised *Instruction* by the Board of Procurators General should enter into force on 1 January 2013, with amendments addressing the Working Group's concerns in Phase 2 recommendation 3(f).

In conclusion, based on the findings in this report on the Netherlands' implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2.

The Working Group invites the Netherlands to report in writing on implementation of recommendations 2(a), 3 and 4(a), as well as its foreign bribery enforcement efforts in one year (i.e., by December 2013). The Working Group invites the Netherlands to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by December 2014). The Working Group will closely re-examine foreign bribery enforcement efforts when the Netherlands makes its Phase 3 Follow-up Report in 2013 and its Written Follow-up Report in 2014.

1. Recommendations of the Working Group

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

12. Regarding the offence of bribing a foreign public official, the Working Group recommends that the Netherlands:
 - a. Keep the Working Group on Bribery informed of developments concerning the adoption of amendments to the foreign bribery offence in the Dutch Criminal Code [Convention, Article 1];
 - b. Periodically review its policy and approach on small facilitation payments, and continue to encourage Dutch companies to prohibit or discourage their use and in all cases, accurately record them in companies' accounts [Convention, Article 1; 2009 Recommendation III. (ii) and VI.(i) and (ii)];
 - c. Continue to encourage Aruba and Sint Maarten to adopt a foreign bribery offence and assist them in their efforts to do so, in line with the rules governing its relationship [Convention, Article 1].

13. Regarding the criminal liability of legal persons, the Working Group recommends that the Netherlands:
 - a. Take all possible measures to ensure that mailbox companies are considered legal entities under the Dutch Criminal Code and that cases of foreign bribery involving mailbox companies can be effectively investigated, prosecuted and sanctioned [Convention, Article 2; 2009 Recommendation V];
 - b. Draw the attention of prosecutors to the importance of applying effectively the criminal liability of legal persons in foreign bribery cases, including for acts by intermediaries and related legal persons [Convention, Article 2; 2009 Recommendation V];
 - c. Continue to maintain detailed yearly statistics on the number of prosecutions of legal persons [Convention, Article 2; 2009 Recommendation V];
 - d. Develop guidance on the application of probationary periods in foreign bribery cases [Convention, Article 2; 2009 Recommendation V].
14. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that the Netherlands:
 - a. Proactively gather information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations [Convention, Article 5; 2009 Recommendation V];
 - b. Proactively investigate cases of foreign bribery involving legal persons, including mailbox companies [Convention, Article 5; 2009 Recommendation V];
 - c. Exercise its jurisdiction in foreign bribery cases concerning Dutch natural or legal persons, and, where relevant, consult with other jurisdictions to determine the most appropriate jurisdiction for prosecution or consider undertaking concurrent or joint investigations [Convention, Articles 4 and 5; 2009 Recommendation V, XIII.(i) and (iii)];
 - d. Proceed with the adoption and implementation of the revised *Instruction on the Investigation and Prosecution of Foreign Corruption* to ensure in no uncertain terms that it cannot be interpreted contrary to Article 5 of the Convention [Convention, Article 5; 2009 Recommendation, Annex I(D)];
 - e. Provide adequate resources to Dutch law enforcement authorities to effectively examine, investigate and prosecute all suspicions of foreign bribery [Convention, Article 5; 2009 Recommendation V and Annex I(D)].
15. Regarding sanctions in cases of transnational bribery, the Working Group recommends that the Netherlands:
 - a. Promptly proceed with the adoption of the proposed amendments to the Criminal Code which would significantly increase the level of sanctions [Convention, Article 3];
 - b. Consider introducing the possibility of additional sanctions against legal persons, such as suspension from public procurement or other publicly-funded contracts [Convention, Article 3; Commentary 24].

Recommendations for ensuring effective prevention and detection of foreign bribery

16. Regarding money laundering, the Working Group recommends that the Netherlands raise awareness and provide training to the FIU, law enforcement officials and reporting entities on foreign bribery as a predicate offence to money laundering. Such awareness-raising could also include the sharing of typologies on money laundering related to foreign bribery [Convention, Article 7; 2009 Recommendation III.(i)].
17. Regarding accounting and auditing requirements, the Working Group recommends that the Netherlands:
 - a. Ensure that the foreign bribery offence and the accounting and auditing requirements of the Convention are covered in training programmes and related guidelines for the accounting and auditing professions, in order to facilitate their more active role in detecting foreign bribery [Convention, Article 8; 2009 Recommendation III.(i)];
 - b. Promptly proceed with the adoption of the proposed amendments to the Criminal Code which would significantly increase the level of financial sanctions on legal persons for the false accounting offence [Convention, Article 8; 2009 Recommendation X.A.(iii)].
18. With respect to tax-related measures, the Working Group recommends the Netherlands encourage law enforcement authorities to promptly share information on foreign bribery enforcement actions with the tax administration to verify whether bribes were impermissibly deducted [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)].
19. Regarding awareness-raising, the Working Group recommends that the Netherlands: (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in cooperation with business associations; (ii) continue to encourage companies, especially SMEs, to develop internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation III.(i), X.C.(i) and (ii); Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance].
20. With respect to the reporting of foreign bribery, the Working Group recommends that the Netherlands:
 - a. Ensure that public servants report all suspicions of foreign bribery, including by private persons and companies, irrespective of whether it constitutes a violation of the rules in the public servants' field of activity, and that they are made aware of this duty [2009 Recommendation IX.(ii)];
 - b. Put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities [2009 Recommendation IX.(iii)].
21. Regarding public advantages, the Working Group recommends that the Netherlands promote the use of the Ministry of Security and Justice's database of convictions more widely among public agencies to enhance due diligence and the application of exclusion rules, where appropriate [2009 Recommendation XI.(i)].

2. Follow-up by the Working Group

22. The Working Group will follow-up the issues below as case law and practice develops:
- a. The results of the analysis carried out by the Netherlands on the reasons for the decline in prosecutions of legal persons [Convention, Article 2];
 - b. The use of out-of-court settlements in foreign bribery cases [Convention, Article 5];
 - c. The application in practice of sanctions and confiscation measures in on-going and future foreign bribery investigations [Convention, Article 3];
 - d. That the Netherlands takes any measures necessary to assure either that it can extradite its nationals for foreign bribery or that it can prosecute its nationals for foreign bribery. If the Netherlands declines a request to extradite a person for foreign bribery solely on the grounds that the person is its national, it shall submit the case to its competent authorities for the purpose of prosecution [Convention, Article 10.3].

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf>

MEXICO (OCTOBER 2011)

1. Recommendations of the Working Group

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

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

c) make special investigative techniques available in foreign bribery cases (Convention, Article 5).

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

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

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

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

Recommendations for ensuring effective prevention and detection of foreign bribery

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

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

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

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

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

15. Regarding whistleblower protection, the Working Group recommends that Mexico enact specific legislation to ensure that public and private sector employees, and auditors who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from

discriminatory or disciplinary action, and raise awareness of this measure [2009 Recommendation IX(iii), X(B)(i) and (v)].

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

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

2. Follow-up by the Working Group

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

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

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Mexicophase3reportEN.pdf>

NEW ZEALAND (OCTOBER 2013)

The Working Group on Bribery is seriously concerned with New Zealand's lack of enforcement of its foreign bribery offence. 12 years after its entry into force, only 2 investigations were opened in July 2013. New Zealand must step up efforts to proactively investigate allegations of foreign bribery. The low level of foreign bribery allegations also raises concerns on the levels of awareness, reporting and detection. This is of particular concern in a context where some individuals, including in the public sector, hold the view that New Zealand individuals and companies do not engage in bribery. The Working Group is also seriously concerned by the low level of priority given by New Zealand to implement the Working Group's Phase 2 recommendations, including on major loopholes such as the absence of an effective regime of liability of legal persons for foreign bribery and significant weaknesses identified in the foreign bribery offence. Seven years after its Phase 2 evaluation, New Zealand has also not addressed any of the weaknesses identified in its regime of non-tax deductibility of bribes.

The Phase 2 evaluation report on New Zealand adopted in October 2006 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of New Zealand's December 2008 written follow-up report, the Working Group concludes that: Recommendation 3b, 3c and 6c have been implemented, Recommendations 1b, 1c, 2a, 2c, 3a and 3e remain partially implemented and Recommendations 3f, 4a, 4b, 4c, 5a, 5b and 6a remain not implemented. While recommendation 6b was deemed implemented in the Phase 2 written follow-up report, it was deemed necessary to re-assess it in Phase 3.

In conclusion, based on the findings in this report on New Zealand's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invited New Zealand to submit a written report in six months on progress made in establishing the liability of legal persons for foreign bribery and every six months thereafter, if needed. As well, as part of its regular Phase 3 evaluation process, the Working Group invites New Zealand to report orally on its implementation of recommendations 2, 4a, 4b, 4c, 11a, 11b and 11c in one year (i.e., by October 2014). It also invites New Zealand to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e., by October 2015). New Zealand is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these two reports.

1. Recommendations of the Working Group

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

1. The Working Group recommends that New Zealand significantly step up efforts to detect, investigate and prosecute foreign bribery. [Convention Article 1, 2009 Recommendation, V]
2. Regarding the foreign bribery offence, the Working Group:
 - (a) Urges New Zealand to proceed, as a matter of priority with the planned amendments to remove the dual criminality exception in section 105E of the Crimes Act; [Convention Article 1, 2009 Recommendation, III (ii), V, VI and Annex I A]
 - (b) Urges New Zealand (i) to clarify the routine government action (facilitation payments) exception in section 105C(3) of the Crimes Act, to ensure that the foreign bribery offence can apply to any bribery of a foreign public official in the conduct of international business

in order to obtain discretionary or illegal acts by the official; or the granting of any improper advantage; and (ii) in its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, to consider the views of the private sector and civil society. [Convention Article 1, 2009 Recommendation, III (ii), V, VI and Annex I A]

3. Regarding the responsibility of legal persons, the Working Group strongly urges New Zealand to review its system of liability for legal persons for foreign bribery as a matter of priority, to ensure that the criteria for such liability are broadened and that the system takes one of the approaches described in Annex 1 to the 2009 Recommendation; [Convention Article 2, 2009 Recommendation III ii), V, Annex I B]
4. Regarding sanctions, the Working Group recommends that:
 - (a) New Zealand consider making both imprisonment and fines available as sanctions against natural persons for foreign bribery; [Convention Article 3; 2009 Recommendation III (ii)]
 - (b) In connection with the revision of its system of corporate criminal liability for foreign bribery, New Zealand (i) ensure that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions; and (ii) re-visit the possibility to make available additional sanctions for legal persons to ensure effective deterrence; [Convention Article 3; 2009 Recommendation III (ii) and V]
 - (c) New Zealand maintain statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive; [Convention Article 3; 2009 Recommendation III ii) and V]
 - (d) New Zealand make full use of the large range of asset confiscation tools offered under the Criminal Proceeds Recovery Act (2009), and to consider issuing guidelines on how to quantify the proceeds or benefits of a foreign bribery offence. [Convention Article 3; 2009 Recommendation III (ii) and V]
5. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that:
 - (a) The SFO (i) thoroughly investigate and prosecute foreign bribery allegations; (ii) proactively gather information from diverse sources to increase the number of allegations and to enhance investigations; and (iii) make full use of special investigative techniques in foreign bribery investigations, where appropriate; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
 - (b) New Zealand provide law enforcement authorities with regular, practical training on (i) the foreign bribery offence; (ii) investigative techniques adapted to this offence; and, more generally, (iii) ways to more proactively detect, investigate and prosecute the offence of bribery of foreign public officials; [Convention Article 5; 2009 Recommendation Annex I D]

- (c) New Zealand take steps to ensure that the *Solicitor General's Guidelines* cannot be interpreted contrary to Article 5 of the Convention, and that prosecutors are made aware of Article 5 of the Convention to ensure that the factors enumerated in the Article do not influence foreign bribery investigations and prosecutions; [Convention Article 5; 2009 Recommendation Annex I D]
 - (d) New Zealand remove the requirement of the Attorney General's consent for the prosecution of foreign bribery cases. [Convention Article 5]
6. Regarding jurisdiction, the Working Group recommends that New Zealand remove or amend the dual criminality exception under section 105E of the Crimes Act in order to ensure that nationality jurisdiction for foreign bribery is applied according to the same principles applied with regard to jurisdiction for other offences committed abroad. [Convention Article 4]
 7. With regard to mutual legal assistance, the Working Group recommends that New Zealand continue to routinely and promptly co-ordinate with foreign law enforcement authorities, and make greater efforts to obtain evidence from these authorities, including through formal treaty-based MLA, where appropriate, in foreign bribery cases. [Convention Article 9]
 8. With regard to extradition, the Working Group recommends that New Zealand (i) ensure that when an extradition request for foreign bribery is refused solely on the grounds of nationality, the cases would be submitted to competent authorities in New Zealand for the purposes of investigation and prosecution; and (ii) consider repealing section 101 of the Extradition Act on the refusal of extradition on the basis of nationality, in the context of its All-Government Response to Organised Crime and planned review of its Extradition Act. [Convention Article 10]

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

9. Regarding money laundering, the Working Group recommends that:
 - (a) New Zealand pursue its efforts to amend the dual criminality exception for the money laundering offence under section 245 CA, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred; [Convention, Article 7 and 2009 Recommendation, III (i)]
 - (b) New Zealand continue to raise awareness and make a full use of the new tools at its disposal to increase the enforcement of its money laundering offence in cases where foreign bribery is the predicate offence. [Convention Article 7 and 2009 Recommendation, III (i)]
 - (c) New Zealand maintain clearer statistics on investigations, prosecutions and sanctions related to money laundering in cases where foreign bribery is the predicate offence. [Convention Article 7 and 2009 Recommendation, III (i)]

10. Regarding accounting and auditing, corporate compliance, internal controls and ethics, the Working Group recommends that:

- (a) New Zealand raise awareness among accountants and external auditors, including by providing guidance and training on detecting red flags for foreign bribery in company accounts; [Convention Article 8; 2009 Recommendation III.i]
- (b) New Zealand (i) require external auditors who discover indications of a suspected act of foreign bribery to report the discovery to corporate monitoring bodies as appropriate; and (ii) consider requiring auditors to report to external competent authorities, including law enforcement authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure auditors making such reports reasonably and in good faith are protected from legal action as appropriate. [2009 Recommendation III(iv), (v), X.B(iii), (v)]

11. Regarding tax measures to combat bribery of foreign public officials, the Working Group:

- (a) Urges New Zealand to proceed with plans to amend its legislation to ensure that no foreign bribe payments covered under criminal law are tax deductible, including in particular bribes (i) paid through intermediaries; (ii) paid for the purpose of obtaining an advantage for a third party; and (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties; [2009 Tax Recommendation]
- (b) Recommends that in parallel with the planned amendments to its tax legislation, New Zealand pursue its efforts to provide guidelines, instructions and training to tax examiners on (i) the non-tax deductibility of bribes; (ii) determining whether a particular payment to a foreign public official comes under the facilitation payment exception; and (iii) detection of foreign bribery during tax audits; [2009 Tax Recommendation]
- (c) Recommends that New Zealand proceed as a matter of priority with its proposal to allow Inland Revenue to share information with law enforcement agencies in relation to “serious crime” with a view to amending its tax legislation to require, where appropriate, Inland Revenue to provide information on request from law enforcement authorities in the context of foreign bribery investigations, and to report information regarding suspected foreign bribery uncovered in the course of their work to law enforcement authorities; [2009 Tax Recommendation]
- (d) Recommends that Inland Revenue target a wider range of recipients in its anti-bribery awareness-raising measures, in particular SMEs. [2009 Recommendation, III(iii) and 2009 Tax Recommendation]

12. Regarding awareness-raising, the Working Group recommends that: New Zealand (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in co-operation with business associations; and (ii) encourage companies, especially SMEs, to develop and adopt adequate internal controls, ethics and compliance

systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance. [2009 Recommendation III (i), X C (i) and (ii), and Annex II]

13. With respect to the reporting of foreign bribery, the Working Group recommends that New Zealand:

- (a) Ensure that all public servants, including within NZAID, are made aware of the obligation to report all credible suspicions of foreign bribery involving New Zealand individuals or companies detected in the course of their work to New Zealand law enforcement authorities; [2009 Recommendation IX (i) and (ii)]
- (b) Continue efforts to raise awareness of the Protected Disclosures Act in order to encourage and facilitate the reporting of suspected acts of foreign bribery in good faith and on reasonable grounds to New Zealand law enforcement authorities, in particular among private sector employees. [2009 Recommendation IX (iii)]

14. Regarding public advantages, the Working Group recommends that:

- (a) New Zealand issue guidance to its contracting authorities to ensure that exclusion from public procurement due to foreign bribery is effectively implemented in practice; [2009 Recommendation XI (i)]
- (b) NZECO (i) continue to raise awareness among its employees on its Anti-Bribery Policy and reporting obligations; and (ii) consider adopting written guidance on factors to be considered when determining ceilings on agents' commissions, and whether to interrupt support if bribery is proven after support has been approved. [2009 Recommendation XI (i); 2006 Export Credit Recommendation]

2. Follow-up by the Working Group

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

- (a) The application of the “corruptly” intent requirement;
- (b) Whether the sanctions imposed against natural persons for foreign bribery are effective, proportionate and dissuasive;
- (c) The exercise of jurisdiction over legal persons;
- (d) The use of the terms “bribe” and “corruptly” in the Tax Act to ensure that it is sufficiently clear that bribe payments are non-tax deductible.

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/NewZealandPhase3ReportEN.pdf>

NORWAY (JUNE 2011)

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

The Phase 2 evaluation report on Norway, adopted in February 2004 included recommendations and issues for follow-up. In March 2007, at the time of Norway's written follow-up report to Phase 2, the Working Group concluded that all Phase 2 recommendations had been satisfactorily implemented.⁷ Thus, this Phase 3 Report has not had to address any remaining recommendations from Norway's Phase 2 evaluation.

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

1. Recommendations of the Working Group

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

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

Recommendations for ensuring effective prevention and detection of foreign bribery

4. Regarding accounting and auditing requirements, the Working Group recommends that Norway:

⁷ See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

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

2. Follow-up by the Working Group

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

- d) The application of the money laundering offence, given the absence of investigations and prosecutions of money laundering based on a predicate offence of foreign bribery.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Norwayphase3reportEN.pdf>

POLAND (JUNE 2013)

The Working Group on Bribery commends the Polish authorities for their high level of transparency and cooperation throughout the Phase 3 process. One prosecution of the bribery of foreign public officials is ongoing in Poland. Since Poland's foreign bribery offence came into force in February 2001, it has not prosecuted any other foreign bribery case. Two investigations were terminated concerning allegations of foreign bribery by Polish SOEs to obtain major public procurement contracts in high risk and sensitive sectors. Another known allegation involving a major public procurement contract in a high risk and sensitive sector did not progress to an investigation.

Poland has not fully implemented any of the partially implemented or unimplemented Phase 2 recommendations that remained outstanding at the time of the Phase 2 written follow-up report in October 2009 (Recommendations 1c, 1d), 2d), 3a), 3e), 3f), 4a) 4b) and 5). These recommendations address areas including the following: awareness-raising, training and reporting by the accounting and auditing profession, whistleblower protections, proactive foreign bribery investigations, the "impunity" provision in the foreign bribery offence, legal requirements for the application of the liability of legal persons, level of sanctions including for legal persons, and the tax treatment of bribe payments. In addition, regarding Phase 2 Recommendation 4b) to consider raising or eliminating the cap on fines against legal persons, Poland has instead lowered the cap and the range of fines, with the result that the maximum fine for legal persons has been reduced from PLN 20 million (around EUR 5 million) to PLN 5 million (around EUR 1.2 million).

The Working Group notes that with efforts being taken by the Polish government to encourage the international competitiveness of Polish enterprises, and Poland's recent economic performance, the risk of foreign bribery by Polish entrepreneurs could increase in the medium to long term. Recommendation 4, below, is to develop a comprehensive investigation and prosecution strategy to address this increasing risk. Given the overriding importance of this recommendation to Poland's effective implementation of the Convention, the Working Group requests that Poland present the strategy in writing at the time of its one-year oral follow-up report. The Working Group also requests that the written strategy address Recommendation 1 on the "impunity" provision, Recommendation 2 on the liability of legal persons, and Recommendation 7 on the prevention and identification of bribe payments through tax measures. In addition, the Working Group requests Poland provide an oral report on implementation of recommendation 3c) on sanctions for legal persons.

Further, based on the findings in this report on the implementation by Poland of the Anti-Bribery Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below.

1. Recommendations of the Working Group

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

1. Regarding the offence of bribing a foreign public official in Article 229.5 of the Polish Penal Code, the Working Group recommends that Poland urgently take appropriate measures feasible within the Polish legal system to ensure that the "impunity" provision cannot be applied to the bribery of foreign public officials (Convention, Articles 1 and 3; 2009 Recommendations III and V).

2. Regarding the liability of legal persons in the Act on Liability of Collective Entities for the bribery of a foreign public official, the Working Group recommends that Poland:

- a) Take urgent steps to eliminate the requirement of a conviction of a natural person or a decision to discontinue proceedings against the natural person, in order to impose liability on a legal person (Convention, Articles 2 and 3); and
 - b) Take steps to ensure that police and prosecutors are adequately trained and made aware of the importance of effectively enforcing the liability of legal persons, and that such training address challenges in investigating and prosecuting legal persons caused by the requirement described in subparagraph (a) above (Convention, Article 3; 2009 Recommendation III).
3. Concerning sanctions for the bribery of a foreign public official, the Working Group recommends that Poland:
- a) Continue to raise the awareness of the Polish law enforcement authorities of the importance of imposing effective, proportionate and dissuasive sanctions on natural persons (Convention, Article 3; 2009 Recommendation III);
 - b) Continue to raise awareness of the Polish law enforcement authorities of the importance of imposing confiscation upon conviction (Convention, Article 3; 2009 Recommendation III); and
 - c) Regarding legal persons, eliminate the cap on or increase the maximum penalty available under the law so that they are subject to effective, proportionate and dissuasive penalties, and as a matter of priority draw the attention of the relevant authorities to the availability of additional sanctions, including debarment, upon conviction of a legal person under the Liability of Collective Entities Act (Convention, Articles 2 and 3; 2009 Recommendation III).
4. Concerning the investigation and prosecution of the bribery of foreign public officials, the Working Group recommends that Poland establish an investigation and prosecution strategy to address the increasing risk of foreign bribery by Polish companies that addresses issues including the following: (i) the need for adequate resources and expertise to investigate and prosecute highly complex cases, including in sensitive sectors, involving SOEs, and requiring forensic financial and accounting expertise; and (ii) a comprehensive plan on how to reduce the length of time for foreign bribery proceedings to a workable and reasonable period (2009 Recommendation V).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. The Working Group recommends that Poland take the following steps to improve the prevention and detection of foreign bribery through its anti-money laundering system:
- a) Examine whether “para-banking” poses a risk of laundering the proceeds from foreign bribery (Convention, Article 7; 2009 Recommendation V); and
 - b) Urgently take substantial steps to raise the awareness of and provide training for the FIU and all entities subject to suspicious transactions reporting requirements of the risk of laundering the proceeds of the bribery of foreign public officials, and provide them with guidance on what constitutes such proceeds, and how to effectively detect them (Convention, Article 7; 2009 Recommendation III).
6. The Working Group recommends that Poland take the following steps to enhance the prevention and detection of foreign bribery through accounting and auditing requirements, and internal controls, ethics and compliance measures:

- a) Intensify efforts to encourage the accounting and auditing profession to raise awareness and provide training on the detection of foreign bribery in companies' books and records (Convention, Article 8; 2009 Recommendation X);
- b) Provide clarification and guidance to the accounting and auditing profession on the evidentiary standards that must be met to justify reporting suspicions of foreign bribery to the law enforcement authorities (Convention, Article 8; 2009 Recommendation X);
- c) Find a way appropriate and feasible in its legal system to ensure that natural and legal persons are subject to effective, proportionate and dissuasive penalties for fraudulent accounting for the purpose of bribing foreign public officials or hiding such bribery (Convention, Article 8; 2009 Recommendation X); and
- d) Urgently make significant efforts to raise the awareness of large companies, SOEs, and SMEs of the following: (i) the risks of foreign bribery in international business transactions; (ii) application of the foreign bribery offence and the Law on Liability of Collective Entities to bribes made through agents abroad; and (iii) the need to adopt effective internal controls, ethics and compliance measures for preventing foreign bribery (2009 Recommendation III).

7. Regarding the prevention and detection of foreign bribery through tax measures, the Working Group recommends that Poland:

- a) As a matter of priority, take appropriate and feasible steps within its legal system to clarify that all bribes to foreign public officials in violation of Article 229.5 of the Polish Penal Code are not tax deductible (2009 Recommendations III and VIII; 2009 Recommendation on Tax Measures); and
- b) Re-examine the processes in place for identifying bribe payments, to ensure that Poland has in place proper tools, including technology and expertise, to track bribe payments for which tax deductions have been sought under categories of allowable expenses (2009 Recommendations III and VIII; 2009 Recommendation on Tax Measures).

8. The Working Group recommends that Poland take the following steps to enhance public awareness and the reporting of foreign bribery:

- a) Significantly increase public awareness-raising efforts, with an emphasis on the growing presence of Polish companies in international business (2009 Recommendation III); and
- b) Prioritise the reform of the law on whistleblower protections to ensure that appropriate measures are in place to protect from retaliatory or disciplinary action private and public sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds (2009 Recommendation IX).

9. Regarding the prevention and detection of foreign bribery through agencies responsible for providing public advantages to Polish businesses, the Working Group recommends that Poland:

- a) Raise awareness about the foreign bribery offence among institutions involved in public procurement contracting, including ODA-funded procurement contracting (2009 Recommendation III);
- b) Consider systematically checking the publicly available debarment lists of international financial institutions in relation to: (i) the award of public procurement contracts, including ODA-funded

procurement contracts; and (ii) the provision of official export credit support (Convention, Article 3; 2009 Recommendation XI); and

- c) Refuse to approve official export credit cover or other support to applicants if due diligence concludes that bribery was involved in the transaction, and take appropriate action if bribery is proven after credit, cover or other support has been approved (Convention, Article 3; 2009 Recommendation XII; 2006 Recommendation on Export Credits).

2. Follow-up by the Working Group

10. The Working Group will follow-up the issues below as jurisprudence and practice develop on the implementation of the foreign bribery offence in Poland:

- a) Application of the foreign bribery offence to: 1) the bribery of employees of state administrations performing exclusively “service type work”; 2) bribes made through intermediaries; and 3) bribes in the form of non-pecuniary benefits (Convention, Article 1; 2009 Recommendation (Annex I on Good Practice Guidance on Implementing Specific Articles of the Convention, Article C);
- b) Application of territorial jurisdiction to natural persons;
- c) Regarding legal persons, application of the following: (i) the requirement in the Act on Liability of Collective Entities that the conduct of a natural person “did or could have” given an advantage to the legal person, (ii) nationality jurisdiction, and (iii) other sanctions, including debarment (Convention, Article 3; 2009 Recommendations III and XI);
- d) The recent separation of the role of the Office of the Prosecutor General (OPG) and the Minister of Justice in Poland, to ensure that it effectively safeguards investigative and prosecutorial decision-making in foreign bribery cases from considerations of factors prohibited in Article 5 of the Anti-bribery Convention (Convention, Article 5; 2009 Recommendation V); and
- e) The extradition of permanent residents of Poland for the bribery of foreign public officials (Convention, Article 10; 2009 Recommendation XIII).

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/Polandphase3reportEN.pdf>

PORTUGAL (JUNE 2013)

The Working Group is seriously concerned about Portugal's implementation of the Convention. Portugal's record of foreign bribery enforcement has been low. Portugal's strong economic links to countries plagued by severe corruption means its companies are highly exposed to the risk of committing foreign bribery. Yet, only 15 foreign bribery allegations have surfaced since Portugal became a party to the Convention in 2001. Of even greater concern is that these allegations have not yet resulted in a single prosecution. Portuguese authorities did not proactively investigate or seek the co-operation of foreign authorities in many of these cases. Several investigations were also closed prematurely. In part because of this lack of enforcement, Portuguese companies and media have an alarmingly low level of awareness of and interest in the fight against foreign bribery.

The Working Group is also concerned that Portugal's foreign bribery investigations and prosecutions may potentially be influenced by factors prohibited under Article 5 of the Convention. Many of Portugal's foreign bribery allegations involve high-level foreign officials and/or major Portuguese companies and their executives. These cases have not yet resulted in prosecution, though some investigations are ongoing. The number of foreign bribery cases involving Angola, and recent threats of economic retaliation by Angolan senior officials and media in response to reported investigations of Angolan officials by Portuguese authorities raise concerns. There are also concerns over the detection, prevention and enforcement of money laundering by politically exposed persons, especially those from jurisdictions with pervasive corruption and close economic ties to Portugal.

Regarding outstanding recommendations from previous evaluations, since Portugal's Phase 2 Written Follow-Up Report, Phase 2 Recommendations 2(d), 3(b), 4(a), 5(a), 6(b) have been fully implemented or have become moot. Recommendations 1(a), 1(b), 1(c), 2(a), 2(b), 2(c), 2(f), 3(a), 3(d), 5(b), 6(a) and 6(c) are only partially implemented or not implemented at all.

In conclusion, based on the findings in this report on Portugal's implementation of the Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Portugal to provide a written self-assessment report within one year (i.e., by June 2014) on (1) all of its foreign bribery investigations and prosecutions, and (2) the implementation of recommendations 3, 5(a), 5(b), 5(c), 5(e), 5(f), and 11. Portugal is further invited to submit a written follow-up report within two years (i.e., by June 2015) on all recommendations, follow-up issues, and foreign bribery investigations and prosecutions. The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should Portugal have failed to take steps to adequately address its recommendations.

1. Recommendations of the Working Group

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

1. With regards to the foreign bribery offence, the Working Group recommends that Portugal take all measures to clarify that:

- a) The offence does not require proof that (i) the foreign public official knows of the offer or promise of the bribe for a completed offence, (ii) the briber knows the details and identity of the recipient of the bribe, when the bribery is committed through an intermediary, and (iii) the official knows that an improper advantage has been given to a third party (Convention Article 1; 2009 Recommendation III.ii and V);

- b) The offence covers (i) bribery of any person exercising a public function for a foreign country, and officials of autonomous territories and separate customs territories; and (ii) bribery in order that an official act or refrain from acting in relation to the performance of official duties (Convention Article 1; 2009 Recommendation III.ii and V);
 - c) Criminal Code Article 374 and Law 34/1987 Article 18 do not apply to foreign bribery cases (Convention Article 1; 2009 Recommendation III.ii and V).
2. With regards to defences to the foreign bribery offence, the Working Group recommends that Portugal amend Article 5(b) of Law 20/2008 and eliminate the effective regret defence from the active foreign bribery offence (Convention, Article 1; 2009 Recommendation III.ii, V).
3. With regards to liability of legal persons, the Working Group recommends that Portugal amend Article 11 of the Criminal Code (a) so that all legal persons, including state-owned or state-controlled enterprises, can be held criminally responsible for foreign bribery, and (b) to repeal the defence of acting against express orders of legal persons (Convention Article 2; 2009 Recommendation Annex I.B).
4. With regards to sanctions and confiscation, the Working Group recommends that Portugal:
- a) Take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases, in light of the system of converting prison sentences to fines (Convention Article 3(1));
 - b) Take steps to make full use of confiscation measures available in its law and ensure that law enforcement authorities routinely consider confiscation in foreign bribery cases (Convention Article 3(3)).
5. Regarding investigations and prosecutions, the Working Group recommends that Portugal:
- a) Review its overall approach to enforcement, especially regarding corporations, in order to effectively combat international bribery of foreign public officials (Convention Articles 1, 2, 5; 2009 Recommendation V);
 - b) Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention Article 5, Commentary 27; 2009 Recommendation IX(i), Annex I.D);
 - c) Take steps to ensure that its authorities (i) do not prematurely terminate cases involving foreign bribery allegations, (ii) proactively seek co-operation and MLA from foreign countries whenever appropriate, (iii) consider whether to conduct concurrent or joint investigations, where appropriate, and (iv) use the corporate liability provisions where appropriate (Convention Articles 2, 5, Commentary 27; 2009 Recommendation XIII, Annex I.D);
 - d) Ensure that Portugal is not prevented from commencing a criminal investigation or prosecution solely because it has provided MLA to a foreign country in the same case (Convention Article 5, 9, Commentary 27; 2009 Recommendation Annex I.D);
 - e) Where foreign bribery allegations involve senior foreign public officials and/or major Portuguese companies, (i) ensure these allegations are promptly and proactively investigated on a high priority basis and with sufficient resources, and (ii) take appropriate steps to ensure that all prosecutors are aware of the requirement to record their reasons for terminating investigations of

the bribery of foreign public officials (Convention Article 5, Commentary 27; 2009 Recommendation Annex I.D);

- f) Train investigators, prosecutors and judges on investigating and prosecuting foreign bribery (including on the enforcement of corporate liability), and raise awareness of Article 5 within the DCIAP, UNCC and other relevant government bodies (Convention Article 5, Commentary 27; 2009 Recommendation III.i, Annex I.D);
- g) Give sufficient priority to investigating and prosecuting foreign bribery, and provide the DCIAP and UNCC with sufficient specialised expertise (Convention Article 5, Commentary 27; 2009 Recommendation Annex I.D).

6. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Portugal:

- a) Clarify whether jurisdiction to prosecute Portuguese nationals for extraterritorial foreign bribery is governed by Article 3 of Law 20/2008 or Article 5 of the Criminal Code (Convention Article 4(2));
- b) Take steps to ensure that its law enforcement authorities consider the exercise of nationality jurisdiction to prosecute foreign bribery wherever appropriate (Convention Article 4(2));
- c) Thoroughly explore territorial links to Portugal in foreign bribery cases, so as to rely on territorial jurisdiction to prosecute wherever possible (Convention Article 4(1)).

7. With regards to enforcement data, the Working Group recommends that Portugal maintain detailed statistics on (i) investigations, prosecutions and sanctions for false accounting and money laundering, including data on whether foreign bribery is the predicate offence, (ii) the application of confiscation in foreign bribery cases, (iii) pre-trial seizures, including on the offence involved and the amount seized, (iv) cases in which the statute of limitations had expired (Convention Articles 3(3), 6, 7, 8).

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

8. With regards to money laundering, the Working Group recommends that Portugal:

- a) Take appropriate measures to enforce the money laundering offence, particularly where foreign bribery is the predicate offence (Convention Article 7);
- b) Provide guidelines and typologies to reporting entities that specifically refer to foreign bribery, as well as additional training to the FIU, law enforcement authorities, reporting entities and their supervisory and oversight authorities on adequately detecting, preventing and prosecuting money laundering by politically exposed persons (Convention Article 7; 2009 Recommendation III.i);
- c) Ensure better feedback by the FIU to reporting institutions regarding STRs (Convention Article 7; 2009 Recommendation III.i).

9. With regards to accounting and auditing, corporate compliance, internal control and ethics, the Working Group recommends that Portugal:

- a) Train external auditors on how to detect foreign bribery, and further raise awareness among external auditors of their key role in detecting foreign bribery and their duty to report suspected foreign bribery (2009 Recommendation III.i, X.B);

- b) Make greater efforts to encourage Portuguese companies (particularly SMEs) to adopt internal control, ethics and compliance measures that explicitly address foreign bribery, and ensure that these efforts involve all government bodies that interact with Portuguese companies, including AICEP, Ministry of Economy and Employment, IAPMEI, DGAE and the CMVM (2009 Recommendation X.C).
10. With regards to tax-related measures, the Working Group recommends that Portugal:
- a) Incorporate the essential elements of the OECD Bribery Awareness Handbook into the standard Manual for Tax Auditing, regularly update the Manual to reflect latest trends on how the crime of foreign bribery is committed, and provide guidelines and training with the Handbook to existing and newly recruited tax examiners (2009 Recommendation III.i, III.iii, VIII.i; 2009 Tax Recommendation II);
 - b) Take all appropriate measures to discourage the use of undocumented expenses, and ensure that tax examiners routinely assess whether undocumented expenses are hidden bribes (2009 Recommendation III.iii, VIII.i; 2009 Tax Recommendation II);
 - c) Promptly ratify the Convention on Mutual Administrative Assistance in Tax Matters, and consider systematically including the language of Article 26 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in its future bilateral tax treaties with countries that are not signatories of the Convention on Mutual Administrative Assistance in Tax Matters (2009 Recommendation VIII.i; 2009 Tax Recommendation I.iii).
11. With regards to awareness-raising and reporting, the Working Group recommends that Portugal:
- a) Take steps to raise awareness in the private sector and media with the involvement of all relevant ministries and bodies (2009 Recommendation III.i);
 - b) Take steps to ensure that (i) Portugal provide information and training as appropriate to its public officials posted abroad on implementing the Convention, (ii) MFA and AICEP proactively reach out to Portuguese companies, and (iii) MFA take further steps to ensure that its overseas missions report all foreign bribery allegations involving Portuguese companies or individuals to Portuguese law enforcement authorities (2009 Recommendation IX.i, IX.ii, Annex I);
 - c) Ensure that appropriate measures are in place to protect public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery from discriminatory or disciplinary action (2009 Recommendation IX.iii).
12. With regards to public advantages, the Working Group recommends that:
- a) Portugal take steps to (i) ensure that all procuring authorities verify whether participants in public procurement, including legal persons, have foreign bribery convictions, and (ii) raise awareness of Criminal Code Article 90-H among procuring authorities (Convention Article 3(4); 2009 Recommendation XI.i);
 - b) CICAL and SOFID (i) raise awareness of foreign bribery among their staff, and their public and private sector partners, (ii) report all foreign bribery allegations involving Portuguese companies or individuals to Portuguese law enforcement authorities, and issue guidelines to staff on the reporting procedure, (iii) insert appropriate anti-corruption clauses in their contracts, and (iv) before approving support for a project, consider whether the recipient of support has a prior conviction for foreign bribery (Convention Article 3(4); 2009 Recommendation III.i, IX.ii, XI.i);

- c) COSEC (i) continue to proactively raise awareness of foreign bribery among its staff and clients, (ii) train its staff on how to detect foreign bribery by conducting appropriate due diligence, and strengthen its due diligence for agent fees and commissions, and (iii) adopt a clear, written policy on reporting foreign bribery allegations to law enforcement, and issue guidelines to staff on this issue (2009 Recommendation III.i, IX.i, XII.ii; 2006 Export Credit Recommendation).

2. Follow-up by the Working Group

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

- a) Application of the foreign bribery offence, particularly the elements of the offence that have raised issues identified in this report (Convention Article 1; 2009 Recommendation III.ii and V);
- b) Application of Article 11 of the Criminal Code, particularly the liability of legal persons for management's breach of duties of surveillance and control, and the terms "in the legal person's name" and "collective interest" (Convention Article 2, 2009 Recommendation Annex I.B);
- c) Sanctions imposed against natural and legal persons for foreign bribery, especially in light of the system of converting certain prison sentences into fines (Convention Article 3(1));
- d) Investigations and prosecutions of foreign bribery allegations involving senior foreign public officials and/or major Portuguese companies (Convention Article 5, Commentary 27; 2009 Recommendation Annex I.D);
- e) Application of the statute of limitations in foreign bribery cases (Convention Article 6);
- f) Pre-trial seizure in foreign bribery cases (Convention Article 3(3));
- g) Enforcement of the non-tax deductibility of foreign bribes, particularly whether Portuguese courts promptly informs tax authorities of convictions related to foreign bribery and whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery; and the reporting of foreign bribery cases by Portuguese tax officials (2009 Recommendation VIII.i);
- h) Provision of MLA in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1));

Application of Article 32 of Law 144/1999 in foreign bribery cases (Convention Article 10).

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Portugalphase3reportEN.pdf>

SLOVAK REPUBLIC (JUNE 2012)

The Working Group on Bribery commends the Slovak authorities for their full cooperation, disclosure and openness to the examiners' assessment and Working Group recommendations throughout the Phase 3 process. The Group also notes the efforts made by the Slovak Republic since Phase 2 to adapt a number of aspects of its legislative framework for prosecuting the foreign bribery offence. It is also encouraged by the clarification of the role of the bodies in charge of the investigation and prosecution of corruption and the creation of a Specialised Criminal Court, as well as by the decision to increase awareness and transparency of all judgements including on plea bargaining through their online publication. The Working Group remains, however, concerned that, 12 years after the entry into force of the Convention in the Slovak Republic, the transposition of the Convention into the Slovak legislation remains incomplete, in particular with regard to the introduction of an effective regime of corporate liability, which ensures that legal persons are held liable for the offence of foreign bribery. The Slovak Republic also does not appear to be actively enforcing its foreign bribery offence, with only one case that has so far given rise to an investigation. At the time of this report, the Slovak Republic had stopped its investigation.

In addition, the Phase 2 evaluation report on the Slovak Republic adopted in December 2005 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of the Slovak Republic's January 2008 Written Follow-Up Report, the Working Group concludes that recommendation 5 has been implemented, recommendations 1a, 9a, and 11 remain partially implemented and recommendations 8a and 10 remain not implemented.

In conclusion, based on the findings in this report, regarding implementation by the Slovak Republic of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites the Slovak Republic to report in writing on the implementation of Recommendation 2 within six months of this report (*i.e.* in December 2012) and every six months thereafter, if needed. As well, as part of its regular Phase 3 evaluation process, the Working Group invites the Slovak Republic to report orally on the implementation of recommendations 1, 4 and 9 within one year of this report (*i.e.* in June 2013). It further invites the Slovak Republic to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in June 2014). If, by the time of this written follow up report, the Slovak Republic has not completed the reform it has initiated to establish the liability of legal persons with regard to cases of foreign bribery, the Working Group will undertake additional follow-up measures to the Phase 3 evaluation of the Slovak Republic. In the meantime, the Working Group will consider constructive and proactive ways, in cooperation with the Slovak Republic, to share best practices of other Parties' implementation of Article 2 and to raise awareness and better understanding of the need for effective corporate liability for the crime of foreign bribery in the Slovak Republic public and private sectors.

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group recommends that the Slovak Republic:

(a) Clarify as soon as possible, by any appropriate means, that the requirement under section 128(2) CC that the offence be committed in connection with the public official's —competencies for running public affairs|| shall be interpreted as covering any use of the public official's position whether or not it is within the official's authorised competence [Convention, Article 1, 4 (c)];

(b) Amend the wording of section 335 CC to align it to the broader definition of a foreign public official provided under section 128 CC and hence ensure the coverage of —any officials or agent of a public international organisation|| in the definition of the foreign bribery offence [Convention, Article 1, 4 (a), Phase 2 evaluation, issue for follow up 14 (a)];

(c) Amend its legislation to exclude the defence of effective regrets from the offence of foreign bribery under section 335 CC and from the provisions applying to legal persons, currently under sections 83(a)(2) and 83(b)(2) CC [Convention, Article 1, 2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 8a.]; and

(d) Urgently take the necessary steps to ensure that the granting of immunity to cooperating offenders is not an impediment to the prosecution of the author of a bribe paid to a foreign public official and hence to the effective enforcement of the foreign bribery offence and that guidelines are issued by the appropriate authorities to explain certain key concepts, such as —significant contribution to clarifying a case of corruption|| [Convention, Article 1, 2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 8b, follow up issue 14(b)].

2. Regarding the responsibility of legal persons, the Working Group urges the Slovak Republic to, as a matter of priority, establish the liability of legal persons, to ensure that legal persons can be held liable for the offence of bribery of a foreign public official (reiterates Recommendation 10 of Phase 2), including when using intermediaries, and that the system thus established take one of the approaches described in Annex 1 to the 2009 Recommendation. [Convention, Article 2, 2009 Recommendation IV, Phase 2 evaluation, recommendation 10]

3. Regarding sanctions and confiscation, the Working Group recommends that the Slovak Republic:

(a) Take steps to ensure that the sanctions available under Slovak legislation are effective, proportionate and dissuasive in all foreign bribery cases, including through (i) continuing to raise awareness amongst the prosecutors and judges of the availability of fines as an optional part of the sentence, although it was deleted from the new text of the offence under section 334 and 335; (ii) eliminating the requirement that the offender —gained or tried to gain a property benefit|| in order for a fine to be imposed; and (iii) reconsidering the enforceability and proportionality of mandatory forfeiture for aggravated foreign bribery offences [Convention, Article 3, 2009 Recommendation III(ii) and V];

(b) (i) Revisit its current system of —preventive measures of confiscation|| and repeal sections 83a and 83b of its Criminal Code; (ii) introduce in its legal system effective, proportionate and dissuasive sanctions, including monetary sanctions, applicable to legal persons responsible for bribery of foreign officials, pursuant to a clearly established concept of liability for legal persons; (iii) ensure that the concepts of confiscation and pecuniary penalties be separated, in order to comply with Article 3 of the Convention; and (iv) ensure that the range of legal persons subject to sanctions is broad enough to include State owned and State controlled companies [Convention, Article 3, 2009 Recommendation III(ii) and V];

(c) Provide training to judges and prosecutors to increase their awareness of the mandatory nature of the confiscation of the bribe and the proceeds of bribery for natural persons convicted of non-aggravated foreign bribery, as well as many types of domestic bribery, pursuant to section 60 of the Criminal Code [Convention, Article 3, 3].

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

(a) Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage, both to increase sources of allegations and enhance investigations [Article 5, 2009 Recommendation IX., Annex I, D.];

(b) Take the necessary steps to ensure that: (i) investigations and prosecutions of foreign bribery cases are not influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or the legal persons involved; and that (ii) foreign bribery allegations are promptly investigated and prosecuted as appropriate [Convention, Article 5];

(c) Continue the efforts made since Phase 2 to ensure that the Special Court and Special Prosecutor's office are adequately staffed and that the Special Prosecutor's Office fill the four remaining prosecutor positions that are still open and therefore fully implement Phase 2 recommendation 9a.[Convention, Article 5, 2009 Recommendation, Annex I, D]; and

(d) Provide adequate training to the law enforcement authorities and police forces: (i) on the specificity of the foreign bribery offence; (ii) on the investigative techniques adapted to this offence; and, more generally, (iii) about the need to more actively and proactively detect, investigate and prosecute the offence of bribery of foreign public officials by both individuals and companies [Convention, Article 5, 2009 Recommendation, Annex I, D].

5. Regarding mutual legal assistance (MLA), the Working Group recommends that the Slovak Republic ensure that its authorities are more proactive about following up on outstanding MLA requests and on executing incoming MLA requests in foreign bribery matters [Convention Article 9; 2009 Recommendation XIII].

Recommendations for ensuring effective prevention and detection of foreign bribery

6. Regarding money laundering, the Working Group recommends that the Slovak Republic: (i) take appropriate measures to effectively enforce its money laundering offence, particularly in connection with bribery cases (reiterates Recommendation 11 of Phase 2); (ii) that it take all necessary measures to ensure that all stakeholders involved in fighting money laundering be adequately made aware that the bribery of foreign public officials is a predicate offence to money laundering, including by offering training to investigators and prosecutors concerning how to build evidence of money laundering offences in corruption cases; and (iii) that it examine its investigative and prosecution priorities to determine whether the way resources are focused creates an impediment to pursuing money laundering offences and whether more resources are necessary [Convention, Article 7; 2009 Recommendation III(i, ii)].

7. Regarding accounting requirements, external audit, and corporate compliance, the Working Group recommends that the Slovak Republic:

- a) Ensure that the provisions in Slovak legislation implementing Article 8 of the Convention are fully used to prevent and detect accounting offences linked to corruption cases, in particular foreign bribery, and that the sanctions for false accounting in practice are effective, proportionate and dissuasive (reiterates Recommendation 12.b. of Phase 2) [Convention Article 8; 2009 Recommendation X(A(iii))]; and
- b) Provide training and awareness-raising in foreign bribery that targets the accounting and auditing profession; raise awareness of the need for internal controls, ethics and compliance

measures; and provide clearer guidance on reporting requirements introduced under 27.3 of the Act on Accounting [2009 Recommendation III(i), X.B, X.C].

8. Regarding tax measures, the Working Group recommends that the Slovak Republic:
 - a) Provide guidelines and training to tax inspectors as to the types of expenses that constitute bribes to foreign public officials, using the OECD Bribery Awareness Handbook for Tax Examiners [2009 Recommendation VIII(i); 2009 Tax Recommendation II]; and
 - b) Consider the inclusion of the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties and consider signing the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters [2009 Recommendation VIII (i); 2009 Tax Recommendation I(iii)].
9. With respect to awareness-raising, the Working Group recommends that the Slovak Republic actively step up its awareness-raising activities by, among other measures: (i) clearly making foreign bribery a priority by addressing foreign bribery in its national anti-corruption policy; (ii) including the 2009 Anti-Bribery Recommendation in the Ministry of Justice's Prevention of Corruption Handbook; (iii) considering undertaking and publishing a risk assessment of the Slovak economy's exposure to foreign bribery; (iv) taking further action to raise awareness of the Slovak foreign bribery offence among the private sector (reiterates recommendation 1.a. of Phase 2); and (v) raise awareness of foreign bribery among public officials, particularly those involved in public advantages, of the Slovak Republic's obligations under the Anti-Bribery Convention [2009 Recommendation III(i)].
10. Regarding whistleblower protection, the Working Group recommends that the Slovak Republic urgently pass whistleblower protection legislation and, once passed, take steps to raise awareness of these new protections [2009 Recommendation IX(iii)].
11. Regarding official development assistance, the Working Group recommends that the Slovak Republic consider systematically including anti-corruption provisions in bilateral aid-funding procurement [2009 Recommendation XI(ii)].

2. Follow-up by the Working Group

12. The Working Group will also follow up the issues below as case law and practice develop:
 - (a) The determination of aggravated and non aggravated foreign bribery and the application of corresponding level of sentence [Convention, Article 1 and 3];
 - (b) The statistics concerning confiscation orders in domestic and foreign bribery cases [Convention, Article 3.3, 2009 Recommendation III(ii)];
 - (c) The Court decisions published online include elements of the arrangements reached through plea bargaining agreements, when appropriate, such as the reasons why such a plea bargain was deemed appropriate in a specific case and the terms of the arrangement (in particular, the amount agreed to be paid) to ensure accountability, raise awareness, and enhance public confidence in the enforcement of the anti-corruption legislation in the Slovak Republic [Convention, Article 3];
 - (d) The application of the statute of limitations, to ensure that it allows an adequate period of time for the investigation and prosecution of the foreign bribery offence [Convention Article 6];

(e) The efficiency of mechanisms for incoming and outgoing mutual legal assistance regarding cases of bribing foreign public officials, in particular where the target of the foreign investigation is a legal person [Convention Article 9; 2009 Recommendation XIII];

(f) The application of the money laundering offence, given the absence of investigations and prosecutions of money laundering based on a predicate offence of foreign bribery [Convention Article 7].

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/SlovakRepublicphase3reportEN.pdf>

SLOVENIA (JUNE 2014)

The Working Group on Bribery is encouraged by Slovenia's recent efforts to implement the Convention. However, the Working Group is seriously concerned with Slovenia's lack of enforcement of its foreign bribery offence. Only four foreign bribery allegations have surfaced since Slovenia became a party to the Convention in 1999. Of the four allegations, one case has been terminated, one case was unknown to Slovenian authorities and two cases have not advanced beyond preliminary stages. The low number of foreign bribery allegations raises further concerns on the levels of awareness, detection and reporting. While Slovenia has placed significant emphasis on combating domestic corruption, there remain serious concerns that the investigation and prosecution of foreign bribery has been afforded little to no priority. In addition, there are concerns that investigations and prosecutions may be obstructed by political and economic considerations.

The Phase 2 evaluation report on Slovenia adopted in June 2007 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of Slovenia's October 2009 written follow-up report, the Working Group concludes that: recommendation 3e has been implemented, recommendations 2d, 3b and 3d have been partially implemented, recommendations 1a, 1b, 1c, 2a, 2b, 5a, and 6b remain partially implemented, recommendation 3a and 6a are now considered not implemented, and 5b, and 6c remain not implemented. The issues raised in Phase 2 recommendations 3c, 4a and 7 are now to be followed up by the Working Group as practice develops.

In conclusion, based on the findings in this report on Slovenia's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invites Slovenia to report in writing on the implementation of recommendations 4a and 4c within six months of this report (i.e. in December 2014). The Working Group also invites Slovenia to report in writing on its implementation of recommendations 1c, 2a, 3c, 4a, 4c and 5(i) in one year (i.e. by June 2015). It finally invites Slovenia to submit a written follow-up report on its implementation of all recommendations and follow-up issues within two years (i.e. by June 2016). Slovenia is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits each of these reports.

1. Recommendations of the Working Group

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

1. Regarding the foreign bribery offence, the Working Group:
 - a) Recommends that Slovenia (i) take all measures to ensure that the foreign bribery offence covers bribery of any person exercising a public function for a foreign country, regardless of whether that person has management powers and responsibilities and (ii) clarify its Criminal Code to ensure that the offence of foreign bribery covers bribery of officials of autonomous territories and separate customs territories; [Convention Article 1; Commentary 18; 2009 Recommendation III.ii and V]
 - b) Recommends that Slovenia clarify that bribery of employees of foreign SOEs is equally criminalised; [Convention Article 1; Commentary 14; 2009 Recommendation III.ii and V]
 - c) Urges Slovenia to clarify by all appropriate means that the defence of "effective regret" in Article 262(3) of the Criminal Code and Article 11(2) of the LLPCO does not apply to foreign bribery.

[Convention Articles 1 and 3; 2009 Recommendation III.ii and V; 2009 Recommendation Annex I.A]

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

- a) Urgently review its approach to corporate liability, in particular to ensure (i) that the elements required to prove a link between the natural person that perpetrated the crime and the liability of the legal person under the Act are not obstacles to effective enforcement of the Act; (ii) a legal person cannot be exempted from prosecution because of its “insignificant” level of participation in the commission of the criminal offence; and (iii) the regime of liability of legal persons adopts one of the approaches described in Annex 1 B) b. of the 2009 Recommendation concerning the level of managerial authority and the type of act that may cause that liability to be incurred; [Convention Article 2; 2009 Recommendation III.ii, V., Annex I.B.]
- b) Issue further specific guidance and training to both police and prosecutors on investigating and prosecuting legal persons, especially with regards to foreign bribery and other intentional economic crimes, and take further steps to prioritise the prosecution of legal persons involved in foreign bribery. [Convention Article 2; 2009 Recommendation III.ii and V, Annex I B]

3. Regarding sanctions and confiscation, the Working Group recommends that Slovenia:

- a) Clarify that suitable fines are also available for “proper” acts or omissions in Article 262(2) CC as a useful additional deterrent; [Convention Article 3]
- b) Ensure that sanctions imposed in practice for foreign bribery are effective, proportionate and dissuasive; [Convention Article 3; 2009 Recommendation III.ii and V]
- c) Continue to take measures to draw the attention of prosecutorial and judicial authorities on the importance of applying sanctions which are sufficiently effective, proportionate and dissuasive on natural and legal persons convicted for foreign bribery offences, in particular, emphasising the importance of adequate economic sanctions. [Convention Article 3; 2009 Recommendation III.ii and V]

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

- a) Recommends that Slovenia (i) seriously step up its enforcement of the foreign bribery offence and take concrete and meaningful steps to ensure that foreign bribery is an area of priority for law enforcement authorities; (ii) take concrete steps to ensure that the National Bureau of Investigation and the Special State Prosecutor’s Office proactively investigate all allegations of foreign bribery; (iii) assess all credible allegations of foreign bribery and seriously investigate complaints of this crime; (iv) generate foreign bribery cases through more proactive means of detection, including through enhancing working relations with foreign law enforcement authorities and using information from diverse sources at the pre-investigative stage; [Convention Article 5; Commentary 27; 2009 Recommendation XIII and Annex I D]
- b) Recommends that Slovenia review the system of maximum 3-month or 6-month time limits imposed on the authorised use of some special investigative techniques in foreign bribery investigations and make full use of such measures at its disposal in foreign bribery cases; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
- c) Recommends that Slovenia, as a matter of urgency, strengthen safeguards and take any other steps to ensure that law enforcement authorities and the CPC are not subject to improper influence by

concerns of a political nature or factors prohibited by Article 5 of the Convention in deciding whether to pursue an investigation or prosecution, or transmit corruption allegation reports to law enforcement authorities; [Convention Article 5]

- d) Recommends that Slovenia promptly provide in depth training specifically on the foreign bribery offence to investigators and prosecutors. [Convention Article 5]
- 5. With respect to mutual legal assistance (MLA), the Working Group recommends that Slovenia ensure: (i) its authorities are more proactive in seeking MLA or other forms of international cooperation, as appropriate, in foreign bribery cases; and (ii) maintain statistics on incoming and outgoing MLA and extradition requests, including on the types of offence involved and the time required to execute requests. [Convention Article 9]

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

- 6. Regarding money laundering, the Working Group recommends that Slovenia raise awareness of foreign bribery as a predicate offence to money laundering and develop foreign bribery-related anti-money laundering measures, such as typologies and training on the laundering of bribes and the proceeds of bribery, for OMLP officials, as well as for reporting entities and relevant professionals. [Convention Article 7 and 2009 Recommendation, III.i.]
- 7. Regarding accounting and auditing, corporate compliance, internal controls and ethics, the Working Group recommends that Slovenia:
 - a) Ensure that false accounting cases are vigorously investigated and effectively prosecuted, where appropriate, and that sanctions imposed in practice for false accounting offences are effective, proportionate and dissuasive; [Convention Article 8]
 - b) Consider whether the external auditing requirements on companies which escape the threshold and which export or have operations abroad are adequate; [Convention Article 8; 2009 Recommendation III.v. and X.B.i.]
 - c) Take appropriate steps to raise awareness specifically on the foreign bribery offence among auditors, and ensure that the profession benefits from regular training, including specific methods for detecting foreign bribery; [Convention Article 8; 2009 Recommendation III.i.]
 - d) Take steps to ensure that auditors who report reasonably and in good faith suspicions of foreign bribery are protected from legal or other retaliatory action, and that they are made aware that such protections exist; [2009 Recommendation III.iv. and X.B.v.]
 - e) Raise awareness of internal controls, ethics and compliance measures to specifically prevent foreign bribery, including among small and medium-sized enterprises and state-owned enterprises. This should include promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Anti-Bribery Recommendation. [2009 Recommendation Annex II]
- 8. Regarding tax measures to combat bribery of foreign public officials, the Working Group recommends that Slovenia promptly train tax officials on issues related specifically to the detection of foreign bribery. [2009 Tax Recommendation]
- 9. Regarding awareness-raising, the Working Group recommends that Slovenia:

- a) Ensure that measures for the prevention, detection and awareness-raising of foreign bribery are included in all national anti-corruption strategies, and that the CPC is provided with sufficient resources and political support to effectively prioritize, coordinate and implement these measures; [2009 Recommendation III.i, Annex I.A and D]
- b) Take measures to raise awareness of the Convention and the foreign bribery offence within the public administration, judiciary and other law enforcement authorities; [2009 Recommendation III.i and Annex I.A]
- c) Urge relevant public agencies that interact with Slovenian companies operating abroad, including the Ministry of Foreign Affairs, to provide guidance about risks of and measures to prevent foreign bribery to Slovenian companies operating abroad; [2009 Recommendation III.i and Annex I.A]
- d) Take more active measures to raise awareness specifically on the foreign bribery offence among Slovenian business associations and companies, including small and medium-sized enterprises and state-owned enterprises. [2009 Recommendation III.i, III.v., X.C and Annex II]

10. With respect to the reporting of foreign bribery, the Working Group:

- a) Urge Slovenia to remind public officials, including those working with overseas development aid and within the Ministry of Foreign Affairs, of their obligation to report instances of foreign bribery, and issue clear instructions to be followed on how to recognise indications of foreign bribery and on the concrete steps to be taken if suspicions or indications of foreign bribery should arise, including reporting the matter as appropriate to Slovenian law enforcement authorities; [2009 Recommendation XI.i. and XI.ii]
- b) Recommends that Slovenia raise awareness within both the public and private sectors of the whistleblower protections afforded under the Integrity and Prevention of Corruption Act and the Slovene Sovereign Holdings Act, for those who report suspicions of foreign bribery; [2009 Recommendation IX]
- c) Recommends that Slovenia take concrete steps to ensure that reports of suspected acts of foreign bribery made in good faith and on reasonable grounds are, in practice, handled efficiently and afforded the protections guaranteed by the law. [2009 Recommendation IX.iii.]

11. Regarding public advantages, the Working Group recommends that:

- a) Slovenia (i) maintain centralised statistics on the number of candidates and tenderers excluded from public procurement based on prior criminal convictions, including for foreign bribery; and (ii) issue guidance to its contracting authorities to ensure that rules on exclusion from public procurement due to foreign bribery is effectively implemented in practice or ways to verify non-EU conviction records; [2009 Recommendation XI]
- b) The Slovene Export Development Bank promptly provide foreign bribery-specific training to its staff to better detect, report and mitigate the risk of foreign bribery. [2009 Recommendation XII; 2006 Export Credit Recommendation]

2. Follow-up by the Working Group

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

- a) The application of article 262 of the Criminal Code (and article 242 in the case of employees of foreign SOEs) to ensure that all bribes to a foreign public official to obtain any use of the official's position – regardless of whether or not it falls within the official's authorised competence – constitute the basis for a foreign bribery offence;
- b) The application of the conditions laid down under Article 11(1) of the Liability of Legal Persons for Criminal Offences Act;
- c) The liability of parent companies which use foreign subsidiaries to commit acts of foreign bribery;
- d) The application in practice of freezing and confiscation measures in on-going and future foreign bribery cases, including for legal persons;
- e) The level of resources available to National Bureau of Investigation, the Special State Prosecutor's Office and the CPC, to support the effective prevention, detection, investigation and prosecution of foreign bribery;
- f) The impact of the recent budgetary constraints confronting the Slovenian judiciary on the speed of judicial proceedings;
- g) The application of territorial and nationality jurisdiction for foreign bribery, especially with regard to legal persons and the ability for Slovenia to exercise jurisdiction over parent companies for acts of foreign bribery committed abroad by its subsidiaries;
- h) The time limitations imposed on prosecutors and investigative judges (and extensions thereof) to ensure that they do not impede the effective investigation and prosecution of foreign bribery;
- i) Whether the money laundering offence can be effectively enforced where the predicate offence is foreign bribery, regardless of where the bribery occurred;
- j) The adequacy of resources available to the Office of Money Laundering Prevention to ensure it can effectively detect money laundering cases predicated on foreign bribery;
- k) The impact of the Audit Act on auditor independence, and whether independence has been supported or compromised in practice;
- l) The application of the non-tax deductibility of bribes, particularly whether Slovenian law enforcement authorities promptly inform the Tax Directorate of convictions related to foreign bribery and whether tax returns are re-examined to determine whether bribes have been deducted;
- m) The treatment of incoming MLA requests and in particular, if such requests trigger the opening of foreign bribery investigations in Slovenia.

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/SloveniaPhase3ReportEN.pdf>

SOUTH AFRICA (MARCH 2014)

The Working Group on Bribery is seriously concerned with South Africa's lack of enforcement of its foreign bribery offence. Since South Africa became a Party to the Convention in 2007, of the only 10 allegations that have surfaced, none has generated a single prosecution or progressed beyond the preliminary stage. South African authorities did not proactively investigate or seek the co-operation of foreign authorities in any of these cases. The Working Group is also seriously concerned that South Africa's foreign bribery investigations and prosecutions may potentially be influenced by political and economic considerations prohibited under Article 5 of the Convention. The low level of foreign bribery allegations also raises concerns on the levels of awareness, reporting and detection. This is of particular concern given South Africa's economic links to a number of countries with corruption risks.

The Phase 2 evaluation report on South Africa adopted in June 2010 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of South Africa's September 2012 written follow-up report, the Working Group concludes that: recommendation 7e has been implemented, recommendations 5c and 7f have been partially implemented, recommendations 4, 5b, 5d, 6, 7c, 7d and 8 remain partially implemented and recommendation 2b remains not implemented. While recommendations 10b and 12a were respectively deemed partially implemented and satisfactorily implemented in the Phase 2 written follow-up report, further assessment in Phase 3 has shown that these were in fact not implemented. Similarly, while recommendation 12b was deemed no longer relevant in the Phase 2 written follow-up report, it was deemed necessary to re-assess in Phase 3.

In conclusion, based on the findings in this report on South Africa's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group requests that South Africa provide a written self-assessment report in 6 months (i.e., by October 2014) on progress made in (i) pro-actively investigating and prosecuting foreign bribery; and (ii) ensuring that investigations and prosecution are not influenced by political and economic considerations, including on implementation of recommendations 1, 4a, 4e, 6, 12c and 12d. It also invites South Africa to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e., by March 2016). South Africa is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these two reports. The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should South Africa have failed to take steps to address its recommendations.

1. Recommendations of the Working Group

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

1. The Working Group recommends that South Africa significantly step up efforts to detect, investigate and prosecute foreign bribery. [Convention Article 1, 2009 Recommendation, V]

2. Regarding the liability of legal persons, the Working Group recommends that South Africa take steps to (i) ensure that prosecutors make full use of the broad range of possibilities available under section 332 of the Criminal Procedure Act (CPA) to effectively enforce the liability of legal persons for acts of foreign bribery; and (ii) encourage the National Prosecution Authority to include such enforcement within

their quantified targeted objectives and monitored conviction rates. [Convention Article 2; 2009 Recommendation III ii), V, Annex I B]

3. Regarding sanctions, the Working Group:

- (a) Urges South Africa to take steps to ensure that the penalties applied to legal persons in practice are sufficiently effective, proportionate and dissuasive; [Convention Article 3; 2009 Recommendation III (ii) and V]
- (b) Recommends that South Africa continue to draw attention of prosecutors and judges to section 28 of the Prevention and Combating of Corrupt Activities Act, 2004 ('PRECCA') to ensure the possible endorsement of natural and legal persons convicted of foreign bribery on the Register of Tender Defaulters and possible termination (subject to applicable court orders) of their on-going relations with the South African National Treasury; [Convention Article 3; 2009 Recommendation III (ii) and V]
- (c) Recommends that South Africa consider reviewing its debarment process to ensure the systematic inclusion in the Register of Tender Defaulters of all natural and legal persons convicted of foreign bribery; [Convention Article 3; 2009 Recommendation III (ii) and V]
- (d) Recommends that South Africa (i) continue to maintain statistics on convictions of natural and legal persons for foreign bribery; (ii) maintain statistics on convictions of natural and legal persons for other intentional economic crimes, including levels of fines, actual time served by natural persons under prison sentences, and the Court which imposed the sanction; [Convention Article 3; 2009 Recommendation III (ii) and V]
- (e) Recommends that South Africa (i) make full use of the provisions available under the Prevention of Organised Crime Act (POCA) to freeze and confiscate the bribe and proceeds of foreign bribery; and (ii) ensure that the evidentiary threshold necessary to apply for freezing and confiscation orders under the POCA is not too high in practice. [Convention Article 3; 2009 Recommendation III (ii) and V]

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

- (a) Strongly recommends that South Africa take concrete steps to ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases, including decisions made by the NDPP; [Convention Article 5]
- (b) Strongly recommends that South Africa increase the financial resources available to the specialist prosecutors charged with fighting corruption to ensure the effective investigation and prosecution of foreign bribery cases, including, through (i) the recruitment of the additional human resources needed; and (ii) ensuring that there is sufficient specialised expertise for foreign bribery cases including more permanently integrated forensic accountants in the Specialised Commercial Crime Unit (SCCU); [Convention Article 5; 2009 Recommendation XIII and Annex I D]
- (c) Recommends that South Africa make full use of the newly established integrated approach to investigating complex commercial crimes – i.e. the coordination and cooperation between the South African Police Service (SAPS) and the National Prosecuting Authority of South Africa (NPA) including through the ACTT – at the outset of foreign bribery cases; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

- (d) Urges South Africa to make full use of the broad range of investigative measures available, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
- (e) Recommends that South Africa: (i) make full use of the legal tools available to gather evidence, including, as appropriate, the issuing of subpoenas to natural and legal persons; and (ii) continue to include the availability and use of subpoenas as an investigative tool in foreign bribery training programmes; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
- (f) Recommends that South Africa: (i) clarify which investigative tools are available at each stage of an investigation, and under what standards or circumstances, in order to enhance their ability to proactively investigate allegations of foreign bribery; and (ii) increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
- (e) Recommends that South Africa raise awareness among prosecutors, including the National Director for Public Prosecutions (NDPP), of the legally-binding nature of the Prosecution Policy to ensure that the considerations prohibited by Article 5 are respected in foreign bribery cases. [Convention Article 5; 2009 Recommendation XIII and Annex I D]

5. Regarding jurisdiction, the Working Group recommends that South Africa ensure that future training provided to law enforcement authorities and the judiciary include the full range of possibilities available under section 35 of the PRECCA to establish jurisdiction, in particular with regard to legal persons. [Convention Article 4]

6. With respect to mutual legal assistance (MLA), the Working Group recommends that South Africa ensure: (i) its authorities respond to MLA requests without unnecessary delays; (ii) its authorities are more proactive in seeking MLA; and (iii) its Central Authority (DoJ&CD) maintain statistics on the number of requests that come from Parties to the Convention, as well as the response time, in order to help monitor the efficiency of its MLA system. [Convention Article 9]

7. With respect to extradition, the Working Group recommends that South Africa promptly proceed with the adoption of the Extradition Bill to ensure that it can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed. [Convention Article 10]

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

8. Regarding money laundering, the Working Group:

- (a) Urges South Africa to maintain statistics on the predicate offences for money laundering as well as statistics on enforcement of the money laundering offence to allow South Africa and the Working Group to assess the efficiency of its money laundering regime in identifying foreign bribery as a predicate offence to money laundering; ; [Convention, Article 7 and 2009 Recommendation, III (i)]
- (b) Urges South Africa to promptly ensure that institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Financial Intelligence Centre, receive appropriate directives and training on the identification and reporting of

information that could be linked to foreign bribery; [Convention, Article 7 and 2009 Recommendation, III (i)]

- (c) Recommends that South Africa consider issuing guidelines and typologies to reporting entities that specifically refer to foreign bribery as well as providing better feedback by SAPS to the Financial Intelligence Centre (FIC) and reporting institutions regarding suspicious transactions reports (STRs) with a view to improving the quality of reporting; [Convention, Article 7 and 2009 Recommendation, III (i)]
- (e) Recommends that further training be provided to the reporting entities and the Financial Intelligence Centre to improve detection and reporting of money laundering offences. [Convention, Article 7 and 2009 Recommendation, III (i)]

9. Regarding accounting and auditing, corporate compliance, internal controls and ethics, the Working Group recommends that South Africa:

- (a) Ensure that false accounting cases are vigorously investigated and effectively prosecuted, where appropriate, and that sanctions imposed in practice for false accounting offences are effective, proportionate and dissuasive; [Convention Article 8]
- (b) Take steps to close any loopholes that may allow entities to escape the requirement to be subject to external audit under the Companies Act, 2008, or any other applicable legislation; [Convention Article 8]
- (c) Take appropriate steps to raise awareness specifically on the foreign bribery offence among auditors, including within the Auditor General of South Africa (AGSA), and ensure that the profession benefits from regular training, including specific methods for detecting foreign bribery, in order to facilitate their more active role in detecting foreign bribery; [Convention Article 8; 2009 Recommendation III.i.]
- (d) Take further steps to encourage the reporting of foreign bribery within the auditing profession and the AGSA, and take concrete and meaningful steps to ensure that auditors who report reasonably and in good faith suspicions of foreign bribery are protected from legal or other retaliatory action, and to raise awareness within the profession of those protections; [2009 Recommendation III.iv., X.B.v.]
- (e) Raise awareness among publicly listed and state-owned enterprises of the requirement to establish social and ethics committees, to further strengthen internal controls, ethics and compliance measures for the purpose of preventing and detecting foreign bribery; [2009 Recommendation Annex II]

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

- (a) South Africa proactively enforce the non-tax deductibility of bribe payments against defendants in foreign bribery cases, including by systematically auditing criminal defendants' (including legal persons) tax returns for the relevant years to verify whether bribes had been deducted; [2009 Tax Recommendation]
- (b) South Africa provide targeted guidance to taxpayers that are small and medium-sized enterprises on the non-deductibility of bribes to foreign public officials, along with the type

of expenses that could constitute bribes, including gifts and entertainment expenses; [2009 Tax Recommendation]

- (c) South Africa disseminates the new OECD Bribery and Corruption Awareness Handbook for Tax Examiners and continues regular training of tax auditors, including through the provision of tailored, country-specific red flag indicators to help tax auditors detect bribe payments; [2009 Tax Recommendation]
- (d) South Africa ensure that adequate resources (including adequately skilled personnel) are made available to South African Revenue Service (SARS), to improve its ability to detect possible cases of foreign bribery through tax audits and investigations; [2009 Tax Recommendation]
- (e) South Africa take steps to ensure (i) that an effective legal and administrative framework is in place to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties to the appropriate domestic law enforcement authorities; (ii) that guidance is provided to SARS officials to that effect; and (iii) that SARS regularly inform tax officials of their obligation under section 34 of the PRECCA to report instances of foreign bribery, and that it encourage and facilitate such reporting; [2009 Tax Recommendation]
- (f) South Africa consider systematically including the language of Article 26.2 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in its future bilateral tax treaties with countries that are not signatories of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. [2009 Tax Recommendation]

11. Regarding awareness-raising, the Working Group recommends that South Africa (i) step up efforts to raise awareness of the foreign bribery offence within both the public and private sectors, including the reporting obligations and sanctions under section 34 of the PRECCA; and (ii) encourage SMEs and non-publicly listed companies to adopt effective internal controls, ethics and compliance measures designed to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex of the 2009 Anti-Bribery Recommendation. [2009 Recommendation III.i, X.C.i., Annex II]

12. With respect to the reporting of foreign bribery, the Working Group recommends that South Africa:

- (a) Ensure that specific reporting obligations and procedures on foreign bribery are developed for DIRCO staff posted in overseas missions; [2009 Recommendation III.iv., IX.i. and ii.]
- (b) Urgently, take concrete and meaningful steps to ensure that those who report suspected acts of foreign bribery in good faith and on reasonable grounds are in practice afforded the protections guaranteed by the law, and; [2009 Recommendation IX.iii.]
- (c) Clarify the relationship between clauses 43 and 49 of the Protection of State Information Bill to ensure that there are no loopholes preventing foreign bribery whistleblowers from being afforded protection under the Protected Disclosures Act; [2009 Recommendation IX.iii.]
- (d) Highlight, in its awareness-raising efforts, that those who report suspicions of foreign bribery are protected under the Protected Disclosures Act, and publicly clarify that those who report on such grounds will not run afoul of the Protection of State Information Bill. [2009 Recommendation IX.iii.]

13. Regarding public advantages, the Working Group recommends that:

- (a) In relation to official development assistance (ODA), (i) South Africa raise awareness of foreign bribery among all officials working with official development assistance and, in addition, that such efforts include the reporting obligations and procedures for staff when they uncover foreign bribery in the course of their work; (ii) the ARF take into account a company's internal controls, ethics and compliance programmes in deciding whether to grant an ODA-funded contract; (iii) South Africa exclude companies convicted of foreign bribery from receiving ODA-funded contracts, and that routine checks against international and domestic debarment lists form part of the due diligence process; and (iv) South Africa ensures that anti-bribery declarations are incorporated in all outbound ODA-funded contracts; [2009 Recommendation XI (ii)]
- (b) South Africa promptly proceed with the adoption of the draft Treasury Regulations requiring public procurement contracting authorities to verify whether prospective tenderers have been listed in the Register for Tender Defaulters and the Database of Restricted Suppliers, and that public contracting authorities take into account the debarment lists of the multilateral development banks in their due diligence and decisions to award a public contract; [2009 Recommendation XI (iii)]
- (c) The Export Credit Insurance Corporation (ECIC) continue to raise awareness among its staff of the foreign bribery offence and reporting obligations, as well as expand its Tip-Off Anonymous hotline to expressly include the reporting of foreign bribery committed by ECIC clients. [2009 Recommendation XII; 2006 Export Credit Recommendation]

2. Follow-up by the Working Group

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

- (a) The issue of intent, to ensure that ignorance of the foreign bribery legislation cannot be relied on as a defence in a foreign bribery case;
- (b) The application of section 5(2) of the PRECCA, to ensure that it does not restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe;
- (c) The application in practice of the foreign bribery offence with respect to legal persons, including as concerns (i) the liability of parent companies for acts of bribery by intermediaries, including related legal persons, such as subsidiaries abroad; (ii) the implications of the requirement that the foreign bribery offence be committed "in furthering or endeavouring to further the interests of that corporate body"; and (iii) the application of corporate liability to state-owned and state-controlled enterprises;
- (d) The use of the Database of Restricted Suppliers to ensure that it is being used to include all those convicted of domestic and foreign bribery;
- (e) Whether natural persons convicted of foreign bribery offenses serve their sentences and, if not, the circumstances surrounding any reductions;
- (f) The use of freezing orders and confiscation measures, whether conviction or non-conviction based;

- (g) Whether South Africa ensures adequate resources are available to the AFU, including ensuring adequately qualified staff, so that it remains effective and capable of handling high-value complex cases, including foreign bribery cases;
- (h) The effectiveness and efficiency of the newly established integrated strategy to investigating complex commercial crimes – i.e. the coordination and cooperation between the SAPS and the NPA – including the ACTT;
- (i) The ability of bodies charged with investigating corruption allegations, including commissions of inquiry, to access classified information without unnecessary delay;
- (j) The independence and effectiveness of the DPCI regarding the investigation of foreign bribery cases;
- (k) The application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, to ensure that the South African authorities can take action against legal persons for bribery of foreign public officials, whether it is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries);
- (l) Whether SAPS routinely inform SARS of foreign bribery convictions;
- (m) With regard to the sharing of tax information with law enforcement authorities, the requirement to obtain *ex parte* orders to ensure that it is effective in facilitating reporting.

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf>

SPAIN (DECEMBER 2012)

The Working Group on Bribery is seriously concerned with Spain's lack of active enforcement of its foreign bribery offence, almost 13 years after its entry into force, with only 7 investigations opened that had all been closed at the time of this report. No individual or company has ever been prosecuted or sanctioned for foreign bribery. The Working Group welcomes the introduction in the Spanish Penal Code of a separate foreign bribery offence in 2010. However, it is concerned at the introduction at the same time of a specific offence for the bribery of European officials, which contains all the deficiencies identified in Phase 2 in the former foreign bribery offence, in particular, with regard to the scope of the offence, the level of sanctions, and the statute of limitations. The Working Group is encouraged by the entry into force, in 2010, of a regime of liability of legal persons, which for the first time since the entry into force of the Convention in Spain, offers a wide range of possibilities for holding companies liable for foreign bribery offences. However, the Working Group is seriously concerned that this new regime of liability excludes from its scope a large range of State-owned enterprises. In this context, the Working Group welcomes the reform of the Penal Code announced by Spain's Minister of Justice at the time of finalising this report.

The Phase 2 evaluation report on Spain adopted in March 2006 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of Spain's October 2008 Written Follow-Up Report, the Working Group concludes that: Recommendations 5(b), 6(a)(ii), 6(d) have been implemented, Recommendations 1(a), 1(b), 1(c), 2(c), 3(c), 3(d), 4(a), 4(b), 4(c), 5(a), 6 (a)(i), 6(c), 6(e) remain partially implemented and Recommendations 2(a), 2(b), 3(e), 6(b) remain not implemented.

The Working Group requests that Spain provide a written self assessment report in one year (*i.e.* in December 2013) on (1) progress in amending its Penal Code; and (2) prosecuting foreign bribery cases, including on implementation of recommendations 2(b), 3(a), 5(g), 8(b) and 10. It further invites Spain to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in December 2014). The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should Spain have failed to take steps to address its recommendations.

1. Recommendations of the Working Group

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

1. Review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials. [Convention, Article 1, 2009 Recommendation, V.]
2. Regarding the foreign bribery offence, the Working Group recommends that Spain proceed, as a matter of priority with the legislative changes announced on 4 December 2012 and, in particular, amend the current statutory framework to consolidate or harmonise the offence under art. 427 PC with the one under art. 445 PC, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including:
 - a) by clarifying that the definition of a foreign public official encompasses "officers of the European Union or civil servants who are nationals of another Member State of the Union", that this

definition is in all cases autonomous; and that characterisation of the expected acts of foreign officials does not require recourse to foreign law in order to establish the offence;

- b) by clarifying that all bribes to a foreign public official to affect the official's exercise of discretion, including where the act induced by the bribe is in accordance with the official's duties would constitute the basis for a foreign bribery offence, regardless of whether the Company could properly have been awarded the business and whether the benefit obtained is "irregular";
- c) by ensuring that the promise of a bribe; the use of intermediaries and bribes paid to a third party are covered in all cases of bribery of a foreign public official; and
- d) by clarifying that the defence under art. 426 PC in cases of corruption offences reported to law enforcement authorities (tantamount to "effective regret") does not apply to the foreign bribery offences, including the offence under art. 427 PC. [Convention, Article 1, 2009 Recommendation, III ii) and V, Phase 2 recommendations 4a. and 4b.]

3. Regarding the responsibility of legal persons, the Working Group recommends that, as part of the legislative reform announced by Spain in its letter to the Group dated 4 December 2012, Spain:

- a) Amend the Penal Code to ensure that State-owned and State-controlled enterprises can also be held liable for bribery of foreign public officials under art 31bis PC; [Convention, Article 2, Article 5 and 2009 Recommendation III ii), V, Annex I(D), and Phase 2 recommendation 5a.]
- b) Ensure by any appropriate means that the criteria of "due control" as well as the onus and level of proof of this standard of liability be specified with a view to ensure coverage of the full range of situations required in Annex I to the 2009 Recommendation, in particular under its subsection B) b) and that the implementation of compliance programs and internal controls by a legal person cannot be used as a defence to avoid liability; [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B) and Phase 2 recommendation 5a.]
- c) Take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among prosecuting authorities throughout the country to ensure that the new range of possibilities available under the law for holding legal persons liable for foreign bribery is understood and applied consistently and diligently, with a view to more effectively enforcing the new corporate liability regime. [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B) and Phase 2 recommendation 5a.]

4. Regarding sanctions, the Working Group recommends that Spain:

- a) Harmonise the regime of sanctions (both criminal and administrative) for bribery of European officials with the one available for bribery of other foreign public officials (under art. 445 PC) for both natural and legal persons to ensure effective, proportionate and dissuasive sanctions in all cases, including for bribery to obtain a favourable exercise of discretion; [Convention, Article 3; 2009 Recommendation V and Phase 2 recommendation 6a.i)]
- b) Increase available sanctions for natural persons in foreign bribery cases involving significant amounts of money in order to achieve sanctions proportionate to those available for similar economic crimes; [Convention, Article 3; 2009 Recommendation V and Phase 2 recommendation 6b.];

- c) Develop guidelines on how to calculate the proceeds of bribery to individuals and/or companies who have benefited from corrupt transactions to ensure effectiveness and consistency in the calculation of the fine available under art. 445 PC, which level depends on the size of the profit; [Convention, Article 3; 2009 Recommendation V]
- d) Compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive; [Convention, Article 3; 2009 Recommendation V]
- e) With regard to confiscation, (i) clarify, by any appropriate means, that confiscation in all foreign bribery cases is governed by art. 127 PC and that the limitations under art. 431 PC do not apply; (ii) also clarify that legal persons can be subject to confiscation measures on the same basis as natural persons; (iii) take steps to ensure that law enforcement authorities and prosecutors seek confiscation in corruption cases, whenever appropriate; (iv) provide training and guidance on the practical aspects of the confiscation of the proceeds of bribes and their quantification; and (v) make the Asset Recovery Office operational as a matter of priority. [Convention, Article 3.3].

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Spain take the necessary steps to:

- a) Ensure (i) that the police forces and magistrates, in particular in the Central Investigating Magistrate Court, receive adequate training on the specific elements of the foreign bribery offences; on the investigative techniques adapted to this offence; and more generally, about the need to more actively and pro-actively detect, investigate and prosecute the offence of bribery of foreign public officials by both individuals and companies; and (ii) that the ACPO, including the specialised agents attached to it, receive specific training to update their knowledge on the above mentioned topics, in particular with regard to the revised foreign bribery offences in the Penal Code; [Convention, Article 5 and 2009 Recommendation III i), Annex I(D)]
- b) (i) Clarify by any appropriate means that the foreign bribery offence under the jurisdiction of the ACPO includes the offences of bribery of an EU official under art. 427 PC; (ii) reinforce the coordination between the SPS and the ACPO and more generally between the relevant authorities in relation to foreign bribery allegations, investigations, prosecutions and international cooperation and (iii) ensure that the courts and other law enforcement authorities systematically and urgently inform the ACPO of any foreign bribery allegation which comes to their knowledge; [Convention, Article 5 and 4 and 2009 Recommendation, Annex I(D)]
- c) Ensure that foreign bribery allegations are not prematurely closed; [Convention, Article 5 and 2009 Recommendation, Annex I(D)]
- d) Clarify by any appropriate means that foreign bribery cases involving an EU official, as provided under art. 427 and 422 PC, are not subject to the Law on Jury Trials (art. 24(1)); [Convention, Article 5, 2009 Recommendation, Annex I(D)] and Phase 2 recommendation 3d.]
- e) (i) Use proactive steps to gather information from diverse sources of allegations and enhance investigations (ii) raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences; and (iii) consider the establishment of a national database for all ongoing cases with a view to ensure coordination of foreign bribery investigations, including the offences of bribery of EU officials, nationally and to avoid intelligence gaps; [Convention, Article 5, 2009 Recommendation, Annex I(D) and Phase 2 recommendation 3e.]

- f) As necessary and in compliance with the relevant rules and procedures, and respecting the fundamental rights of the Defendant, ensure that the decisions published include elements of the arrangements reached through *conformidad*, when appropriate, such as the terms of the arrangement (in particular, the amount agreed to be paid); [Convention, Article 3 and 2009 Recommendation, Annex I(D)]
- g) Concerning the statute of limitations, as part of its announced reform of the Penal Code (i) extend the statute of limitations applicable to the offences under art. 420 PC and align it with the period (10 years) for the offences under arts. 419 and 445 PC; (ii) review the possibilities for suspension and interruption of the limitation period with a view to cover, in particular, situations where the accused is out of the country or in hiding; and (iii) clarify the rules governing the statute of limitations applicable to legal persons. [Convention, Article 6]

6. Regarding mutual legal assistance, the Working Group recommends that Spain take steps to ensure that its authorities are more proactive in seeking MLA or other forms of international cooperation in possible foreign bribery cases. [Convention Article 9; 2009 Recommendation XIII(i) and (iii)]

7. Regarding extradition, the Working Group recommends that Spain (i) take measures to assure either that it can either extradite or prosecute its nationals for the offence of bribery of foreign public officials; and (ii) raise awareness among its judges, prosecutors and Central Authority of the obligations contained in Article 10 of the Convention and of the legal principle of *aut dedere aut judicare*. [Convention, Articles 6 and 10(3)]

Recommendations for ensuring effective prevention and detection of foreign bribery

8. Regarding tax measures to combat bribery of foreign public officials, the Working Group recommends that Spain ensure (a) that tax officials are trained on the applicable requirement for reporting suspected offences to law enforcement authorities; (b) that the Basque and Navarra tax authorities take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials; (c) that central and regional tax authorities inform both tax officials and tax payers of this prohibition, along with the type of expenses that are deemed to constitute bribes, including gifts and entertainment expenses; and (d) that suspicious expenses, irrespective of their size, are routinely analysed by Spanish tax officials; [2009 Tax Recommendation, I; Phase 2 recommendation 7]

9. Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Spain raise awareness among companies of all sizes and sectors of the implications of art. 31bis PC and of the risk of corporate liability for bribery of foreign public officials, along with the corresponding need to put in place an effective anti-bribery compliance programme; [2009 Recommendation, Annex II]

10. Regarding reporting suspicions of foreign bribery, the Working Group recommends that Spain (i) create and publicise a clear means by which reports of suspected instances of foreign bribery can be made by both the private sector and general public to law enforcement authorities; (ii) establish an internal reporting procedure within the Ministry of Foreign Affairs and inform officials at Spanish overseas embassies of the obligation to report suspected instances of bribery to Spanish law enforcement authorities; and (iii) consider whether to extend public sector reporting obligations to officials of Spanish agencies that are not currently covered by these obligations. [2009 Recommendation IX ii); Phase 2 recommendation 2a.]

11. Regarding whistleblower protection, the Working Group recommends that Spain promptly adopt an appropriate regulatory framework to protect public and private sector employees from any

discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds; [2009 Recommendation IX iii)]

12. Regarding money laundering, the Working Group recommends that Spain (i) ensure that SEPBLAC, reach out to reporting entities subject to AML obligations in a more proactive way, including on their duty to detect possible instances of foreign bribery; (ii) continue its efforts to detect money laundering linked to foreign bribery and, (iii) ensure that the ACPO provide feedback to SEPBLAC about the outcome of specific cases generated or enriched by information transmitted by the FIU. [Convention, Article 7 and 2009 Recommendation, III i)]

13. Regarding accounting rules and external audit, the Working Group recommends that Spain:

- a) Ensure that accounting offences are effectively investigated and prosecuted, particularly in connection with bribery cases; [Convention, Article 8]
- b) In order to ensure adequate implementation of auditors' obligations to report suspicions of foreign bribery: (i) further publicise this requirement and provide training on the circumstances under which such reporting is required; (ii) pursue the reform of its Technical Standards in order to clarify the requirement to report to management that applies to auditors, and (iii) raise awareness so that auditors know that they should identify, detect and report foreign bribery. [2009 Recommendation X B. iii)]

14. Regarding company internal controls, ethics and compliance programmes or measures, the Working Group recommends that Spain promote, jointly with the relevant professional associations, internal controls, ethics and compliance programmes or measures in businesses involved in commercial transactions abroad, including SMEs, with reference to *inter alia* Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance. [2009 Recommendation, X. C. i); Annex II]

15. Regarding public advantages and export credit, the Working Group recommends that Spain:

- a) Reinforce the reporting framework in place in CESCE and COFIDES, for example by clarifying the criteria for reporting instances of suspected foreign bribery and training staff accordingly; [2009 Recommendation IX]
- b) Pursue its proposal to modify Royal Decree 2061 in order to ensure that, when authorising exporters of military equipment and dual-use goods, JIMDDU (i) requires an anti-bribery declaration on the part of applicants and considers whether they are the subject of bribery prosecutions or convictions; and (ii) considers the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export authorisation. [2009 Recommendation XI i)]

2. Follow-up by the Working Group

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

- a) The impact on the scope and effective enforcement of the offence of the use of the term “contract”, instead of “business”, in Spain’s official translation of the Convention and in the

- foreign bribery offence under art. 445 PC; [Convention, Article 1, 2009 Recommendation, III ii) and V]
- b) The coverage of non-pecuniary benefits under the new legislation; [Convention, Article 1, 2009 Recommendation, III. ii) and V. and Phase 2 recommendation 4.c.]
 - c) Whether art. 31bis PC imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery (given the requirement under art. 31bis PC. that the offence be committed “for the account” and “to the benefit” of the legal person); [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B), (C) and Phase 2 recommendation 5a.]
 - d) The level of sanctions imposed against natural and legal persons, including through *conformidad*; are effective, proportionate and dissuasive: in the light of (i) Spain’s system of suspending and converting sentences of imprisonment; and (ii) the application of mitigating circumstances, especially in cases of solicitation of bribes by foreign public officials; [Convention, Article 3; 2009 Recommendation V]
 - e) The use made of administrative sanctions under the conditions set out in art. 66 bis PC; [Convention, Article 3; 2009 Recommendation V]
 - f) The use made of criminal and administrative penalties for false accounting against natural and legal persons; [Convention, Article 8; 2009 Recommendation X A iii)]
 - g) The implementation by the auditing and accounting professions of their obligation to develop specific training on foreign bribery and adopt “red flag indicators” to help detecting foreign bribery in companies’ accounts; [Convention Article 8; 2009 Recommendation III i)]
 - h) The guarantees of independence from the other powers of (i) of the State Prosecutor General (FGE) and indirectly those of the ACPO, as well as those (ii) of the investigating magistrates, with a view to ensure that a potential lack of independence of the prosecution combined with its increasingly prominent role does not lead to the consideration of factors prohibited under Article 5 of the Convention; [Convention, Article 5 and 2009 Recommendation, Annex I(D)]
 - i) The investigative powers available to the ACPO prosecutors and that the investigation tools available to them in the prosecutorial investigation phase are sufficient and in particular include the possibility to conduct searches and wiretapping (within the limits of its data protection rules and the provisions of its Constitution); [Convention, Article 5 and 2009 Recommendation, Annex I(D)]
 - j) Whether the system of risk-based tax audits is adequate in terms of the risks taken into account, including the risk of foreign bribery, when deciding which companies to audit, and how often; [2009 Tax Recommendation, I. ii)]
 - k) The impact of the Tax Amnesty Law on the effective prevention, detection and punishment of possible foreign bribery by tax officials; [2009 Recommendation III (iii); 2009 Tax Recommendation II]
 - l) The flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities. [2009 Recommendation XI i); Phase 2 recommendation 6e]

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/Spainphase3reportEN.pdf>

SWEDEN (JUNE 2012)

The Working Group on Bribery commends the Swedish authorities for their high level of cooperation and transparency throughout the Phase 3 process. The Working Group notes that Sweden has very recently taken two important steps to improve compliance with the Anti-Bribery Convention. On 1 July 2012, a new law will come into force, which amends the foreign bribery offence as well as establishes a new offence of the negligent financing of bribery. In January 2012, the National Anti-Corruption Police Unit (NACPU) was created to support the National Anti Corruption Unit (NACU) with corruption investigations, including foreign bribery. The Swedish authorities recognise that it is not possible for the Working Group to assess the effectiveness of these initiatives at such an early stage, and therefore invite the lead examiners to return for a further on-site visit in two years.

The Working Group recommends a Phase 3bis evaluation for the following principal reasons: 1) the absence of a single prosecution of foreign bribery in Sweden for more than 8 years despite several allegations involving major Swedish companies; 2) the potential reasons for the absence of prosecutions, which are discussed in detail throughout this report; 3) new bribery legislation will enter into force on 1 July 2012; and 4) the inability to assess at this stage the impact of amendments to the Penal Code, and the very recent increase of law enforcement resources. The Working Group recommends a Phase 3bis evaluation, the time and scope of which will be decided at a one year written follow-up report. In addition, the Group recommends a six-month written follow-up report concerning Recommendations 1, 3(a), 3(b), 3(d), 4(a), 4(c), 4(d), and 6.

Sweden has now fully implemented the following Phase 2 recommendations that remained outstanding in Phase 2: 5(a) and (b) on reporting by auditors; 8 on the scope of the definition of “foreign public official”; and 12(a) on broadening the grounds for confiscation. However the following recommendations remain unimplemented: 10 on prosecutorial discretion; and 12(c) on the standard contracts of the Swedish International Development Cooperation Agency (Sida). Recommendations 9(b) and (c) on confiscation and corporate fines respectively remain partially implemented.

In addition, based on the findings in this report on the implementation by Sweden of the Anti-Bribery Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below.

1. Recommendations of the Working Group

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

1. The Working Group recommends that Sweden amend its framework on “corporate fines” for foreign bribery offences to ensure that, in accordance with the Good Practice Guidance in Annex I to the 2009 Recommendation, legal persons are held liable for foreign bribery committed through lower-level employees, intermediaries, subsidiaries, or third-party agents in the circumstances outlined therein, and that legal persons may in practice be held liable for foreign bribery even when individual perpetrators are not prosecuted or convicted. (Convention, Article 2, 2009 Recommendation, para. IV, and Annex I, para. B)

2. The Working Group recommends that Sweden increase the maximum level of fines for legal persons for the foreign bribery offence, in light of the size and importance of many Swedish companies active in international business, the location of their foreign operations, and the business sectors in which they are involved. (Convention, Articles 3.1 and 3.2)

3. Regarding cases of the bribery of foreign public officials involving Swedish nationals or legal persons that take place outside Sweden, the Working Group recommends that Sweden as a matter of priority:

a) Take steps to diligently investigate potential territorial links between Swedish legal persons and allegations of the bribery of foreign public officials perpetrated abroad on behalf of foreign subsidiaries, including by non-Swedish nationals;

b) Take urgent measures to be able to sanction Swedish legal persons for foreign bribery offences committed by them abroad, including when the foreign bribery offence is perpetrated abroad through an intermediary who is not a Swedish national;

c) Issue guidance to the prosecution authorities on the legal and evidentiary requirements for dual criminality in order to establish nationality jurisdiction over cases of foreign bribery that take place abroad, and clarify in the guidance that dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute; and

d) Take appropriate measures to ensure that dual criminality for the purpose of applying nationality jurisdiction can be established regardless if the statute of limitations in the foreign jurisdiction has expired, or the level of sanctions for bribery is lower in the foreign jurisdiction. (Convention, Articles 4.1, 4.2 and 4.4)

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

a) As recommended already in Phase 2, issue guidelines to prosecutors clarifying that it is always in the “public interest” to prosecute cases of foreign bribery, subject to the normal exceptions under the Code of Judicial Procedure, and that investigations and prosecutions of foreign bribery 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;

b) Take appropriate steps to ensure that all prosecutors are aware of the requirement to record their reasons for terminating investigations of the bribery of foreign public officials in the computer system (CABRA);

c) Ensure as a matter of priority that adequate resources are available for prosecuting cases of the bribery of foreign public officials;

d) Ensure as a matter of priority that the investigators at NACPU receive adequate specialized training on investigating cases of foreign bribery; and

e) Ensure that the statute of limitations applied to foreign bribery cases, including at the investigative stage, is as a rule the ten-year period for aggravated foreign bribery; and

f) Proactively detect and investigate potential accounting violations related to foreign bribery. (Convention, Articles 5 and 6, and Commentary 27)

5. The Working Group recommends that Sweden take the following urgent measures to improve the detection of foreign bribery through its anti-money laundering system as follows:

a) Increase awareness in the FIU concerning the kinds of transactions that could potentially involve the laundering of the proceeds of the bribery of foreign public officials;

b) Encourage financial institutions to develop money laundering typologies and provide training on the laundering of the proceeds of foreign bribery; and

c) Ensure that NACU and where relevant the Economic Crimes Authority (ECA) provide feedback to the FIU when reports from the FIU have led to foreign bribery investigations. (Convention, Article 7)

Recommendations for ensuring effective prevention and detection of foreign bribery

6. The lead examiners recommend that Sweden take concrete and meaningful steps to examine how it could increase the awareness of Swedish society-at-large of the importance of combating the bribery of foreign public officials by Swedish businesses.

7. Regarding efforts by Sweden to encourage companies to adopt adequate internal controls, ethics and compliance programmes or measures, the Working Group recommends that Sweden take appropriate steps to:

a) Continue encouraging the private sector, including SMEs, to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the OECD Good Practice Guidance; and

b) Raise awareness in the private sector of the new offence of bribery, which includes foreign bribery and negligent financing of bribery, and clarify for the private sector the legal consequences of the proposed code for self-regulation on bribery related matters in the business community, including that the amendments to the Penal Code do not provide a safe harbour for complying with the code; and

c) Urgently take concrete steps to raise awareness in the accounting and auditing profession of the need to diligently report possible acts of foreign bribery according to the established legal system for reporting bookkeeping irregularities. (2009 Recommendation, para. X.C, and Annex II)

8. Regarding the role of official development assistance funded procurement and officially supported export credits in preventing and detecting foreign bribery, the Working Group recommends that Sweden:

a) Implement as soon as possible the outstanding Phase 2 recommendation to review the standard contracts that Sida and Swedfund use with their clients in order to ensure that they specifically prohibit the bribery of foreign public officials related to the contracts;

b) Establish a channel that enables the Swedish Export Credit Corporation (SEK) and the Exports Credits Guarantee Board (EKN) to obtain prompt information about convictions of individuals and the imposition of “corporate fines” for foreign bribery in Swedish courts; and

c) Establish effective channels of communication between SEK/EKN and NACU, to ensure that SEK and EKN report suspicions of foreign bribery without delay to NACU, and to ensure that NACU routinely consult SEK and EKN when investigating allegations of foreign bribery in which official export credit guarantees are involved, as appropriate. (Convention, Article 3.4, 2009 Recommendation, paras. III. vii), XI and XII)

2. Follow-up by the Working Group

9. The Working Group will follow-up the issues below as jurisprudence and practice develop on the implementation of the foreign bribery offence in Sweden:

a) Application of the new foreign bribery offence and the offence of negligent financing of bribery once they come into force, to assess whether they effectively apply to situations including the following: the foreign public official has not requested or received the bribe or an offer or promise of a bribe; instances where a third party acts outside the scope of engagement but for the benefit of the company; complicated case scenarios involving intermediaries and/or foreign subsidiaries; and regarding the distinction between simple and aggravated foreign bribery;

b) Application of the new offence of negligent financing of bribery to legal persons;

c) Application of sanctions for foreign bribery to natural persons;

d) Application of confiscation, including “extended confiscation”;

e) Whether the automatic reporting to the Tax Administration by Swedish courts of foreign bribery convictions will also apply where “corporate fines” are imposed on legal persons;

f) Whether in practice the six-year period within which tax deductions for payments constituting bribes to foreign public officials may be retroactively denied is effective, particularly in view of the ten-year statute of limitations for aggravated foreign bribery; and

g) Whether in practice the application of the ground for denying mutual legal assistance (MLA) when “circumstances are such that the request should not be granted” is an impediment to the provision of prompt and effective MLA to other Parties to the Anti-Bribery Convention for proceedings within the scope of the Convention;

h) Whether employees of Swedish companies report suspected cases of foreign bribery through whistleblower channels, and whether these reports lead to investigations and prosecutions.

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<http://www.oecd.org/daf/anti-bribery/Swedenphase3reportEN.pdf>

SWITZERLAND (DECEMBER 2011)

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

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

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

1. Recommendations of the Working Group

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

1. Regarding criminal liability of legal persons, the Working Group recommends that Switzerland clarify the concept of 'defective organisation' for law enforcement authorities, including by way of specialised training [2009 Recommendation, Annex I, D];
2. Regarding investigations and prosecutions, the Working Group recommends that Switzerland:
 - a) encourage cantons where the Office of the Attorney General remains subject to a public authority, to ensure its autonomy in relation to such authority [Convention, Article 5; 2009 Recommendation, Annex I, D];
 - b) periodically review the resources available to law enforcement authorities in order to effectively combat bribery of foreign public officials [2009 Recommendation, V and Annex I, D];
3. In relation to the use of special procedures and the mechanism for Reparation, the Working Group recommends that Switzerland, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner, the reasons for using that particular procedure, as well as the basis for the decision and the sanctions that were ordered. [Convention, Article 3];
4. Regarding money laundering, the Working Group recommends that Switzerland consider establishing a statutory limitation period for money laundering in connection with the foreign bribery offence, when it does not amount to aggravated money laundering under article 305^{bis}(2) SCC, that allows sufficient time for investigation and prosecution of such cases [2009 Recommendation, III (ii)];

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

Recommendations for ensuring effective prevention and detection of foreign bribery

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

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

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

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

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

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

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

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

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

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

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

2. Follow-up by the Working Group

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

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

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

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

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

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

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

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Switzerlandphase3reportEN.pdf>

TURKEY (OCTOBER 2014)

Although the Working Group on Bribery welcomes Turkey's efforts to improve its foreign bribery offence, it remains seriously concerned about Turkey's low level of enforcement of foreign bribery, as well as certain aspects of its corporate liability legislation. Since the entry into force of the foreign bribery offence in Turkey in 2003, only one prosecution has occurred, resulting in an acquittal, and only six foreign bribery investigations have been initiated. The Working Group considers that detection could be improved through enhanced training for law enforcement officials, increased engagement with relevant public agencies, and improved reporting mechanisms such as enhanced whistleblower protections. Further, the Working Group emphasises that Turkey should ensure foreign bribery enforcement is not subject to improper influence of a political nature in a manner contrary to Article 5 of the Convention.

Regarding outstanding recommendations since the Phase 2 and 2bis written follow-up report in March 2010⁸, the Working Group concludes that recommendation 5(b) remains partially implemented.

In conclusion, based on this report's findings on Turkey's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the recommendations in Part 1 below; and (2) will follow up the issues identified in Part 2 below. The Working Group invites Turkey to submit a report in writing in one year (i.e. by October 2015) on its implementation of Recommendations 1, 3, and 7b, and to submit a written follow-up report in two years (i.e. by October 2016) on its implementation of all recommendations and follow-up issues. The Working Group also invites Turkey to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits its oral and written reports.

1. Recommendations of the Working Group

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

17. Regarding the liability of legal persons, the Working Group recommends that Turkey:

- a) Amend its law or otherwise expressly clarify that all Turkish legal persons, including state-owned and state-controlled enterprises, can be held liable for foreign bribery [Convention, Article 2];
- b) Amend its law or otherwise expressly clarify that legal persons may be held liable for foreign bribery without prior prosecution or conviction of a natural person [Convention, Article 2; 2009 Recommendation, Annex I.B];
- c) (i) Increase the level of sanctions applicable to legal persons for foreign bribery to ensure they are effective, proportionate and dissuasive; and (ii) take all necessary measures to ensure that confiscation of the bribe and proceeds of bribery (or monetary sanctions of comparable effect) may be imposed on legal persons without prior conviction of a natural person [Convention, Articles 2 and 3; 2009 Recommendation Annex I.B]; and

⁸ See Annex 1: Phase 2 and 2bis recommendations to Turkey and assessment of implementation by the Working Group on Bribery in 2010.

- d) Enhance the usage of, and train law enforcement authorities on, the corporate liability provisions in foreign bribery cases [Convention, Articles 2 and 5; Commentary 27; 2009 Recommendation Annex I.D].
18. Regarding sanctions and confiscation, the Working Group recommends that Turkey:
- a) Consider making fines as well as imprisonment available as sanctions for natural persons in foreign bribery cases [Convention, Article 3; 2009 Recommendation V];
 - b) Maintain detailed statistics on sanctions imposed in foreign bribery cases as they arise [Convention, Article 3]; and
 - c) Take further steps, such as through providing guidance and training, to ensure that law enforcement authorities routinely consider confiscation in foreign bribery cases [Convention, Articles 3 and 5; 2009 Recommendation III.ii].
19. Regarding investigation and prosecution of foreign bribery, the Working Group recommends that Turkey:
- a) Review its overall approach to enforcement in order to effectively combat foreign bribery [Convention, Article 5; Commentary 27; 2009 Recommendation V. and Annex I.D.];
 - b) Ensure that sufficient resources and expertise to more effectively detect, investigate and prosecute foreign bribery are made available to (i) Public Prosecutor's Offices, in particular in the specialised Public Prosecutor's Offices responsible for financial and economic crime; and (ii) the police [Convention, Article 5; 2009 Recommendation III.i and Annex I.D.];
 - c) Take a more proactive approach to the detection of foreign bribery, including by (i) promptly reviewing and improving existing mechanisms for gathering information reported in the media; and (ii) ensuring law enforcement officials engage with other investigative authorities, such as those involved in anti-money laundering, tax audits, accounting and auditing [Convention, Article 5; Commentary 27; 2009 Recommendation V. and Annex I.D.]; and
 - d) Ensure that investigation and prosecution of foreign bribery is not 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, and take all necessary steps to ensure that any reassignment of police, prosecutors or magistrates does not adversely affect foreign bribery investigations and prosecutions [Convention, Article 5; Commentary 27].

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

20. Regarding money laundering, the Working Group recommends that Turkey increase its capacity to detect foreign bribery through money laundering cases, including:
- a) Raise awareness among reporting entities of foreign bribery as a predicate offence to money laundering [Convention, Article 7; 2009 Recommendation III.i];
 - b) Increase awareness in MASAK on foreign bribery as a predicate offence to money laundering [Convention, Article 7; 2009 Recommendation III.i];

- c) Encourage law enforcement to more actively use MASAK as a resource in foreign bribery investigations [Convention, Articles 5 and 7; 2009 Recommendation III.i]; and
 - d) Address the issue of politically exposed persons (PEPs) in its anti-money laundering legislation [Convention, Article 7; 2009 Recommendation III.i].
21. Regarding accounting, auditing, and internal controls, ethics and compliance, the Working Group recommends that Turkey:
- a) Ensure that both natural and legal persons can be held liable for the full range of conduct described in Article 8(1) of the Convention and ensure that sanctions for this conduct for legal persons are effective, proportionate and dissuasive [Convention, Article 8];
 - b) (i) Raise awareness among auditors that foreign bribery is a type of fraud; and (ii) promptly train and raise awareness among accounting and auditing professionals (particularly those providing services to non-listed companies) on foreign bribery, including red flags to detect foreign bribery and reporting obligations [Convention, Article 8; 2009 Recommendation III.i and III.v]; and
 - c) Consider broadening the scope of private companies subject to external audit to include non-listed companies operating abroad [Convention, Article 8; 2009 Recommendation X.B; Turkey Phase 2 recommendation 5(b)].
22. With respect to tax-related measures, the Working Group recommends that Turkey
- a) Ensure that law enforcement authorities routinely share information on foreign bribery-related enforcement actions with the tax administration [2009 Recommendation VIII.i; 2009 Tax Recommendation];
 - b) Improve sharing of information and coordination between the Tax Inspection Board and the law enforcement authorities to enhance detection and investigation of foreign bribery [2009 Recommendation VIII.i; 2009 Tax Recommendation].
23. Regarding reporting of foreign bribery, the Working Group recommends that Turkey:
- a) Review existing policies and procedures on detection and reporting of foreign bribery for the Ministry of Foreign Affairs, Ministry of Economy and other public agencies involved with Turkish companies operating abroad, and develop and promote more effective reporting policies and procedures [2009 Recommendation III.iv and IX.i-ii]; and
 - b) Ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery, and take steps to raise awareness of these mechanisms [2009 Recommendation IX.iii].

24. Regarding awareness-raising, the Working Group recommends that Turkey increase awareness-raising efforts in the private sector to (i) specifically target companies, including SMEs, that conduct business in higher-risk corruption locations and sectors abroad; and (ii) highlight the importance of developing and implementing anti-bribery internal controls and corporate compliance programmes, including promoting the 2009 Good Practice Guidance, and consider targeting non-listed Turkish companies (e.g., SMEs) operating abroad [2009 Recommendation III.i and III.v].
25. Regarding public advantages, the Working Group recommends that Turkey:
- a) In the awarding of public advantages, including public procurement and ODA funded contracts, and officially supported export credits, take into consideration, where international business transactions are concerned, and as appropriate, applicants' internal controls, ethics and compliance programmes or measures [2009 Recommendation X.C.vi];
 - b) With respect to public procurement, routinely check the publicly available debarment lists of international financial institutions [Convention, Article 3; 2009 Recommendation XI.i-ii; DAC Recommendation];
 - c) With respect to export credits, provide training to Turk Eximbank staff on detecting foreign bribery, including through conducting adequate due diligence [2009 Recommendation XII.i; 2006 Export Credit Recommendation]; and
 - d) With respect to official development assistance (ODA), take steps to ensure that due diligence is carried out prior to the granting of ODA contracts, including by routinely checking international debarment lists [Convention, Article 3; 2009 Recommendation XI.ii].

2. Follow-up by the Working Group

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

- a) The application of articles 252(4) and 252(9) of the Criminal Code to bribes offered or promised to foreign public officials [Convention, Articles 1 and 3];
- b) The application of the phrase "to be indicated" in article 252(1) of the Criminal Code in relation to bribes provided to a third party beneficiary, such as a family member of an official, a political party, or a charity [Convention, Article 1];
- c) The application of article 43/A of the Code of Misdemeanours, in particular to ensure that (i) the level of authority of the natural person whose conduct triggers the liability of the legal person is sufficiently flexible to reflect the wide variety of corporate decision-making systems; and (ii) legal persons cannot avoid responsibility by using intermediaries, including related legal persons [Convention, Article 2; 2009 Recommendation Annex I.B];
- d) The application of sanctions in foreign bribery cases to ensure that they are effective, proportionate and dissuasive, and the imposition of measures to confiscate the bribe and proceeds of bribery [Convention, Article 3];

- e) Whether Law 6526, which imposes stricter conditions for the use of certain investigative measures, hinders the investigation of foreign bribery cases [Convention, Article 5; 2009 Recommendation V and Annex 1.D];
- f) The application of the non-tax-deductibility of bribes in practice, particularly to see whether any of the ongoing foreign bribery investigations and any new investigations lead to the reopening of tax returns [2009 Recommendation VIII.i; 2009 Tax Recommendation I.i and ii]; and
- g) The enforcement actions taken by Turkish authorities in foreign bribery cases where Turkey refuses a request from another country for extradition [Convention, Article 10].

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf>

UNITED KINGDOM (MARCH 2012)

Since Phases 2 and 2bis, the number of foreign bribery-related enforcement actions in the UK against legal and natural persons has commendably increased. In this respect, the designation of the SFO as the UK's lead agency for foreign bribery has had a positive effect. There is also heightened awareness of the Bribery Act and the foreign bribery offence in both the public and private sectors owing in part to the efforts of the UK government, including its overseas missions. The Working Group welcomes these developments and encourages the UK to continue its efforts, especially in vigorously investigating and prosecuting foreign bribery.

Regarding outstanding recommendations from previous evaluations, since its Phase 2 and 2bis Written Follow-Up Reports, the UK has fully implemented Phase 2 Recommendations 1(a), 2(a), 3(a), 3(b), 3(c), 5(b), 5(c), and 7(a); and Phase 2bis Recommendations 1(a), 1(b), 2, 3(a), and 5(a). UK has partially implemented Phase 2 Recommendations 2(b), 4(a), 5(a), 5(b), and 6(b); and Phase 2bis Recommendations 4(a), 4(b), 5(b), and 5(d). UK has not implemented Phase 2bis Recommendations 3(b), 5(e), 7(a), and 7(b). The Working Group expresses its disappointment, however, that the UK did not reassess the national security issues surrounding the Al Yamamah discontinuance before BAE's settlement with US authorities.

In conclusion, based on the findings in this report on the UK's implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites the UK to report orally on the implementation of recommendations 1(b), 5(c), 5(d), 5(f), 7(a), 7(b), 7(c), 9(a) and 9(b) within one year (i.e., by March 2013). The Working Group invites the UK to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by March 2014).

1. Recommendations of the Working Group

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

18. With respect to facilitation payments, the Working Group recommends that the UK:
- (a) co-ordinate its approach to facilitation payment cases to ensure a coherent approach across the SFO, CPS and other UK prosecuting agencies, such as the Scottish Crown Office and Procurator Fiscal Office, as well as use a consistent definition of facilitation payments in its published guidance including the JPG, GCO and Quick Start Guide (Convention Article 5; 2009 Recommendation VI, X.C.i);
 - (b) develop firm criteria for assessing whether companies are moving towards a "zero tolerance" policy within a reasonable timeframe (Convention Article 5; 2009 Recommendation VI, X.C.i).
19. With respect to the Guidance to Commercial Organisations (GCO), the Working Group recommends that the UK:
- (a) concerning hospitality and promotional expenditures, (i) clarify the significance of "reasonable and proportionate" in the GCO, including the reference to industry norms; and (ii) amend the GCO to note that certain examples represent a high risk of bribery (Convention Articles 1, 5; 2009 Recommendation, X.C.i);

- (b) clarify the significance of indirect benefits in determining whether persons may be an “associated person” under section 7 of the Bribery Act (Convention Articles 2, 5).
20. With respect to investigation and prosecution, the Working Group recommends that the UK:
- (a) ensure that the Bribery Act applies equally to joint ventures that were created before and after the entry into force of the Act (Convention Article 5);
 - (b) continue prosecuting both natural and legal persons in a foreign bribery-related case whenever appropriate (Convention Article 5);
 - (c) consider removing the reference in the Code for Crown Prosecutors to mandatory exclusion from EU public procurement contracts (Convention Article 5).
21. Regarding the attribution and assignment of cases, the Working Group recommends that:
- (a) the UK update the 2008 Memorandum of Understanding to clarify attribution rules for Scotland and to account for the Bribery Act’s broader jurisdictional rules (Convention Article 5);
 - (b) where appropriate, the SFO and FSA conduct co-ordinated enforcement actions, and consider seeking criminal and/or civil sanctions in addition to FSA penalties (Convention Articles 3, 5, 8(2)).
22. With respect to the settlement of cases, the Working Group recommends that the UK:
- (a) reconsider the SFO’s policy of systematically settling self-reported foreign bribery cases “civilly wherever possible”, and ensure that self-reported cases result in effective, proportionate, and dissuasive sanctions (Convention Articles 3, 5; 2009 Recommendation, IX.i);
 - (b) amend the SFO’s Approach to Dealing with Overseas Corruption to distinguish between cases reported directly by the company prior to investigation, and cases where a company admits guilt after the commencement of an investigation (Convention Article 5; 2009 Recommendation, IX.i);
 - (c) make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible, including on the SFO’s website (Convention Articles 1, 3, 8);
 - (d) avoid entering into confidentiality agreements with defendants that prevent the disclosure of information to the public about case resolutions (Convention Articles 3, 8);
 - (e) establish clear procedures and criteria for communicating with companies which clearly distinguish between companies seeking advice and those that self-report wrongdoing, as well as make public (where appropriate and in conformity with the applicable procedural rules) in a more detailed manner sufficient information to increase transparency of written advice and provide guidance to companies and decisions not to prosecute in cases of self-reported misconduct (Convention Article 5);
 - (f) ensure that its settlements agreements (i) explicitly reserve the right to provide MLA, and (ii) are not overbroad, including by explicitly reserving the right to prosecute the defendant

for conduct unknown to the UK authorities at the time of the settlement (Convention Articles 3, 5, 9(1)).

23. With respect to sanctions, the Working Group recommends that the UK:

- (a) regarding corporate monitors, (i) provide guidance on when and on what terms the UK authorities would seek a monitor; (ii) make public where appropriate the monitoring agreement, the reasons for imposing a monitor, and the basis for the scope and duration of the monitoring; and (iii) ensure that breaches of monitoring agreements result in effective sanctions (Convention Article 3);
- (b) ensure that (i) payments of reparations and compensation to foreign countries by defendants are not lost to corruption; and (ii) plea and settlement agreements impose further specified sanctions if defendants fail to make the required payments by a specified deadline (Convention Article 3);
- (c) regarding public procurement, (i) consider undertaking a systematic approach to allow relevant agencies to easily access information on companies sanctioned for corruption such as through the establishment of a national debarment register; (ii) train public contracting authorities to carry out this due diligence more effectively, including by checking for any convictions of the tenderer awarded the contract; and (iii) make available on the Cabinet Office's website guidance on excluding economic operators, including factors to be considered in deciding whether to exclude a company convicted under Section 7 of the Bribery Act (Convention Article 3(4); 2009 Recommendation, XI.i).

24. With respect to resources and priority, the Working Group recommends that the UK:

- (a) maintain the SFO's role in criminal foreign bribery-related investigations and prosecutions as a priority (Convention Article 5);
- (b) ensure that other government departments assume a greater responsibility in assisting companies to prevent corruption (Convention Article 5);
- (c) ensure that SFO and police resources for foreign bribery-related cases are adequate (Convention Article 5).

25. With respect to Article 5 of the Convention, the Working Group recommends that the UK:

- (a) take steps to ensure that Article 5 is clearly binding (though not necessarily through legislation) on investigators, prosecutors (including Scotland), the Attorney General and the Lord Advocate at all stages of a foreign bribery-related investigation or prosecution, and in respect of all investigative and prosecutorial decisions (Convention Article 5);
- (b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5, so that they can assist investigators and prosecutors to act in accordance with that Article (Convention Article 5).

26. With respect to Crown Dependencies (CDs) and Overseas Territories (OTs), the Working Group recommends that the UK:

- (a) promptly adopt a roadmap setting out specific goals, concrete steps, deadlines, and the provision of technical assistance for implementing the Convention in the OTs (Convention Article 1);
- (b) extend jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs (Convention Article 4(2)).

27. With respect to measures for mutual legal assistance (MLA), the Working Group recommends that the UK:

- (a) produce more detailed statistics on formal MLA requests received, sent and rejected, so as to identify more precisely the proportion of those requests that concern foreign bribery (Convention Article 9(1));
- (b) ensure, where possible, that pending MLA requests are not adversely affected by the UK's conclusion of its own investigations.

Recommendations for ensuring effective prevention and detection of foreign bribery

28. With respect to awareness-raising, the Working Group recommends that the UK continue its efforts, in co-operation with business associations, to encourage companies in particular SMEs to develop internal control and compliance mechanisms; raise awareness of the FSA's foreign bribery-related enforcement actions, the UK Corporate Governance Code, and the FSA's Listing Principles (2009 Recommendation X.C., and Annex II).

29. With respect to tax-related measures, the Working Group recommends that the UK:

- (a) ensure that Her Majesty's Revenues and Customs (HMRC) proactively enforces the non-tax deductibility of bribe payments against defendants in past and future foreign bribery-related enforcement actions, including by systematically re-examining defendants' tax returns for the relevant years to verify whether bribes had been deducted, and examining why HMRC failed to detect proven cases of bribery (2009 Recommendation, VIII.i; 2009 Tax Recommendations);
- (b) strengthen HMRC's training and awareness-raising programmes for tax examiners to detect, prevent and report foreign bribery (2009 Recommendation, VIII.i; 2009 Tax Recommendations);
- (c) ensure that HMRC is obliged to provide information for use in foreign bribery-related investigations upon request and report suspicions of foreign bribery to the SFO (2009 Recommendation, VIII.i; 2009 Tax Recommendations);
- (d) ensure that the SFO continues to share information on foreign bribery-related enforcement actions with HMRC (2009 Recommendation, VIII.i; 2009 Tax Recommendations).

30. Regarding export credits, the Working Group recommends that Export Credits Guarantee Department (ECGD):

- (a) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on the merits, make vigorous use of all of its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4); 2009 Recommendation, XI.i);
- (b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4); 2009 Recommendation, XI.i).

2. Follow-up by the Working Group

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

- (a) the following matters under the Bribery Act and associated guidance: facilitation payments; hospitality payments; the written law exception; corporate liability; and the interpretation of “carries on a business or part of a business, in any part of the United Kingdom” (Convention Articles 1, 2; 2009 Recommendation, VI);
- (b) legislative and other efforts concerning plea negotiations, civil settlements, deferred prosecution agreements and plea agreements (Convention Article 5);
- (c) impact of the National Crime Agency on the UK’s priority, co-ordination, resources and framework for investigating and prosecuting foreign bribery-related cases (Convention Article 5);
- (d) impact of the UK’s disclosure framework on the enforcement of foreign bribery-related offences (Convention Articles 3, 5);
- (e) whistleblower protection to determine if whistleblowers who report in good faith and on reasonable grounds are protected under the Public Interest Disclosure Act (PIDA) (2009 Recommendation, IX, X.C.v);
- (f) implementation of the “forum” bar to extradition (Convention Article 10).

Complete Phase 3 Report available at:
<http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>

UNITED STATES (OCTOBER 2010)

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

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

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

1. Recommendations of the Working Group

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

1. Regarding the statute of limitations, the Working Group recommends that the United States ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution (Convention, Article 6).
2. Concerning the foreign bribery offences in the FCPA, for the purpose of further increasing effectiveness of combating the bribery of foreign public officials in international business transactions, the Working Group recommends that the United States:
 - a) In its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, consider the views of the private sector and civil society, particularly on ways of clarifying the ‘gray’ areas identified by them (Convention, Article 1, 2009 Anti-Bribery Recommendation VI.i);
 - b) Consolidate and summarise publicly available information on the application of the FCPA in relevant sources, including on the affirmative defence for reasonable and bona fide expenses in recent Opinion Procedure Releases and enforcement actions (Convention, Article 1); and

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

Recommendations for ensuring effective prevention and detection of foreign bribery

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

2. Follow-up by the Working Group

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

Complete Phase 3 Report available at:

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf>