



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

SLOVENIA: PHASE 1
REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997
RECOMMENDATION

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 28 February 2005.

SLOVENIA

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 REVISED RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

1. Slovenia is the first country to accede to the Convention since its adoption in 1997.¹ Pursuant to article 13 of the Convention, which regulates in accession,² Slovenia formally applied to the OECD Secretary General to become a full participant to the OECD Working Group on Bribery in International Business Transactions and to accede in the Convention in December 2000. After a review of this application by the Working Group, the Council of the OECD approved Slovenia's participation in the Working Group in June 2001, and Slovenia participated in its first Working Group meeting the same month. Slovenia deposited its instrument of accession and became a Party to the Convention on 6 September 2001.

The Convention and the Slovenian legal system

2. To comply with the requirements of the Convention, Slovenia introduced the offence of bribery of foreign public officials in the Slovenian Penal Code (PC) in March 1999. Subsequent to the 2001 Working Group discussions on Slovenia's application, amendments to the Penal Code were adopted on 20 April 2004 (Official Gazette No. 40/04) and entered into force on 5 May 2004. They modify the definition of foreign public officials and increase the sanctions.

3. Article 268 of the Penal Code sanctions the active bribery of "officials" and article 126 defines "officials" as covering both Slovenian and foreign public officials. Pursuant to the 1999 *Responsibility of Legal Persons for Criminal Offences Act* legal persons are liable for the offence of bribing a foreign public official. In the field of money laundering, Slovenia uses an "all-crime approach" pursuant to which all criminal offences, including bribery of Slovenian and foreign public officials, are predicate offences for the purpose of money laundering.

4. To further improve co-ordination among the responsible agencies and provide a comprehensive strategy against corruption (including transnational bribery), the Office of the Republic of Slovenia for Prevention of Corruption was established on 15 March 2001. It has recently been replaced by the Commission for the Prevention of Corruption.³ The Commission's main tasks are, among others: to identify loopholes in the existing legislation and in practise, to propose improvements such as the April 2004 amending law, to draw the attention of all public institutions to

¹ Slovenia is not an OECD member country. Five other countries that were not member countries signed the Convention in 1997: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic (the latter became a member country in 2000).

² Pursuant to article 13 of the Convention, the Convention is "open to accession by any non signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions".

³ *New Anti-Corruption Act* (Official Gazette No. 2/04); the new Commission started with its work on 1 October 2004.

the implementation of Slovenian international obligations in the field of corruption, and to serve as a contact point for international co-operation in the field of corruption prevention.

5. The Lead Examiners welcome the establishment of the Commission for the prevention of corruption and acknowledge that it is an important part of the overall legal and institutional framework for preventing and suppressing corruption in Slovenia. As it is a new institution, the challenge now is to become fully operational and the Lead Examiners encourage the Slovenian authorities to support the independent Commission in its efforts.

6. The Slovenian Constitution regulates the hierarchy of norms: pursuant to article 8, “laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.” Therefore, the Slovenian authorities indicate that prosecutors and judges refer directly to international conventions when interpreting national laws that implement them. The Commentaries to the Convention do not have a binding nature in Slovenia. They nevertheless serve as an additional source for the interpretation of the basic text of the Convention. Finally, the Slovenian authorities state that in order to be passed by Parliament, proposed legislation must be supported by explanations on all articles. Those explanations, together with the basic legal text, are published in “*Poročevalec*” (“Messenger”, official edition of the Parliament), and serve as a primary legal source when interpreting the legislation.

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

7. Article 268, which criminalises the bribery of a foreign public official, provides:

[Improper acts]

(1) Whoever promises, offers or gives a reward, a gift or any other benefit to an official either for him/her or for any other person, in order that such official performs within the scope of his/her official authority an official act which he/she should not have performed or not to perform an official act which he/she should or could have performed shall be punished by imprisonment of one to five years and a fine.

[Proper acts]

(2) Whoever promises, offers or gives a reward, a gift or any other benefit to an official either for him/her or for any other person, in order that such official performs within the scope of his or her official authority an official act which he/she should or could perform or not to perform an official act which he/she anyhow may not perform shall be punished by imprisonment of six months to three years.

[Waiver of punishment]

(3) The perpetrator of the offences provided for in preceding two paragraphs that gave a reward, a gift or any other benefit on the request of an official and subsequently reported the offence before it was discovered or before knowing that the offence was discovered is criminally liable, but the court may waive the punishment.

[Confiscation of the bribe]

(4) The reward, gift or other benefit given shall be confiscated; in the case of the previous paragraph the court may decide to restore them to the person who gave it.

8. In summary, article 268 provides two active bribery offences. The first offence, under article 268(1), sanctions bribery for the purpose of obtaining acts that the official should not perform, or omissions that he/she should or could have performed. Throughout this report, this form of bribery is referred to as bribery for an “improper act”, and is treated as the more serious of the two offences, with

more serious sanctions. The second offence, under article 268(2), sanctions bribery for the purpose of obtaining acts that the official should or could perform or omit to perform acts that he/she may not in any case perform. Throughout the report, this form of bribery is referred to as bribery for a “proper act”. (see point 1.1.8)

9. Article 268 of the Slovenian Penal Code sanctions the active bribery of “officials”. This term is defined in article 126 (see point 1.1.6) and covers officials of Slovenia, foreign countries and public international organisations, as well as the international court or tribunal. Paragraph 4 provides for the confiscation of the bribe (see part 3.6 on confiscation).

10. Paragraph 3 sets forth a waiver of punishment for effective regret in cases of solicitation by the public official, which the judge can discretionarily admit. The lead examiners consider that this provision may play an important role in identifying domestic officials who have been bribed, enabling the Slovenian authorities to pursue the passive bribery of domestic officials. For domestic policy reasons, this approach has its advantages. However, when applying this provision to the bribery of foreign public officials, the important policy rationale no longer applies. Such a waiver is not contemplated by article 1 of the Convention and may lead to a significant loophole in the implementation of the Convention.

11. The general part of the Penal Code (articles 11 to 21) sets forth the general circumstances that exonerate a person from criminal liability or responsibility, including for the offence of bribery (e.g., state of necessity, duress, mistake of law, mistake of facts, etc.). In particular, the Slovenian authorities indicated that the defence of mistake of law is rarely accepted by courts, but has been accepted in a recent decision of the Supreme Court concerning the offence of abuse of official authority.⁴

1.1 The Elements of the offence

1.1.1 any person

12. Article 268 of the Penal Code (PC) sanctions “whoever” bribes a foreign public official. This applies to all natural persons.

13. Pursuant to the Slovenian Constitution, the parliamentarians of the National Assembly, Members of the National Council⁵ and Constitutional Court judges are immune from prosecution upon their request, except where immunity has been lifted by the relevant body or where the person has been apprehended in the course of committing an offence punishable by more than 5 years of imprisonment.⁶ Judges also benefit from immunity for the criminal offence perpetrated in the

⁴ In this case, the court held that the public official’s conduct (abuse of official funds) was justifiable because he relied on legal advice from two sources. The Slovenian authorities provided a summary of the facts and it would appear that the *ratio decidendi* would only apply to this very limited fact pattern.

⁵ The National Council is the representative body for social, economic, professional and local interests. (Article 96 of the Constitution)

⁶ See articles 83, 100 and 167 of the Constitution. In addition, no deputy of the National Assembly shall be criminally liable for any opinion expressed or vote cast at sessions of the Assembly or its working bodies.

performance of their judicial office.⁷ The immunities do not extend to prosecutors. The Slovenian authorities indicate that 20 members of Parliament formally initiated on 8 December 2004 the abolishment of the procedural immunity in the Constitution. The Commission for the Prevention of Corruption, based on discussions with the Chairman of Parliament, has prepared a set of guidelines for the members of Parliament deciding on immunities. Those guidelines, which will be discussed in January 2005, basically limit the immunity to deeds closely and directly related to the performance of the function of the parliamentarians.

1.1.2 intentionally

14. In accordance with article 15 of the PC, bribery of a (foreign) public official can be committed only intentionally. Article 15(2) of the PC provides that “the perpetrator shall be guilty if he has committed a criminal offence with intent ...”. The Slovenian authorities explain that case law also admits probable intent.

15. The Slovenian authorities indicate that intent can be either direct intention (*dolus directus*) or recklessness (*dolus eventualis*).⁸ The Slovenian authorities confirm that the case where a company representative directs an intermediary to obtain a contract from a foreign government through “any means” without expressly directing him/her to bribe would be covered. Similarly, they confirm that a person would be liable when he/she instructs another to bribe a foreign public official but does not specify the particular individual to be bribed.

1.1.3 to offer, promise or give

16. Article 268 refers to whoever “promises, offers or gives” a bribe. For an offence to be completed the “promise, offer or giving” must reach the public official, but further actions such as acceptance or rejection of the offer by the official are irrelevant. In the case where the public official is unaware of the promise or offer, i.e. where the offer, promise or gift does not reach the official, the offence is criminalised as attempted bribery (discussed further under point 1.3).

17. Article 268 applies irrespective of whether the briber promises or gives a bribe in response to a solicitation by the foreign public official. However, in the event the public official solicited the briber, the latter can escape sanctions if he/she reports the acts to the Slovenian authorities. As already mentioned, the lead examiners consider that a defence of effective regret is not permitted under the Convention.

1.1.4 any undue pecuniary or other advantage

18. Article 268 refers to “a reward, gift or any other benefit”. According to the Slovenian authorities, these words, used in different provisions of the Penal Code, have been consistently interpreted broadly by courts and legal commentators as any kind of undue advantage – consequently these terms cover pecuniary and non-pecuniary undue advantages, including intangible advantages such as advice, data or information. The Slovenian authorities confirm that, for instance, this includes the admission of a public official’s child to a school where he/she has not met the academic criteria.

⁷ Article 134(2): If a judge is suspected of a criminal offence in the performance of judicial office, he may not be detained nor may criminal proceedings be initiated against him without the consent of the Assembly.

⁸ Negligence is not covered: Article 15(3) provides that “If the perpetrator has committed a criminal offence through negligence, he shall be liable only when so prescribed by the statute” and articles 268 to 269a do not mention it.

The Slovenian authorities further indicate that there is no minimum threshold for the value of the bribe.

19. The Slovenian authorities indicate that in absence of case law on transnational bribery, they cannot predict how courts will take into account Commentaries 7 and 8 to the Convention when deciding on a case.⁹ They nevertheless consider that a “defence” based on Commentary 7 would not be successful.

1.1.5 whether directly or through intermediaries

20. Article 268 does not stipulate that the offence may be committed through intermediaries as set forth in article 1.1 of the Convention. The Slovenian authorities nevertheless state that persons who bribe through intermediaries are punishable under Slovenian law, although they cannot provide supporting case law.

21. The Slovenian authorities indicate that the new article 269a criminalising trading in influence would cover bribery through intermediaries. Article 269a covers “whoever promises, offers or gives to another person a reward, a gift or any other benefit for that or another person, in order that such person exploit his/her position or influence...” This would cover cases where the intermediary actively influences a public official. The lead examiners consider that article 269a is not applicable to cases where the intermediary does not abuse real or supposed influence, but simply acts as a medium for communicating or transferring the offer, promise or gift.

22. However, rules on participation in criminal offences apply to bribery. Pursuant to article 26 of the Penal Code, “anybody who intentionally solicits another person to commit a criminal offence shall be punished as if he/she him/herself had committed it” and shall be punished for the criminal attempt if the perpetration of the offence falls short of the intended consequence or even if the offence has not been attempted by the person solicited (articles 26 and 28). In addition, article 25 covers cases where “two or more persons are engaged jointly in the commission of a criminal offence by collaborating in the execution thereof or by the performance of any act representing a decisive part of committing the offence”. Article 29 states that participants are liable within the limits of their respective intents. Thus, the rules on participation seem to cover cases involving bribes through intermediaries where the briber and intermediary jointly participate in the offence. Finally, the Slovenian authorities indicate that case law on other intentional offences clarifies that the person who used an intermediary could be convicted where the intermediary is merely an unwitting tool of the briber.

1.1.6 to a foreign public official

23. Article 268 sanctions the active bribery of “officials”. Article 126 of the General Part of the Penal Code provides definitions of various terms found in the Code, including the definition of “officials” in paragraph 2:

(2) For the purpose of this Code the term “official” shall mean:

⁹ Commentary 7: “[The conduct described in Article 1 of the Convention] is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.” Commentary 8: “It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”

- 1) a deputy of the National Assembly, a member of the National Council, and a member of a local or regional representative body;
- 2) a person carrying out official duties or exercising a public function with state bodies;
- 3) any other person exercising official duties by authorisation of the law, of by-law or of the contract **or** arbitration concluded on the basis of the law;
- 4) military person designated as a such with special regulations, in instances when the act is not already criminalised as a criminal offences against military duty;
- 5) a person in a foreign country carrying out legislative, executive or judicial function or any other official duty at any level, providing that he/she meets the substantive criteria under items 1., 2., or 3. of this paragraph;
- 6) a person recognised as an official within a public international organisation providing that he/she meets the substantive criteria under items 1., 2., or 3. of this paragraph;
- 7) a person carrying out judicial, prosecutorial or other official function or duty with the international court or tribunal. (Underlining has been added for emphasis).

24. The Slovenian authorities confirm that sub-paragraphs (1) to (4) apply to Slovenian officials, and sub-paragraphs (5) to (7) to foreign officials (officials of foreign states, international organisations and of the international court).¹⁰ The definition of officials of foreign States in sub-paragraph (5) covers the three branches of power covered by the Convention definition¹¹ and explicitly covers officials “at any level”. The Slovenian authorities confirm that this covers any level of government. The term foreign country or State does not extend to any organised foreign area or entity, such as an autonomous territory or a separate customs territory as required by Commentary 18.

25. The definition of public officials of foreign states and international institutions in sub-paragraphs (5) to (7) is not autonomous. The reference in sub-paragraphs (5) and (6) to sub-paragraphs (1) to (3) indicates that to determine whether a person is a foreign public official, it is first necessary to determine whether the person would conform to the definition of a Slovenian public official. The Slovenian authorities indicate that this is due to the strict interpretation of the principle of legality in Slovenian criminal legal theory. The Slovenian authorities are of the view that this is not an obstacle to the prosecution of bribery of foreign public officials and does not violate requirements of Article 1 of the Convention since the substantive criteria in place for domestic public officials cover all conceivable “types” of public officials, except *de facto* officials, who would probably not be covered by article 126, i.e. persons not formally designated as public officials but who *de facto* hold public authority or perform a public function, such as political party officials in single party States.

26. Sub-paragraph (1) covers persons performing legislative duties. A concern was raised in the 2001 accession discussions concerning members of foreign public assemblies, as Slovenia made a reservation to article 6 of the Council of Europe Criminal Law Convention on Corruption concerning members of foreign public assemblies.¹² Since at that time Slovenian law only criminalised the bribery

¹⁰ The Slovenian authorities underline that the original Slovenian text cannot logically be interpreted as applying only to Slovenian nationals carrying out the relevant public functions in a foreign country, public international organisation and international court or tribunal respectively.

¹¹ Article 1.4.a of the Convention: “‘foreign public official’ means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation”

¹² Article 6 – Bribery of members of foreign public assemblies: “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3 ([active and passive bribery of domestic public officials]), when involving any person who is a member of any public assembly exercising legislative or

of persons elected at the national level (and not local levels), the Slovenian law would not have been in conformity with article 6 of the Council of Europe Convention, which applies to “any” public assembly. The Slovenian authorities indicated that they were considering correcting this situation. With the 2004 amendments to the offence, sub-paragraph (1) now refers to a “*member of a local or regional representative body*”. However, the Slovenian authorities have not repealed the reservation to article 6 of the Council of Europe Criminal Law Convention on Corruption. As the reservation indicates that “Slovenia reserves its right not to establish as a criminal offence under its domestic law the conduct referred to in article 6...”, it is no longer valid in substance, but remains valid formally. The Slovenian authorities indicate that there is no need for reservations anymore and announced that the reservation will be repealed as soon as possible.

27. Sub-paragraph (2) covers persons “carrying out official duties or exercising a public function with state bodies”. Pursuant to case law, the two notions are to a large extent interchangeable. The difference that can sometimes be observed in case-law is that “performing a public function” covers officials that are “functionaries” (high level public officials such as ministers, heads of public agencies, judges, etc.).

28. Sub-paragraph (3) covers “any other person exercising official duties by authorisation of the law, of by-law or of the contract or arbitration concluded on the basis of the law”. The Slovenian authorities explain that official duties are defined broadly in case-law: they are defined as carrying out different tasks (either permanent or temporary, subject to payment or for “free”) that fall under the competences of a given public entity, institutions and companies performing, partly or fully, tasks in the public interest (and those competences are defined by law, by-laws or authorisations – contracts completed on the basis of law or by-law). In considering whether a foreign public official falls under this category, it is necessary to refer to the relevant law of the foreign public official’s country.

29. Persons acting for public enterprises¹³ are not explicitly covered by the definition of “official”. The Slovenian authorities indicate that the interpretation of the courts relating to the status of an official has always been broad in Slovenia; among others the courts have stated that the definition covers “all persons carrying out obligations or privileges in the domain of any state or state-associated body, [regardless of] whether the person is permanently or temporary employed in a state or state-associated body, [or] whether the person is paid or not for his/her work”. The Slovenian authorities confirm that what is important is that those persons carry out official duties, by authorisation of the law (subparagraph 3). Therefore, they consider assimilated to public officials persons working in state-owned or state-controlled enterprises that have been delegated by law public authority. The same applies to other institutions of a public nature (e.g. education, health, public notaries, etc.).¹⁴ The Slovenian authorities explain that law enforcement authorities, when investigating a criminal case involving the alleged corruption of a person from a state-owned or state-controlled company, have to determine whether the act of that person is based on an explicit authorisation or obligation of a law or is derived from his/her work in the normal sphere of the economic activity of his/her company. Therefore, in considering whether a person working in a state-

administrative powers in any other State.” “The Republic of Slovenia reserves its right not to establish as a criminal offence under its domestic law the conduct referred to in Article 6, when involving any person who is a member of a public assembly exercising legislative or administrative powers in any other State”.

¹³ See Commentary 15 to the Convention.

¹⁴ Article 121(2) of the Slovenian Constitution: “Self-governing communities, enterprises, other organisations and individuals may be vested by law with public authority to perform certain duties of the state administration”.

owned or state-controlled enterprise is a foreign public official, it is necessary to refer to the relevant law, by-law, etc of the foreign country to determine that the person acted based on an explicit authorisation or obligation of a law. The Slovenian authorities explain that this “double test” approach (i.e. the conformity with the definition of Slovenian officials and with the domestic foreign definition of officials) is necessary and entails a mutual legal assistance request, except where the public nature of the functions exercised by the foreign person is evident. The lead examiners consider that such an approach is not in conformity with the principle of an autonomous definition set out in article 1 of the Convention as well as with the objectives of the Convention, which aim at guaranteeing a homogenous application of the Convention.

30. Another concern is the absence of a cross-reference between sub-paragraphs (5) and (6) and sub-paragraph (4) on military personnel, as this seems to exclude the application of the bribery offence to foreign “military persons”. The Slovenian authorities explain that foreign “military persons” could nevertheless be covered by sub-paragraph (2) as persons carrying out official duties or exercising a public function with state bodies.

1.1.7 for that official or for a third party

31. With the 2004 amendments to the offence, article 268 stipulates that the advantage is offered, etc. “*to an official either for him/her or for any other person*”. This amendment criminalises the case where the bribe is given to the public official and subsequently transferred to a third person. The Slovenian authorities indicate that the third person may be a natural or legal person,¹⁵ and that the knowledge of the third person is not required. The Slovenian authorities indicate that the provision would cover the case where the bribe is given directly to a third person without transiting through a public official.

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

32. Article 268 establishes two bribery offences, depending on the act or omission of the public official sought by the briber. In paragraph 1, the purpose of the bribe is for the public official to “perform an official act which he/she should not have performed or not to perform an official act which he/she should or could have performed” (bribery for an “improper” act). In paragraph 2, the purpose of the bribe is for the public official to “perform an official act which he/she should or could perform or not to perform an official act which he/she anyhow may not perform” (bribery for a “proper” act).

33. The Slovenian authorities indicate that the criteria for determining whether an offence has been committed under paragraph 1 or 2 is whether the act or omission of the public official is “legal” or “illegal”. To illustrate the difference between the two paragraphs the Slovenian authorities cite two actual cases of domestic bribery: a person who bribed an investigative judge to reject a flawless and well-grounded application of the prosecutor for an investigative action was punished under paragraph 1;¹⁶ a person who bribed a public official to speed up (within the legal time limits) an otherwise valid and well-grounded application for economic subsidies was punished under paragraph 2.

¹⁵ The Slovenian authorities indicate that case law on bribery exist where the third person was a football club or a private company.

¹⁶ The Code of Criminal Procedure gives a limited list of reasons to reject an investigation.

34. According to the Slovenian authorities, a “dubious exercise” of discretionary powers as a result of bribery is fully covered by the words “or could have performed” in paragraphs 1 and 2. Hence, the use of discretionary powers is sanctioned differently depending on whether it resulted in an act (§2) or abstention (§1).

35. There is no exception for small facilitation payments in the definition of bribery set forth in the Slovenian Penal Code. In addition, the Slovenian authorities indicate that the courts have never excluded the criminalisation of such payments in cases of bribery of Slovenian officials. They nevertheless indicate that such payments could theoretically be covered by article 14 of the Penal Code which regulates “*de minimis* offences”.¹⁷ However in practice this provision has never been used for bribery offences or for any offences against official duty, but rather for petty thefts and very minor drug offences.

36. The offence explicitly covers both acts and omissions of a foreign public official. But the bribery of foreign public officials is punishable only where the bribe is offered, promised or given in exchange for an “official act” to be performed or omitted “within the scope of [the public official’s] official authority”. The Slovenian authorities indicate that the questions whether the act of a foreign public official was “official” and whether it fell “within the scope of [the public official’s] official authority” will be considered through the eyes of foreign laws and regulations, i.e. depending on the legal or regulatory provisions defining the rights and obligations of the foreign public official. Similarly, concerning the scope of official duties, courts will have to refer to the laws and regulations of the foreign public official’s country. Accordingly, the unauthorised release of confidential information would be considered an official act only when the handling and release of confidential information falls within scope of the official’s legal duties. For example, paying an official who deals with public procurement to provide confidential information to which the official has legal access would be bribery. On the other hand, paying an official to disclose confidential information from the files managed by his/her colleague (e.g. information regarding a competitor’s bid) would not constitute a bribery offence, but rather an offence of instigating or complicity to the criminal offence under article 261 (Abuse of Office or Official Duties) or one of other incriminations under Chapter 26 (Criminal Offences against Official Duties and Public Authorisations).

37. The lead examiners are concerned that this reasoning may lead to very difficult and time consuming investigations, especially if the country of the foreign public official does not co-operate with the Slovenian authorities. In addition, the coverage of some cases through the charge of instigation or complicity to an offence perpetrated by a foreign public official would certainly cause practical problems, such as the non-availability of the foreign official for prosecution. They have serious concerns as to whether the standard of the Convention, which provides under article 1.4.c that the offence has to include “any use of the public official’s position, whether or not within the official’s authorised competence” is met, even if article 269a on trading in influence may cover some of the acts not captured by article 268.

¹⁷ “A conduct which is of low significance shall not constitute a criminal offence although it contains all elements thereof. Conduct shall be deemed to be of low significance when the danger thereby involved is insignificant, owing to: the nature or gravity of the conduct; the fact that harmful consequences are insignificant or do not exist; the circumstances in which the conduct was performed; the low degree of criminal liability of the perpetrator; personal circumstances of the perpetrator.”

38. Article 269a might cover one specific case where a foreign public official acts outside his/her scope of official authority – the abuse of his/her position to influence another official to perform or omit to perform a particular official act.

(1) Whoever promises, offers or gives to another person a reward, a gift or any other benefit for that or another person to another person, in order that such person exploit his/her position or influence and to intervene for the purpose that an official act is or is not performed

shall be punished by imprisonment of up to three years.

(2) Whoever promises, offers or gives to another person a reward, a gift or any other benefit for that or for another person, in order that such person exploit his/her position or influence and to intervene for the purpose that an official act that should not have been performed is performed, or that an official act that should or could have been performed is not performed shall be punished by imprisonment of one to five years.

(...)¹⁸

39. It would appear that, consistent with Commentary 19, the case where an executive of a company who gives a bribe to a senior official of a government, in order that the official use his/her office--though acting outside his/her competence--to make another official award a contract to that company, is covered by article 269a.

40. Nevertheless, the question remains about the sanctioning of a bribe given to a foreign public official in order that he/she perform an official act that is not in his/her scope of official authority, without the involvement of a third influenced official (e.g. to obtain unauthorised access to information about a competitor's bid in a public procurement tender, a person bribes an official of another department who nevertheless has physical access to the relevant office).

1.1.9/10 in order to obtain or retain business or other improper advantage/in the conduct of international business

41. Article 268 does not limit the offence to bribes made in order to obtain or retain business or other improper advantage in the conduct of international business.

1.2 Complicity

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

43. In Slovenia, complicity is a form of criminal participation. The Penal Code distinguishes between complicity, criminal solicitation and criminal support. Accomplices are persons engaged jointly in committing an offence by collaborating in the execution thereof or by the performance of acts representing a decisive part of the offence. Support covers counselling, instructing the perpetrator on how to carry out the offence, providing instruments of the offence, removal of obstacles, and promises to conceal the crime, the perpetrator, instruments or proceeds.

¹⁸ Paragraphs 3 and 4 of article 269a are identical to paragraphs 3 and 4 of article 268. The Slovenian authorities specify that the terms “exploit his position” and “intervene” are not a cumulative requirement: “intervene” is a necessary verb in such sentences for purposes of the Slovenian language -- requiring action from the person exploiting his/her position or influence.

44. All participants are punishable as the principal offender. If the perpetration of an offence falls short of the intended consequence, persons who solicited or supported the offence are punishable for the attempted offence.

1.3 Attempt and conspiracy

Attempt

45. Article 1.2 of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

46. The attempt to bribe a Slovenian or foreign public official is punishable under the Slovenian Penal Code (article 22). Criminal attempt covers “anybody who intentionally initiated a criminal offence but did not complete it”. The sanctions are in principle the same as for the perpetrated offence, but “may be reduced as the case may be”. The sanction may be withdrawn in cases of inappropriate attempt and voluntary abandonment of attempt.¹⁹ The Slovenian authorities have not provided case law on attempts to bribe, but explain that an attempt to bribe would be constituted where a bribe is offered but the public official is not aware of it. As soon as he/she becomes aware, the full offence is committed.

Conspiracy

47. Criminal conspiracy is punishable under the Slovenian Penal Code (article 298).²⁰ It covers conspiracy to commit an offence punishable by at least 5 years, i.e. it covers bribery for an improper act under article 268(1). It does not cover bribery for a proper act under article 268(2).

2. ARTICLE 2: RESPONSIBILITY OF LEGAL PERSONS

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

49. Article 33 of the Penal Code provides that “the liability of a legal person for criminal offences which the perpetrator commits in its name, on its behalf or in its favour shall be provided for by the statute.” For the purpose of implementing article 33, the 1999 *Liability of Legal Persons for Criminal Offences Act* was enacted. It establishes the liability of legal persons for a list of offences including the active bribery of Slovenian or foreign public officials.²¹ This liability is theoretically not criminal liability, but liability for criminal acts, as legal persons are not considered to meet the principle of subjective guilt. Nevertheless, the general part of the Penal Code and the Code of Criminal Procedure apply to legal persons.

¹⁹ Article 23 defines inappropriate attempt as cases when “the perpetrator has attempted to commit a criminal offence by inappropriate means or to injure an inappropriate object”. Article 24 defines voluntary abandonment of attempt as cases when “the perpetrator has commenced with the committing of a criminal offence but has voluntarily desisted from going through with it”.

²⁰ “Whoever agrees to commit a criminal offence with another, for which a punishment of five years' imprisonment or more may be imposed, shall be sentenced to imprisonment for not more than one year.”

²¹ Article 5 (Official Gazettes No. 59/99, 50/04). It also includes private-to-private bribery (articles 247 and 248 of the Penal Code), trading in influence (articles 269 and 269a), and money laundering (article 252).

50. In 2004, 44 court proceedings were introduced against legal persons for various offences. In two cases the proceedings were concluded with the conviction of legal persons. All the other (42) cases are still pending. In addition, the police “composed some criminal charges” against legal persons in bribery cases, but the criminal procedures did not yet reach the judicial level. As a consequence, the following developments are based on the opinion of the Slovenian authorities rather than case law.

Legal entities subject to liability

51. The entities subject to liability are “legal persons”. The law does not define the concept of “legal person”. The Slovenian authorities indicate that legal persons are not defined elsewhere in the Slovenian legal order. The law only specifies that both Slovenian and foreign legal persons are covered (article 3) and expressly excludes the “Republic of Slovenia” and local self-governing communities (article 2). The Slovenian authorities nevertheless specify that *de jure* associations, foundations and other non-profit entities are considered legal persons, but not *de facto* entities. They also indicate that domestic legal persons are those established in accordance with national laws that regulate conditions and procedures for establishing different types of legal persons (e.g. the *Companies Act* for undertakings, the *Associations Act* for associations, etc.).

52. The Slovenian authorities explain that, as provided for in the Government’s explanations to the Bill presented to the National Assembly, the “Republic of Slovenia” covers state organs, public administration bodies, etc. but not state-owned companies and state-controlled companies (i.e. liability applies).²²

Standard of liability

53. The grounds for the responsibility of legal persons are given in articles 4 and 5 of *The Liability of Legal Persons for Criminal Offences Act*:

Article 4: A legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of or in favour of the legal person:

- 1. if the committed criminal offence means carrying out an illegal resolution, order or endorsement of its management or supervisory bodies; [or]*
- 2. if its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence; [or]*
- 3. if it has at its disposal illegally obtained proceeds of crime or uses objects gained through a criminal offence; [or]*
- 4. if its management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them.*

Article 5(3): A legal person may only be liable for criminal offences committed out of negligence under the conditions of Point 4 of Article 4 of this Act. In this case the legal person may be given a reduced sentence.

54. The Slovenian authorities indicate that the “perpetrator” can be anyone, i.e. an employee, manager, or even a person outside the company. The perpetrator must nevertheless be linked to the legal person, since he/she must have acted “in the name of, on behalf of or in favour of the legal person”. The Slovenian authorities explain that, in principle, in cases of acting “in the name” or “on behalf of” a legal person, a formal link would as a rule exist between the legal person and the perpetrator, who might be, for example, an employee, a representative, a person with delegated

²² There is not yet supporting case law but the doctrine supports this interpretation; see Bele, Deisinger, Balazic, a Commentary to the Act, 2000.

powers, or a contractor. On the other hand, the term “in favour of the legal person” means that the offence results in a gain, profit, benefit (either material or immaterial), or advantage, for the legal person, and therefore the perpetrator could be anyone.

55. In most cases, management or supervisory bodies have to be involved in the perpetration of the offence to trigger the liability of the legal person (paragraphs 1, 2, 4).

56. In situations contemplated by paragraphs 1 and 2, “the management or supervisory bodies” of the legal person are actively involved in the perpetration of the offence. In the first case, the perpetrator simply carries out an illegal resolution, order or endorsement of its management or supervisory bodies. In the second case, management or a supervisory body influences the perpetrator or enables him/her to commit the criminal offence. In the first situation, the perpetrator is the tool of management or the supervisory body. In the second situation, the leading person solicits or instigates the offence.

57. In the situation contemplated by paragraph 4, “the management or supervisory bodies” of the legal person are passively involved in the perpetration of the offence as they have omitted obligatory supervision of the legality of the actions of employees subordinate to them.

58. The Act does not define the concepts of “management or supervisory bodies”. The Slovenian authorities explain that this omission is intentional: these terms are general and may cover the various company structures in the Slovenian system and used in other areas of law as well (for example in commercial law). In most cases this will cover directors, managers, and supervisory boards that have the capacity of managing and supervising the activities of and in the legal person. In other cases, courts will have to assess if a particular individual or body has such powers on the basis of acts and regulations, relevant for a given legal person. The Slovenian authorities indicate that these terms could also cover persons to whom governing executive authority has been delegated (i.e. persons empowered to act on behalf of the legal person).

59. In addition, the acts of the ultimate perpetrator alone (without the involvement of management or supervisory bodies) can trigger the liability of the legal person if the legal person has at its disposal illegally obtained proceeds of crime or uses objects gained through the criminal offence (point 3). This triggering condition has a limited application to corruption offences, as it necessitates that (i) the offer, promise or giving of a bribe has been successful, (ii) that the foreign public official performed or omitted to perform the official act by which the briber (the legal person) obtained a gain, and (iii) that the legal person uses the proceeds of crime or “objects” in bad faith (i.e. the responsible bodies are aware of their illegal origin).

60. Concerning cases where several legal persons are involved in the same offence, article 10 of the Act provides as follows: “(1) Two or more legal persons are engaged in the committing of a criminal offence as accomplices if each meets one of the grounds of liability under article 4. (2) In this case each legal person shall be sentenced as though it was the only party besides the perpetrator liable for the criminal offence.”

61. The Slovenian authorities indicate that there has never been a case involving the liability of a Slovenian parent company for the acts of its foreign subsidiary abroad. However, they indicate that the company could be held liable in three cases: 1. company headquarters authorised the bribery of a foreign public official; 2. company headquarters “knew” about the bribery of a foreign public official; 3. company headquarters has no knowledge of the bribery of a foreign public official, but “should have known” about it. The liability cannot be triggered when company headquarters has no knowledge

of the bribery of a foreign public official and could not have known about it, as objective liability does not exist in Slovenia.

Proceedings against legal persons

62. The conviction of a natural person is not a prerequisite for the liability of the legal person (article 5(1)) and the Slovenian authorities indicate that the case where the legal person has been convicted whereas the natural person has been acquitted could in theory arise. However, his/her identification is required in practice in order to trigger the liability of a legal person. The responsibilities can be cumulative, as the liability of a legal person does not preclude the criminal liability of natural persons for the committed criminal offence (article 5(2)).

63. The proceedings against the legal person are as a rule initiated and carried out together with the proceedings against the perpetrator for the same criminal offence and for the same charge (article 27 of the Act). The provisions of the Code of Criminal Procedures apply.

64. Article 28 of the *Liability of Legal Persons for Criminal Offences Act* on “Expediency of Initiation of Proceedings”, states that the prosecutor “may decide not to request the initiation of criminal proceedings against a legal person if the circumstances of the case show that this would not be expedient because the legal person’s participation in the criminal offence was insignificant ...”.²³ The Slovenian authorities clarify that this exemption must be based on the well-grounded reasoning of the prosecutor. In addition, according to the Slovenian authorities, the word “insignificant” would relate exclusively to the level of participation of the legal person, and not to the seriousness of the offence. Therefore, a small facilitation payment could lead to the prosecution of a legal person if the participation of the legal person were not insignificant. The lead examiners nevertheless consider that this provision is vague and therefore could potentially unduly restrict the liability of legal persons. It is therefore important that clear limits are placed on the interpretation of the term “insignificant”.

65. Article 5(4) of the Act provides for an exception when the perpetrator of the offence is a leading person of the legal person: “If a legal person has no other body besides the perpetrator who could lead or supervise the perpetrator, the legal person shall be liable for the committed criminal offence within the limits of the perpetrator’s guilt”. The Slovenian authorities explain that this provision applies exclusively to “single-person companies”. As in other cases, the legal person can be sanctioned even if the natural person is not convicted, but the natural person has to be liable (i.e. exclusion of liability in cases of mistake of facts or law, insanity, etc.). In addition, article 28 provides that the prosecutor “may decide not to request the initiation of criminal proceedings against a legal person if the circumstances of the case show that this would not be expedient because the perpetrator of the criminal offence is the sole owner of the legal person against which it would be necessary to initiate proceedings”.

3. ARTICLE 3: SANCTIONS

66. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal

²³ Other reasons are: “because the legal person does not have any property or has so little property that this would not even suffice to cover the costs of the proceedings, because bankruptcy proceedings have been initiated against the legal person, or because the perpetrator of the criminal offence is the sole owner of the legal person against which it would be necessary to initiate proceedings”.

sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

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

67. The Slovenian penal system provides three types of sanctions: the principal sanctions set forth in the provision defining the offence, and accessory sanctions and safety measures set forth in the general part of the Penal Code.

68. The principal criminal sanctions applicable to natural persons in cases of active bribery of Slovenian and foreign officials are identical: imprisonment between 1 and 5 years as well as a fine in cases of an “improper act or omission” from the public official; and imprisonment between 6 months and 3 years and no fine in cases of a “proper act or omission”. Confiscation of the bribe is mandatory (see below 3.6).

69. The sanctions are lower for trading in influence/using intermediaries: imprisonment of up to 3 years when the trader in influence exploits his/her position or influence and intervenes for the purpose that an official act is or is not performed; imprisonment of 1 to 5 years when the trader in influence exploits his/her position or influences and intervenes for the purpose that an official act that should not have been performed is performed, or that an official act that should or could have been performed is not performed.²⁴ The Slovenian authorities indicate that the difference between sanctions for active versus passive bribery, as well as bribery for “proper” versus “improper” acts, is a question of the criminal and sentencing policy of the legislator. This policy reflects the “estimation” of values protected by specific incriminations and fit the overall sentencing policy of the Criminal Code.

70. Fines are prescribed under article 268(1) on “improper” acts/omissions, and not under article 268(2) on “proper” acts/omissions or under article 269a on trading in influence. However, fines could still be applied in addition to imprisonment for cases under articles 268(2) and 269a, as accessory sanctions provided for in the general part of the Penal Code, if the bribery has been committed “out of greed”, pursuant to article 36(2). The Slovenian authorities specify that the word “*koristoljubje*” covers situations where the perpetrator commits an offence to obtain any type of material advantage (*lucris causa*). The application of a fine as an accessory sanction is discretionary.

71. Articles 268(1) and 36(2) do not set the limits on the fine, which are regulated in the general part of the Penal Code (article 38). Fines can be imposed in “daily instalments” or, when this is not possible (i.e. when the offender does not provide the court with the necessary information), in a one-off amount.

72. The daily amount of the fine is fixed by the court by taking into account the perpetrator's daily income (net salary and other incomes) as well as with respect to his/her family expenditures. The limits of the daily amount of the fine are based on the average monthly net salary per employee in

²⁴ Sanctions for passive bribery are higher: imprisonment between 1 and 8 years and a fine in the case of an improper act, and imprisonment between 1 and 5 years in the case of a proper act.

Slovenia,²⁵ and range from 5 to 360 daily instalments, or for criminal offences committed “out of greed”/“for one's own interest”,²⁶ from 5 to 1500 daily instalments.²⁷ Therefore, the maximum fine is SIT 83.1 million (352 200 euros, 450 800 USD) when the offender acts to obtain a material advantage, and 2 million in all other cases (8 480 euros, 10 850 USD).

73. The fine imposed in a one-off amount is between SIT 30 000 and 3 000 000 (127 to 12 700 euros or 163 to 16 300 USD). For aggravated offences, i.e. committed to obtain a material advantage, the maximum one-off fine may be SIT 9 000 000 (38 140 euros or 48 830 USD).²⁸

74. The Slovenian authorities estimate that 99% of the cases of corruption are committed to obtain a material advantage. According to the Slovenian authorities, the aggravated fine may apply when the bribery offence has been committed for the direct interest of the natural person as well as in the case where the briber acted in the interest of a legal person, or acted out of his/her interest and the interest of the legal person.

75. Another accessory sanction may apply to foreign citizens, i.e. deportation from the territory of Slovenia for a period of between 1 and 10 years. Safety measures include disbarment from an occupation. Their application is left to the discretion of the court. The court may bar the perpetrator from performing a certain profession, autonomous activity or function from 1 to 5 years if, by abusing such a position, activity or function he/she committed a criminal offence and if the court has probable cause to believe that his/her further performance of such an occupation would therefore be dangerous (article 67). The Slovenian authorities explain that the term “dangerous” aims at offenders who could misuse their profession and/or position to repeat a criminal offence or conduct another one, including financial crimes.

76. Sanctions applicable to legal persons are fines, expropriation of property or winding-up, in cases of bribery of a Slovenian or foreign public official. As for natural persons, the sanction depends on the gravity of the offence (article 26 of the *Liability of Legal Persons Act*).

77. For acts covered by articles 268(1) and 269a(2), the fine may be between SIT 2 500 000 and 150 000 000 (10 595 and 635 714 euros, 13 560 and 813 714 USD) or up to 200 times the amount of the damage caused or proceeds obtained through the criminal offence. The fine can be replaced by a sentence of expropriation of property and/or winding-up.

78. For acts covered by article 268(2) and article 269a(1), the fine may be between SIT 500 000 and 75 000 000 (2 119 and 317 860 euros, 2712 and 406 860 USD) or up to 100 times the amount of the damage caused or proceeds obtained through the criminal offence. The fine can be replaced by a sentence of winding-up.

²⁵ Average net monthly salary in Slovenia for July-September 2004 is 166 188 Slovenian tolar (SIT) (700 euros). On 26 October 2004, 1 000 SIT are equal to 4.24 euros or 5.42 US dollars.

²⁶ The Slovenian authorities clarified that the same word is used in Slovenian in articles 36 and 38: *koristoljubje* and should have been translated similarly in the two articles.

²⁷ The lowest daily amount amounts to 1/16th of the last officially published average monthly net salary in the Republic of Slovenia per employee, while the highest amounts to 1/3rd thereof.

²⁸ In the event that a fine may not be collected within 3 months, the court enforces it by applying a prison sentence so that each two daily amounts of a fine is converted into one day of imprisonment, with the proviso that the so determined term of imprisonment shall not exceed six months. (article 38(6))

79. The law does not specify when the courts should decide between imposing a fine within the monetary limit or beyond the limit based on the damaged caused or proceeds obtained. The Slovenian authorities indicate that the second option allows courts to go over the limits set in the first option, when they decide that the circumstances of the case so require.

80. The “expropriation of property” corresponds to the expropriation from half to the entire property of a legal person (article 14 of the Act). The winding-up of a legal person may be ordered if the activity of the legal person was entirely or predominantly used for the carrying out of criminal offences. It can be imposed in addition to the expropriation of property, and the court initiates the liquidation procedure (article 15 of the Act). In addition, creditors may be paid-off by the bankrupt or liquidated legal person.

81. Determination of the sentence: General rules on sentencing are set out in article 41 of the Penal Code and article 16 on the Liability of Legal Persons Act.

82. Article 41 of the Penal Code is applicable to both natural and legal persons. The perpetrator shall be sentenced with respect to the gravity of his/her offence and his/her culpability. In fixing the sentence the court shall consider all circumstances that have an influence on the level of the sentence (mitigating and aggravating circumstances) and in particular: the degree of the perpetrator's culpability; the motives for which the offence was committed; the seriousness of the danger or injury caused to the property protected by law; the circumstances in which the offence was committed; the perpetrator's past behaviour; his personal and pecuniary circumstances; his conduct after committing the offence, especially whether he provided compensation, which provides general rules on sentencing, for the damages caused by committing the offence; and other circumstances relevant to the character of the perpetrator.

83. Pursuant to article 16 of the *Liability of Legal Persons Act*, in determining the sentence for a legal person, the court shall also consider the economic position of the legal person. There is no prescribed method of quantifying the “economic position” or economic power of a legal person. The Slovenian authorities indicate that it would normally be quantified by factors such as profits, size, number of employees, movable and immovable property, share and position in the market, etc.. The underlying rationale is that the punishment should achieve its punitive objective (a harsher punishment for a financially stronger company), but not be disproportionate (e.g. a fine or expropriation of property of the amount that would in effect result in the collapse of a company – except when closure of the company was pronounced as a punishment).

3.3 Penalties and Mutual Legal Assistance

84. In general, mutual legal assistance does not depend on the level of the penalty attached to a specific offence. However, a maximum term of imprisonment of at least 5 years is required for the application of special investigative methods by law enforcement authorities. Thus such measures are available for acts covered by article 268(1) and 269a(2), but not for acts covered by article 268(2) and 269a(1). (see Part 5 below)

3.4 Penalties and Extradition

85. Under Slovenian law, extradition does not depend on the level of the penalty attached to a specific offence.

3.5 Seizure and Confiscation

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

87. The Slovenian authorities indicate that the confiscation of proceeds from crime and a parallel financial investigation in criminal cases were rare before 2001. Significant efforts have been undertaken to correct this situation in the last two years. Today, all authorities involved in criminal proceedings (police, prosecution, courts) are obligated to undertake measures for the tracing, identification, seizure and confiscation of proceeds from crime. This "*ex officio*" approach has been strengthened by amendments to the Code of Criminal Procedure of 2002 and the *Police Act* of 2003. Training was carried out for relevant criminal justice actors in 2003 and 2004. Internal (and official) guidelines issued in 2004 by the General Director of the Police require the criminal police to conduct a formal financial investigation in parallel to the criminal investigation in order to identify the proceeds and trace the suspect's assets in all offences for which the proceeds exceed 1.5 million SIT (6 340 euros or 8 450 USD). On the basis of a report on the financial investigation the prosecutor is then obliged to file a request with the court to order temporary measures for securing possible later confiscation.²⁹

Provisional Seizure

88. Pre-trial seizure is mandatory for objects that must be confiscated under the Penal Code (i.e. to secure confiscation), and objects needed for the purpose of evidence (articles 502³⁰ and 220(1) of the Code of Criminal Procedure). According to the Slovenian authorities, this applies to both a bribe and the proceeds of bribery.

89. The Slovenian authorities indicate that the court, on the request of the prosecutor, orders seizure at the stage of the preliminary police investigation.³¹ As soon as the court determines that the confiscation of property benefits is feasible (when the conditions for this measure are met) it is its obligation *ex officio* to secure the claim.³²

Confiscation

90. Confiscation of the bribe: article 268(4) explicitly provides for the mandatory confiscation of bribes: “The reward, gift or other benefit given [to a public official] shall be confiscated...”. This does not cover the bribe promised or offered but not yet given. In addition, monetary sanctions of comparable effect are not available if the confiscation of the bribe is unavailable. Moreover, in cases of bribery of foreign public officials, it will often be the case that the bribe is transferred to the public

²⁹ Statistics on seizure and confiscation of proceeds of corruption cannot be provided, as the central system for comprehensive following of seized and confiscated proceeds is yet under development. In the 2003 GRECO report, the Slovenian authorities indicate that provisional measures were used in only one case of domestic bribery in 2000.

³⁰ “The court may order measures to secure later confiscation in the pre-criminal procedure.”

³¹ Before 1998, the measures were available once a judicial investigation was opened.

³² According to one of the latest decisions of the Constitutional Court of Slovenia article 502 has to be amended in the way that the court cannot secure the claim alone since a proper demand from the public prosecutor is needed. The Slovenian authorities indicate that the CCP will be amended in 2005.

official outside of Slovenia and therefore is not available for confiscation except where the foreign country provides mutual legal assistance in the form of confiscation.³³ A feature of the bribery offence is that under certain conditions the bribe shall be confiscated even if the criminal procedure is completed with a judgement in which the accused was not found guilty (article 498a of the Code of Criminal Procedure).

91. Confiscation of the proceeds: articles 95-98 of the Penal Code provide for the mandatory confiscation of “the property gained through or owing to the commission of a criminal offence”.³⁴ The Slovenian authorities confirm that this covers the proceeds of bribery, but not the instrument, i.e. the bribe. Proceeds cover “money, valuables and any other property benefit”.

92. Confiscation first applies to the offender. The offender can be a natural person (article 96) or a legal person (article 98). Concerning natural persons, when confiscation of the proceeds cannot be carried out, property of an equivalent value is confiscated. And when property of an equivalent value cannot be confiscated, the perpetrator shall be obliged to pay an equivalent sum of money.³⁵

93. Confiscation can also apply to third (natural) persons “to which the proceeds or object of the offence were transferred free of charge or for a sum of money that does not correspond to their actual value, if such persons knew or could have known” their illegal origin (article 96). The third person can also be a legal person: “A property benefit or property equivalent to the property benefit shall also be confiscated from legal persons when the perpetrator of the offence or beneficiary have transferred this property to the legal person free of charge or for a sum of money which does not correspond to its actual value” (article 98). The Slovenian authorities explain that in the case of *bona fide* third persons, the court will confiscate from the perpetrator of the offence the value equivalent to the benefit obtained from the transfer to the third person.

94. If an injured party has been awarded his/her claim for damages by the criminal court, the court orders the confiscation of property insofar as such property exceeds the adjudicated claim of the injured party (article 97).

3.6/3.7 Additional Civil and Administrative Sanctions

95. The Slovenian legal system does not impose any specific additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official. However, the unlawful activities of individuals bear consequences that are not civil or administrative sanctions as such.

³³ In the case of effective repentance, the court may decide to restore the bribe to the person who gave it (article 268(4) of the Penal Code).

³⁴ The Slovenian authorities explain that confiscation under articles 95-98 is a measure *sui generis* and is considered neither a punishment nor a safety measure from the perspectives of theory and practice. The confiscation of property benefits may be imposed in the judgement of conviction, in the ruling on judicial admonition or security measure (article 503 of the Code of Criminal Procedure).

³⁵ If an accurate determination of the proceeds would entail undue difficulties, the court fixes the amount of the proceeds to be confiscated using its discretion (article 501 of the Code of Criminal Procedure).

Automatic administrative consequences

96. The *Public Procurement Act*³⁶ (article 42) requires that (domestic or foreign) bidders fulfil certain conditions in order to participate in public tenders. For instance, they must be neither subject to criminal proceedings for a criminal offence in connection with bribery, nor convicted of such an offence by means of a legally binding judgement. The contracting entity must exclude a bidder from the procedure where there is a failure to submit proof of fulfilment of the conditions, including confirmation from the Ministry of Justice that the bidder is not entered in the criminal records. Exclusion is also mandatory when the contracting entity has good reason to suspect that the bidder, or some other person on the bidder's behalf, committed an act of bribery or trading in influence during the tender process. The Slovenian authorities indicate that in 2004 the State Revision Commission nullified seven public tenders due to suspicions of different criminal offences, including corruption.

97. The Slovenian authorities indicate that pursuant to articles 246 and 449 of the *Companies Act*, natural persons who have been sentenced because of a criminal act connected with the economy or legal transactions, etc. cannot be board members or managers in the case of capital companies and managers in limited liability companies. This automatic professional exclusion may apply in cases of bribery.³⁷

Possible civil consequence

98. The Slovenian authorities indicate that article 131 of the Code of Obligation (civil code) sets the principle that whoever causes damage to another is obliged to compensate for damage caused by him/her unless s/he proves that the damage is not the result of his/her guilt. The Code of Criminal Procedure defines the procedure concerning the indemnification arising out of a criminal offence (articles 100-111). Claims for indemnification shall, upon a motion by rightful claimants,³⁸ be dealt with in the criminal procedure. A claim for indemnification may consist of a demand for compensation for damage, the recovery of property or the cancellation of a legal transaction.

99. However, it is doubtful whether the requisite elements of "victim" and "damages" are present in the case of bribery. The Slovenian authorities indicate that in cases where the foreign official has not performed or omitted to perform an official act, the offence is considered a "victimless crime" under Slovenian criminal legal theory and case law. On the contrary, the Slovenian authorities consider that bribery that results in an act or omission of a public official involves a victim, with the same consequent rights and expectations for third parties as are afforded for cases involving an abuse of official position. Therefore, according to the Slovenian authorities, a company that was excluded from the tendering process because another company obtained a contract by bribing a public official could have the standing of a "victim" and all rights associated with this status in the criminal

³⁶ Official Gazette of the Republic of Slovenia, No. 36/04 – official consolidated version

³⁷ Any natural person with unlimited contractual capacity may be a board member, except: a person who has been sentenced because of a criminal act connected with the economy, working relations or social security, legal transactions, the management of social or natural resources, public or private property, for a period of five years after the sentence becomes definitive, and not before two years have passed since the prison sentence has been served; a person against whom a security measure prohibiting him/her from carrying out his/her profession has been ordered, for the duration of this prohibition; if, as a member of the management board of a company for which a bankruptcy proceeding was started, a person is finally ordered to pay damages to claimants. This may cover persons convicted for bribery.

³⁸ The motion for the assertion of an indemnity claim in criminal procedure may be made by the person entitled to assert such claim in a civil action. (article 101)

proceeding (e.g. for the purposes of “*partie civile*” proceedings). The analogy with the offence of an abuse of official position implies that the competitor would be the victim of the official’s acts, whereas in cases of active bribery of a foreign public official the Slovenian courts decide on the guilt of the briber.³⁹

4. ARTICLE 4: JURISDICTION

4.1 Territorial Jurisdiction

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

101. Article 120 of the Penal Code sets forth the principle of territoriality for all offences, including the foreign bribery offence.⁴⁰ Article 10 specifies that “a criminal offence is committed both in the place where the perpetrator was acting and in the place where the unlawful consequence occurred”. The Slovenian authorities explain that in the case of bribery, the “acting” and “unlawful consequences” are assimilated, as bribery is completed with the offer, promise or giving, and no further consequence is needed. Article 10 does not specify whether jurisdiction covers offences only partly committed in Slovenia. However, the Slovenian authorities confirmed that territoriality may be established when the bribery offence is committed in whole or in part in its territory, for instance where a phone-call or e-mail emanating from Slovenia conveys an offer or promise of a bribe.

4.2 Nationality Jurisdiction/Extraterritorial Jurisdiction

102. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

103. Article 122 of the Penal Code sets forth the principle of nationality jurisdiction for all offences, including bribery of foreign public officials, when the person has been apprehended in or extradited⁴¹ to Slovenia.⁴² Dual criminality is required to exercise nationality jurisdiction. This requirement is understood broadly as it means that the perpetrator’s conduct must constitute a criminal offence in the country where it was committed, and not specifically the offence of bribing a foreign public official. The Slovenian authorities indicate that cases of the bribery by a Slovenian national of

³⁹ Even if in theory, Slovenia could prosecute abuse of office by a foreign public official, as the offence of abuse of office applies to “officials” and the definition of officials cover foreign public officials. But Slovenia could rarely establish its jurisdiction.

⁴⁰ In addition, crimes perpetrated on board Slovenian vessels or aircrafts are subject to Slovenian jurisdiction.

⁴¹ The Slovenian authorities recognise that the requirement that the alleged offender is extradited to Slovenia may appear circuitous, given that most States cannot provide extradition without jurisdiction first having been established. However, the Slovenian authorities assured the lead examiners that this provision has not caused problems in practice.

⁴² “The Penal Code shall be applicable to any citizen of the Republic of Slovenia who commits any criminal offence abroad ... and who has been apprehended in or extradited to the Republic of Slovenia.”

a public official of country A in country B, where country B does not criminalise bribery of foreign public officials or cannot cover the acts through another offence would be covered as long as the bribery of domestic officials is punishable in these countries.

104. Concerning legal persons, articles 3(2) and 3(3) of the *Liability of Legal Persons for Criminal Offences Act* provide for the liability of legal persons for offences committed abroad where one of two conditions is met. First, Slovenia has jurisdiction if the offence was committed against the Republic of Slovenia, a citizen thereof, or a domestic legal person (paragraph 2). Second, Slovenia has jurisdiction if the offence was committed against a foreign state, foreign citizen or foreign legal person, under the same conditions as for natural persons, except the condition of extradition or apprehension of the perpetrator on the territory of Slovenia. These provisions have not yet been applied.

105. The Slovenian legal system also provides for “passive” nationality jurisdiction to prosecute natural persons as well as legal persons, i.e. jurisdiction based on the Slovenian nationality of the victim.⁴³

4.3 Consultation Procedures

106. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

107. Consultation procedures are foreseen in the Code of Criminal Procedure in two specific cases. First, if a Slovenian citizen (or permanent resident) committed a criminal offence abroad, Slovenia can agree to handle the case, upon a foreign country’s request (article 520). Second, if an alien committed a criminal offence in Slovenia, a foreign country can ask for the surrender of the case to its authorities. Slovenia may grant the request if the conditions for extradition are met and the person does not permanently reside in Slovenia. An exception exists for cases of corruption and money laundering where the seizure (or temporary securing of the petition for confiscation) of illegally acquired funds or property was ordered in Slovenia. In these cases, the surrender may be granted only if the foreign country has appropriate legislation in connection with the confiscation of property benefits and the surrender of criminal files (article 519).

4.4 Review of Basis of Jurisdiction

108. The Slovenian authorities consider that the current basis for jurisdiction is effective and broad enough to combat bribery of foreign public officials, especially as they apply the principle “prosecute or extradite” (*aut dedere aut judicare*).

5. ARTICLE 5: ENFORCEMENT

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

⁴³ See article 123 of the Penal Code and article 3(2) of the *Liability of Legal Persons Act*.

5.1 Rules and Principles Regarding Investigations and Prosecutions

110. A specialised police unit deals with the investigation of corruption at the state (Anti-Corruption Division) and regional level, and the Group of Public Prosecutors for Special Tasks is authorised to deal with organised cases of corruption. Both, the police Anti-Corruption Division and Group of Public Prosecutors for Special Tasks include bribery of foreign public officials in their scope of activities.

Procedural steps

111. All bribery offences are investigated *ex officio* (i.e. mandatory investigation). Therefore, if grounds exist for suspecting that a bribery offence has occurred, the police must start a preliminary investigation to identify the perpetrator, prevent his/her hiding, detect and preserve traces of crime or objects of value as evidence, and collect all information that may be useful for the successful conduct of criminal proceedings (see article 148(1) of the Code of Criminal Procedure, hereinafter CCP). There is no additional requirement, such as the taking out of a complaint.⁴⁴

112. On the basis of the investigation, the police must submit a criminal report to the prosecutor. A report must be submitted even if, according to the police, there are no grounds for criminal charges (articles 148(9) and 148(10) of the CCP). The prosecutor may request the police to perform additional investigations before deciding on how to proceed.

113. Generally, all bribery offences are prosecuted *ex officio* (i.e. mandatory prosecution). However, the public prosecutor can dismiss the police report if he/she is satisfied that no offence was committed, the act is statute-barred, amnestied or pardoned, or if no reasonable suspicion exists against the suspect (article 161 of the CCP). The prosecutor must notify the victim of the dismissal of a report, and the victim can continue the criminal proceeding on his/her own initiative (article 60 of the CCP).

114. The Slovenian authorities also mention that the abandonment of a report of bribery is possible, but they indicate that this has not yet happened in practice. If there is sufficient evidence that a criminal offence has occurred, the public prosecutor can decide to abandon the prosecution only when pursuant to the Penal Code the court may or must remit the penalty, and the public prosecutor assesses that in view of the actual circumstances of the case a conviction alone without a sanction is adequate (article 163 CCP).⁴⁵ The remission of penalty is possible only when it is expressly provided for by the statute. Article 268(3) on the waiver of punishment for “effective regret” is considered a remission of penalty.

115. The public prosecutor may also transfer the report for a settlement procedure or suspend prosecution⁴⁶ for an offence punishable by up to 3 years of imprisonment, which covers bribery acts under articles 268(2) and 269a(1). The application of these procedures may lead to: the elimination or

⁴⁴ If the police do not start the investigation, the public prosecutor, which has been made aware of the possible crime (from any sources), can instruct the police to start the investigation on the basis of article 161(2) of the CCP.

⁴⁵ The prosecutor must notify the victim of the abandonment of a report, and the victim can continue the criminal proceeding on his/her own initiative (article 60 of the CCP).

⁴⁶ Settlement procedure and suspension are available upon the agreement of the victim and offender (articles 161a and 162 CCP). In case of suspension, the offender has to perform certain actions and remove the harmful consequences of the criminal offence.

compensation of damage; the payment of a contribution to a public institution or a charity or fund for compensation for damage to victims of criminal offences; the execution of some generally useful work; the fulfilment of the alimony obligation. The Slovenian authorities indicate that the settlement procedure is not often applied, and has never been applied to a case of domestic bribery.

116. For all other cases where there is sufficient evidence that a criminal offence has occurred, the prosecutor has to file a request for judicial investigation with an investigating judge or directly file an accusation with the court.⁴⁷ Investigations are instituted against a specific natural person when a well-founded suspicion exists that he/she has committed a criminal offence. Where a legal person is involved, the identification of a legal person within which an offence has been perpetrated is not sufficient: the identification of a natural person is required.

117. The investigative judge performs the investigation in order to gather evidence and data necessary for deciding whether to bring charges or discontinue proceedings, and the police must assist the judge upon request.

118. A judicial investigation can be suspended only because of the illness of the suspect or if he/she evades the authorities (article 179 CCP) and is resumed when these obstacles have disappeared. The judicial investigation can be terminated (dismissed) for the same reasons as for the dismissal of a criminal report by the prosecutor.

119. Once the investigative judge considers that an offence is established (“elucidated”), he/she sends the file to the prosecutor, who may ask for the investigation to be supplemented, decide to issue an accusation with the court, or decide to refrain from prosecuting the case (in the same conditions as when receiving the report of the police).

120. In Slovenia, the first instance jurisdiction is the county court for offences of a maximum penalty of 3 years imprisonment, and the district court for offences of a maximum penalty higher than 3 years. Therefore offences covered by article 268(1) and 268(2) are not dealt with by the same court.

Investigative tools

121. The police may perform various investigating acts both during the pre-investigation stage and upon request of the investigating judge. The police may: seek information from citizens; inspect transportation vehicles, passengers and luggage; restrict movement within a specific area for a specific period; perform what is necessary to identify persons and objects; send out a wanted circular for persons and objects; inspect in the presence of the responsible person specific facilities, premises and documentation of enterprises and other legal entities, and undertake other necessary measures. The facts and circumstances established in individual actions that may be of concern for criminal proceedings, as well as the objects found and seized, shall be indicated in the record, or an official note shall be made thereon. The police may summon citizens and interrogate suspects (in the presence of a lawyer) (article 148 of the CCP). Following an arrest, a person’s detainment can only be continued if he/she is brought before an investigative judge. The detainment must be terminated if the trial does not commence within six months.

⁴⁷ In case of bribery, the prosecutor may prefer to directly file an accusatory act with the court if evidence collected about the offence and the perpetrator provide sufficient ground for filing charges (article 170(6) of the CCP).

122. In addition, the law enforcement authorities can use special investigative methods if there are reasonable grounds for suspecting that a criminal offence has been committed, is being committed or is being prepared or organised, and the use of traditional investigative methods is not sufficient. The investigative judge can order the operator of the electronic communications network to furnish information on the participants in and the circumstances and facts of electronic communications. The investigative judge can order the monitoring of electronic communications using listening and recording devices and the control and protection of evidence on all forms of communication transmitted over the electronic communications network; control of letters and other parcels; control of the computer systems of banks or other legal entities which perform financial or other commercial activities; and bugging and recording of conversations with the permission of at least one person participating in the conversation. Article 155 of the CCP provides that the prosecutor may permit measures of “feigned acceptance or giving of gifts or bribes”. In implementing this measure, the police may not incite the offence, i.e. no criminal proceedings can be initiated if it appears that the person would not have otherwise been prepared to commit a bribery offence.⁴⁸

123. Under the same conditions, the use of additional tools of secret surveillance in public locations and undercover operations is available, with the authorisation of the investigative judge and/or prosecutor. However, undercover operations other than using technical devices for transmitting and recording sound, photography and video are available only for offences punishable by a maximum imprisonment of at least 5 years (article 155a of the CCP). Therefore, some measures are available for acts covered by article 268(1) and 269a(2) but not for acts covered by article 268(2) and 269a(1).

5.2 Considerations such as National Economic Interest

124. The Slovenian authorities indicate that there are no other legally admitted reasons to influence the investigation and prosecution beside the above-mentioned reasons for the suspension or termination of the criminal investigation and/or prosecution (see 5.1.). In all other cases the prosecutors are obliged to continue the prosecution. The Slovenian authorities affirm that the continuation of the prosecution is the practice, which means that considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved do not influence criminal proceedings in Slovenia.

6. ARTICLE 6: STATUTE OF LIMITATIONS

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

126. In Slovenia, the statute of limitations for the foreign bribery offence is 5 years from the day the offence is committed. This applies to both proper and improper acts (article 268 (1) and 268(2)) and to both natural and legal persons.⁴⁹ The Slovenian authorities indicate that the statute of limitations starts running the date of the offer, promise or gift. The Slovenian authorities specify that the 5-year limitations period has not presented serious problems, taking into account the possibilities of interruption.

⁴⁸ The prosecutor may also permit measures of feigned purchase.

⁴⁹ The length of the limitation period depends on the maximum imprisonment penalty. See articles 111 and 112 of the Penal Code.

127. The statute of limitations may be interrupted and suspended, but the criminal prosecution is absolutely barred when double the limitations period has elapsed, i.e. 10 years for bribery as set out in article 112 of the Penal Code. It may be interrupted (i.e. a new period starts) by any procedural act performed to initiate the criminal prosecution as well as if the perpetrator commits another criminal offence of the same or greater seriousness before such a period has ended. The statute of limitations may be suspended “for the time when the prosecution may not be initiated or continued under the statute”. The Slovenian authorities indicate that pursuant to case law suspension occurs as long as (i) the perpetrator is not identified (since the criminal proceedings can be initiated only against a specific person), (ii) immunities apply; or (iii) article 179 of the Criminal Procedure Code applies (e.g. the accused is unfit for trial due to illness).

128. A constraining time limitation could be the 6 months period allocated to the investigative judge to perform the investigation in order to gather evidence and data necessary for deciding whether to bring charges or discontinue proceedings. Article 185 of the CCP provides that if an investigation is not completed within 6 months, the investigating judge shall be bound to inform the president of the court of the reasons for this; and the president shall take the necessary steps for the investigation to be brought to a close. In the opinion of the lead examiners, this time period appears quite short for complex cases involving financial analysis and obtaining mutual legal assistance, but the Slovenian authorities clarified that in practice the president often provides additional time for the investigating judge to finish the investigation.

129. The statute of limitation for the implementation of the sanction can be 5 or 3 years in cases of bribery of a foreign public official, depending on the sentence: 5 years if the sentence exceeds one year imprisonment, 3 years if the sentence is lower or a fine (article 113 of the Penal Code). It starts running the day of the final judgement, and is suspended if the convicted person evades the sanction.

7. ARTICLE 7: MONEY LAUNDERING

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

Money Laundering Offence

131. In Slovenia, both bribery of a domestic and a foreign public official are predicate offences for money laundering. The offence of money laundering is defined in article 252(1) of the Penal Code:

Whoever accepts, exchanges, stores, freely uses, uses in an economic activity or in any other manner determined by the law conceals or attempts to conceal by money laundering the true origin of money or property that was, to his knowledge, acquired through the commission of a criminal offence, shall be sentenced to imprisonment for not more than three years.

132. Article 252 covers the laundering of the proceeds of offences (but not the laundering of instruments). The sanction applicable to money laundering is imprisonment for not more than 3 years without fine (except in cases of aggravated money laundering, where fines and imprisonment apply).

133. Self-laundering (i.e. the laundering of the proceeds by the person who committed the predicate offence) is punishable under the same conditions (paragraph 2). Paragraphs 3 and 4 provide for aggravated sanctions for the laundering of proceeds of considerable value or laundering in the

framework of a criminal association. Paragraph 5 provides for mitigated sanctions in case of negligent laundering.⁵⁰ Confiscation of the proceeds is mandatory (paragraph 6).

134. The Slovenian authorities specify that it is not necessary to have a prior conviction for the predicate offence to obtain the conviction for money laundering; and this has been confirmed by a 2004 decision of the Supreme Court. They also consider that in theory it should be sufficient that the person knows that the money derives from an offence, and not from a specific offence, but this has not yet been tested by courts.

135. According to the Slovenian authorities, the money laundering offence may be punished without regard to the place where the bribery occurred. However, in that case the dual criminality principle would have to be applied.

Money Laundering Reporting

136. The *Act on the Prevention of Money Laundering* was enacted in 1994, with major revisions in 2001 and 2002. Pursuant to this Act, financial organisations and other reporting entities must forward to the Office for Money Laundering Prevention within the Ministry of Finance information on the following: cash transactions exceeding SIT 5 000 000 (21 200 euros), several connected cash transactions which together exceed SIT 5 000 000, and transactions or clients for which there are reasons to suspect money laundering (article 10). In addition, the Office may issue a written order temporarily postponing a transaction if it believes that there are well-founded reasons to suspect money laundering. If the Office considers that there are reasons to suspect money laundering in connection with a transaction or certain persons, the Office may request that the reporting entities provide information and documentation, data on the statement of assets and bank accounts of these persons as well as other data and information required for the detection of money laundering. In addition, reporting entities must send to the Office all the necessary documentation upon request (article 15).

137. Financial organisations and other reporting entities must also identify their customers, when opening an account or establishing a permanent business relationship, or when performing transactions which exceed 3 000 000 SIT (in one or several connected transactions; 12 700 euros or 16 300 USD) (articles 4 to 9a).

138. The reporting entities include banks, savings banks and branches of foreign banks, savings and credit houses, post offices, companies for the management of investment funds, pension companies, stock exchanges (including agencies and branches), insurance companies, gaming houses, exchange offices. They also include legal and natural persons performing activities of: sale and purchase of claims, factoring, managing the property of third persons, issuing and performing operations with debit and credit cards, leasing, travel organisation, real estate agencies, safekeeping, trade in precious metals and precious stones and products made from these materials, issuing guarantees and other warranties, crediting and credit agencies, offering loans, and art trading⁵¹ (article 2). Obligations of due diligence, reporting information and identification of customers also apply to

⁵⁰ Respectively: imprisonment for not more than eight years and a fine; imprisonment between one and ten years and a fine; imprisonment for not more than two years.

⁵¹ Other entities are organisations performing payment transactions, founders and managers of mutual pension funds, other concessionaires for special lottery games, pawnbroker offices, legal and natural persons performing activities of: brokering in the negotiation of loan deals, brokering in the sale of insurance policies, organisation and execution of auctions (article 2)

some extent to lawyers, notaries, audit companies, independent auditors and legal or natural persons performing accountancy services or tax advisory services (article 28).

139. The reporting entities are obliged to appoint an authorised person and to adopt an internal regulation on internal control over the performance of their duties (article 12 of the Act). These entities are also obliged to provide professional training for all their employees performing duties under the Act and to prepare and to use in practice a list of indicators for recognising suspicious transactions. The Office for Money Laundering Prevention may request from the reporting entities written information, data and the documentation concerning the performance of their duties and other data required for the execution of control.

140. Violations of the obligations regarding the identification of customers, suspicious transactions reports and internal controls are subject to administrative sanctions both for the reporting entity and the natural person responsible for the violation.⁵²

141. The Office is required to report in writing to the competent authorities suspicions of money laundering, bribery (including bribery of a foreign public official), or criminal association, and crimes punishable with 5 years or more, based on information and documentation obtained (article 22).

142. The Office may exchange information with foreign authorities, i.e. for the request of information and provision of information, upon request or upon its own initiative in the framework of the 2001 *Act on the Prevention of Money Laundering*.

8. ARTICLE 8: ACCOUNTING

143. Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, each Party prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting and Auditing Requirements / Companies Subject to Requirements

Books and Records/Accounting Standards

144. According to the Slovenian authorities, no legal persons are exempted from the obligation to keep accounting records or books.⁵³ Accounting records or books must be kept according to the *Slovenian Accounting Standards* (SAS), determined by the *Companies Act* and the Slovenian Institute

⁵² Articles 45, 46 and 47 of the Act; the maximum fine for legal person is SIT 30 millions (127 070 euros).

⁵³ All legal persons, established according to the *Companies Act*, *Public Services Act* and other corporate legislation are subject to the *Slovenian Accounting Standards*.

of Auditors as the standard-setter. These standards, conform to international standards, are the basis for the *Accounting Act*, which applies to State budget users, which therefore must also keep records.⁵⁴

145. In addition, all taxpayers shall keep business accounts and records, draw up annual reports, tax accounts and keep other records provided by this and other laws for the purposes of taxation pursuant to article 61 of the *Tax Procedure Act*.⁵⁵ Business accounts and records shall be kept in order and correctly, and in such a manner as to make the information available for the assessment of tax liabilities.

146. According to the Slovenian authorities, all the fraudulent accounting activities listed in article 8.1 of the Convention are generally prohibited by article 51 of the *Companies Act*, which describes the general rules of accounting and in the second paragraph states that the two basic financial statements (balance sheet and income statement) must present the true and fair situation of assets and liabilities, financial situation and operating result of the company. The *Accounting Act* contains similar provisions. In addition, SAS contains special standards. SAS 21 – Bookkeeping Documents and SAS 22 – Books of Account, which deal with the recording of business transaction. SAS 21 determines that bookkeeping documents should disclose transactions and business events in a credible and fair manner, and further SAS 22 determines that it is mandatory to keep the main book of accounts (the journal and the general ledger) and that entries in the book of accounts should be based on credible and authentic bookkeeping documents and the books of accounts should reflect the financial position of the enterprise as well as its profit or loss.

External Auditing Requirements

147. The *Auditing Act* provides various auditing requirements. In addition, auditors must maintain *International Auditing Standards*, published by the International Federation of Accountants (IFAC).

148. The financial statements and consolidated financial statements of large and medium-sized companies, and public companies (stocks on the Stock Exchange) must be audited every year pursuant to the *Companies Act*. The violation of this obligation is sanctioned with a penalty of 3 to 10 million SIT (12 710 to 42 380 euros, 16 270 to 54 250 USD). State-owned and state-controlled enterprises are subject to the same obligation pursuant to the *Public Finance Act* and the *Court of Auditors Act*.⁵⁶

149. The *Auditing Act* sets out rules on auditors' independence *vis-à-vis* the audited company. Sanctions for the violation of the independence rules are the withdrawal of the auditor's license or an order to the auditing company for elimination of the violations. Fines can also be imposed (between 1 and 5 million SIT).

Reporting of offences

150. When an auditor discovers indications of a possible illegal act of bribery, according to IAS 250, he/she must report to management and/or to corporate monitoring bodies where warranted due to

⁵⁴ Budget users are all legal persons that receive some funds from the State budget. They are divided into direct and indirect users. Direct users are state and community organs and organisations, indirect users are state or community owned funds, institutions and agencies.

⁵⁵ Official Gazette of the RS, No. 54/04

⁵⁶ The criteria for determining the size of a company are the number of employees, net sales and value of assets. Minimum for medium-sized companies are 50 employees, net sales of 1 million SIT and assets of 500 millions SIT. Bank and insurance companies are treated as large companies.

the influence of the discovered indicators on the auditing report. If appropriate, he/she must express a qualified opinion.

151. In addition, auditors and auditing firms are persons with public authority in Slovenia and as such they must report all indications of a possible illegal act of bribery to the competent authorities (prosecutor, police or court) pursuant to article 145 of the Code of Criminal Procedure. In case of indications of a criminal offence, auditors are released from the duty to maintain business secrecy (article 22 of *Auditing Act*⁵⁷).

152. Accountants and advising professionals are not obliged to report criminal offences, except in cases stipulated by the law (failure to provide information on crime). Such an exception exists as concerns money laundering offences, pursuant to the *Prevention of Money Laundering Act*, but not for bribery offences. However, as for any person, internal accountants and advising professionals “may” report suspicions of bribery to a prosecutor pursuant to article 146 of the Code of Criminal Procedure. Indeed, the Slovenian authorities indicate that in principle an internal accountant cannot be sanctioned for the violation of professional secret if he/she reports a suspicion of bribery to a prosecutor, as article 153 of the Penal Code releases professionals from the duty to preserve secrecy if disclosure of the secrecy is in the “general interest”. Although the Slovenian authorities do not provide case law on the interpretation of this criterion, they consider the reporting of suspicions of bribery to be in the “general interest”.

8.3 Penalties

153. The violation of Slovenian accounting standards is not directly regulated by the *Companies Act*. Only the violation of accounting standards that results in an incorrect basis for a tax audit is penalised pursuant to the *Corporate Income Tax Act*.

154. In addition, the Penal Code provides for the offence of Falsification or Destruction of Business Documents (article 240):

“(1) Whoever enters false information or fails to enter any relevant information into business books, documents or files which he is obliged to keep under the statute or regulations derived therefrom and which are essential for the operation of business with other legal or natural persons or intended for making decisions concerning economic or financial activities, or whoever certifies such a book, document or file containing false information with his signature or renders possible the creation of such a book, document or file, shall be sentenced to imprisonment for not more than two years. (2) Whoever uses a false business book, document or file as truthful or whoever destroys or hides books, documents or files under the preceding paragraph, or substantially damages or renders the same useless, shall be punished to the same extent.”

155. This offence applies both to natural and legal persons⁵⁸ and has already been applied in cases of hiding bribery of Slovenian public officials. The Slovenian authorities specify that the falsification of accounting books for the purpose of bribing foreign public officials in international business

⁵⁷ The duty to preserve secrecy shall not apply if data are required to establish the facts in criminal proceedings and if the submittal of such data is required in writing by the competent court, and if the data, facts and circumstances that came to the knowledge of the auditing company in the course of auditing give rise to reasonable suspicion of commission of a criminal act which should be reported.

⁵⁸ Article 25 of the *Liability of Legal Persons Act* includes article 240 of the Penal Code in the list of offences applicable to legal persons.

transactions or of hiding such bribery would certainly be considered as an act “intended for making decisions concerning economic or financial activities”. The sanction applicable to a legal entity are as follows (since the prescribed punishment under article 240 is up to two years of imprisonment): a fine up to 75 000 000 SIT (318 000 euros, 407 000 USD) or a maximum of 100 times the amount of damage caused or illegal benefit obtained through the criminal offence.⁵⁹ The Slovenian authorities indicate that for the moment no legal person has been convicted on the basis of article 240.

156. The *Tax Procedures Act* provides that a fine shall be imposed on private business persons and any other natural persons performing a registered activity, as well as legal persons (article 27 paragraph 3) where they fail to do any of the following: keep business accounts and records or fail to administer them correctly and in due order, or administer them in a manner so as to make information unavailable for the assessment of tax liabilities; submit them within the term and at the place determined by the tax authorities; or keep business accounts and records until the expiry of time specified by the present law (1st, 2nd and 3rd paragraphs of article 27 of *Tax Procedures Act*). Article 27 has never been applied in cases of a tax offence committed in connection with the bribery of a Slovenian or foreign public official or of hiding such bribery.

157. The Slovenian authorities explain that an essential condition for the application of article 240 of the Penal Code is the identification of the natural person who has committed the violation (i.e. who intentionally inserted false information or avoided to insert important information). Article 226 of the *Tax Procedure Act*, which establishes the minor offence for the breach of article 27 is based on the responsibility of legal persons and their managers for the simple fact that there has been improper book-keeping, and no identification of the real perpetrator is required. If the provision of article 226 of the *Tax Procedure Act* is applied, the provision of article 240 can also be applied to the same person at a later stage. On the contrary, if the perpetrator for criminal offence (article 240) has been tried, he/she cannot be further punished for the same act within the minor offence procedure.

9. ARTICLE 9: MUTUAL LEGAL ASSISTANCE

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

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

9.1.1. Criminal Matters

159. The Code of Criminal Procedure specifies that mutual legal assistance (MLA) is possible for offences for which extradition is provided, i.e. only in instances provided for by international treaties binding on the Republic of Slovenia (see part 10 on *Extradition* below). Otherwise, the relevant court will consult with the Ministry of Justice to decide whether to grant MLA.

160. Once the Slovenian authorities determine that MLA is available pursuant to a treaty (or the Ministry authorisation), criminal investigations and proceedings are regulated in the Code of Criminal

⁵⁹ As determined by Art. 26 of *Liability of Legal Persons for Criminal Offences Act*, taking into account the level of sanctions applicable to natural persons. A sentence of winding-up of the legal person may be applied instead of the fine, if the activity of the legal person was entirely or predominantly used for carrying out criminal offences.

Procedure (Chapter Thirty), unless otherwise provided in an international treaty (principle of subsidiarity).

161. Slovenia is a party to several MLA treaties: the Council of Europe Criminal Law Convention on Corruption, the 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters with its Additional Protocol, and bilateral treaties on mutual legal assistance with twelve Parties to the Convention (Austria, Belgium, Bulgaria, Czech Republic, France, Germany, Greece, Hungary, Poland, Slovak Republic, Spain and Turkey) as well as with other countries.⁶⁰

162. The Slovenian authorities indicate that mutual legal assistance with respect to criminal proceedings against legal persons can be provided under the same provisions as for natural persons.

163. The Code of Criminal Procedure does not specifically regulate the coercive and non-coercive measures that Slovenia can undertake to respond to a MLA request. Article 516(3) states that the permissibility of the requested act and the manner of its performance is decided by a court, pursuant to Slovenian laws. The Slovenian authorities indicate that they can provide mutual legal assistance in the form of the service of documents, interrogations, “confrontation” of a person, search of property to recover evidence, seizure, and performance of all investigative acts provided for in the Code of Criminal Procedure (see *Investigative tools* under part 5 above).

164. Concerning confiscation, the Criminal Procedure Code does not recognise the principle of direct enforcement of foreign court decisions. Article 517 states that domestic courts may grant the request of a foreign authority for enforcement of a judgement of conviction passed by a foreign court if so provided by the international agreement or if reciprocity exists. It will take the form of imposing a sanction in accordance with the Slovenian legislation.

165. A 1998 amendment to the Code of Criminal Procedure introduced new procedures for mutual legal assistance. If reciprocity applies or if so determined by an international treaty, international criminal-legal assistance may be exchanged directly between the Slovenian and foreign bodies that participate in the pre-criminal and criminal proceedings, wherein modern technical assets, in particular computer networks and aids for the transmission of pictures, speech and electronic impulses may be used.

166. Slovenia has also entered bilateral agreements concerning international police and/or judicial investigation and co-operation in the field of organised or serious crimes, including corruption offences.⁶¹ These bilateral agreements make co-operation easier since they establish direct links between the authorised institutions of the countries involved.

9.1.2 Non-Criminal Matters

167. The Slovenian authorities indicate that mutual legal assistance in civil and commercial matters is possible on the basis of an international treaty or on the basis of reciprocity. Unless provided otherwise by a treaty, proceedings are regulated by the Code of Civil Procedures. The Slovenian authorities also indicate that prompt and effective legal assistance to another Party is possible for the

⁶⁰ Algeria, Croatia, Cyprus, Iraq, Macedonia, Mongolia, Romania, and Russia.

⁶¹ Agreements were concluded with the following Parties to the Convention: Austria, Bulgaria, Czech Republic, Estonia, Greece, Italy, Hungary, Germany, Poland, Slovakia, Sweden, Switzerland and Turkey; and with non-Parties: Albania, Cyprus, Croatia, Former Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, Romania, and Russian Federation.

purpose of administrative proceedings within the scope of the Convention brought by another Party against a legal person.

9.2 Dual Criminality

168. Under article 9.2 of the Convention, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence in respect of which assistance is sought is within the scope of the Convention.

169. Dual criminality is necessary for Slovenia to be able to provide mutual legal assistance. The Slovenian authorities explain that pursuant to article 8 of the Constitution of the Republic of Slovenia, ratified and published international treaties are to be used directly. Therefore, they consider the Convention as a sufficient basis for dual criminality where a request for mutual legal assistance is submitted by another Party.

9.3 Bank Secrecy

170. Pursuant to article 9.3 of the Convention, a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy.

171. According to the Slovenian authorities, it would not be possible for a Slovenian court to decline to render mutual legal assistance for criminal matters on the grounds of bank secrecy, because of the direct applicability of the Convention, including article 9.3, in Slovenia. They add that in 2003 bank information was communicated to 26 foreign countries seeking MLA in criminal matters, and to 18 countries in the first half of 2004.

172. According to the Slovenian authorities, the right to privacy provided for in articles 35 and 37 of the Constitution of the Republic of Slovenia could not impede the rendering of MLA on the ground of bank secrecy. However, enterprises and other legal persons may request that information concerning their business is not published in the media.

173. The procedure to obtain bank information for MLA purpose is the same as for domestic investigation purpose. Pursuant to article 156 of the Code of Criminal Procedure, the investigating judge may, upon a properly reasoned proposal of the public prosecutor, order a bank, savings bank or savings-credit service to disclose to him/her information and send documentation on the deposits, statement of account and account transactions or other transactions by the suspect, the defendant and other persons who may reasonably be presumed to have been implicated in the financial transactions or deals of the suspect or the defendant. Such an order is available if such data might represent evidence in criminal proceedings or are necessary for the seizure of objects or the securing of a request for the seizure of property benefits or the seizure of property whose value is equivalent to the value of property benefits. The financial institution must immediately send to the investigating judge the requested data and documentation and may not disclose to their clients or third persons that they have sent, or will send, data and documentation to the investigating judge.

10. ARTICLE 10: EXTRADITION

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

174. Article 10.1 of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of the Parties and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a

request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

175. Extradition from Slovenia is possible only in instances provided for by international treaties binding on the Republic of Slovenia (article 521(2) of the Code of Criminal Procedure).⁶² This requirement was introduced in 2003. Slovenia is a party to the Council of Europe Extradition Convention and its two protocols, the Framework Decision on the European Arrest Warrant, and to bilateral treaties with five Parties to the Convention (Australia, Bulgaria, Switzerland, Turkey, and the United-States of America) and other countries.⁶³

176. The Slovenian authorities indicate that in the absence of an extradition treaty with another Party to the Convention, the Convention may be the basis for extradition upon the decision of the court in individual cases. However, although ratified and published treaties are applied directly (article 8 of the Constitution) another article provides that “individual acts and actions of State authorities... must be based on a law or regulation adopted pursuant to a law” (article 153(4)). Up to now, extradition has never been requested and granted on the basis of a treaty that is not specifically an extradition treaty (most extraditions were based on the European Convention on Extradition).

177. Extradition is regulated in the Code of Criminal Procedure (Chapter Thirty-one), unless otherwise provided in an international treaty. The conditions of extradition are as follows: 1) the foreign nationality of the offender, 2) the extraterritoriality of the offence, 3) dual criminality, 4) that the offence is not statute barred in Slovenia, 5) the *non bis in idem* principle, 6) the identification of the person, 7) that there is sufficient evidence to suspect that the foreigner whose extradition is requested has committed a criminal offence or a finally binding judgement, and 8) the speciality principle (articles 522 and 531).

178. Before a decision is taken on a request for extradition, a hearing is held before an investigative judge providing the prosecutor and the defence counsel the opportunity to state their case. If necessary the investigative judge may order investigative acts to determine if there are sufficient grounds for the extradition. The file is then sent to a circuit court panel. If it rejects the extradition request, the decision is forwarded to the Ministry of Foreign Affairs, which notifies the foreign authorities of the decision. If the panel finds that the conditions for extradition are fulfilled, it informs the Minister of Justice, who takes the final decision, except under the European arrest warrant.

179. The Minister may decline extradition if the criminal offence involved is punishable by up to 3 years imprisonment (or if the foreign country has imposed a sentence for a prison term of up to 1 year). Acts defined in article 268(2) and 269a(1) are covered by this provision (i.e. bribery for proper acts and trading in influence for the performance or omission of an officials act). According to the Slovenian authorities, the Minister would be bound by the Convention in cases of bribery of a foreign public official.

⁶² In addition, article 530(2) of the CCP explicitly indicates that the Minister of Justice shall not permit the extradition of a foreigner if an international treaty with the country demanding extradition does not exist.

⁶³ Albania, Croatia, Iraq, Macedonia, Mongolia, Romania, and Russia. It is also a party to the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Agreement on Illicit Traffic by Sea; Implementing article 17 of the preceding instrument; European Convention on the Suppression of Terrorism; UN Convention on Transnational Organised Crime; and Council of Europe Criminal Law Convention on Corruption.

10.3/10.4 Extradition of Nationals

180. Slovenia can extradite its nationals only to another member of the European Union pursuant to article 47 of the Constitution.⁶⁴

181. Upon the request of a foreign country Slovenia can prosecute Slovenian nationals (or persons having permanent residence in Slovenia) for a criminal offence committed abroad. The request is to be transmitted, together with the files, to the competent public prosecutor in whose territory that person has permanent residence. Information about the refusal to assume criminal prosecution and the final decision thereon is sent to the foreign country that requested prosecution (article 520 of the CCP). The Slovenian authorities indicate that the refusal to prosecute can only be based on the same grounds as for an offence perpetrated in Slovenia (article 161 CCP).

10.5 Dual Criminality

182. Dual criminality is a condition for extradition in Slovenia pursuant to article 522 of the CCP. According to the Slovenian authorities, this condition is deemed to be fulfilled if the criminal offence for which extradition is sought is within the scope of article 1 of this Convention.

183. In addition, if the offence was committed in a third country, dual criminality applies also to the law of that country (article 523). This would be the case for instance where the requesting country exercises its nationality jurisdiction over a national having bribed abroad.

11. ARTICLE 11: RESPONSIBLE AUTHORITIES

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

185. Slovenia has not yet notified the Secretary-General of the OECD of the responsible authority(ies). The Slovenian authorities indicate that the Ministry of Interior is preparing the notification.

186. Pursuant to the Code of Criminal Procedure, diplomatic channels should be used for making and receiving requests of mutual legal assistance and extradition. The Ministry of Foreign Affairs then forwards the request to the Ministry of Justice, which in turn forwards the request to the court or investigative judge.⁶⁵ The central authority for the receipt of requests for mutual legal assistance can also be the Ministry of Justice, Department for International Legal Assistance, where a bilateral or multilateral treaty provides so. Therefore, this procedure may apply to MLA and extradition based on the Convention, where such MLA or extradition treaty applies or once the notification to the Secretary General will be made.

⁶⁴ “No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which ... Slovenia has transferred the exercise of part of its sovereign rights to an international organisation.”

⁶⁵ In urgent cases the Ministry of the Internal Affairs can be used as channel for MLA, provided reciprocity exists. MLA requests linked to money laundering are dealt with directly by the body responsible for the prevention of money laundering. (article 515)

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. Tax Deductibility

187. The Slovenian tax legislation is in a transitory period, since a new *Corporate Income Tax Act* entered into force on 1 January 2005.⁶⁶ This new law applies to all legal persons of domestic and foreign law, as well as natural persons conducting economic activities, pursuant to article 35(2) of the *Personal Income Tax Act*. Exceptions are the Republic of Slovenia, self-governing local communities and the Bank of Slovenia (articles 3, 4, 5).⁶⁷

188. Article 21 of the new *Corporate Income Tax Act* provides a list of non-deductible expenses that cannot serve as a basis for a tax deduction, including “bribes, and other forms of material benefit given to natural or legal persons in order to bring about or prevent a certain event which would otherwise not arise, such as in order for a certain action to be performed more quickly or favourably omitted”. The Slovenian authorities clarified the following with respect to article 21:

- “material benefit” includes intangible property such as certificates of stocks, bonds, promissory notes, copyrights and franchises;
- a tax payer could not deduct a contingent liability based on an offer or promise of a bribe, because the Slovenian tax law does not permit deductions based on contingent liabilities;
- a bribe payment from a tax payer who was the best qualified bidder in a foreign tendering process is not deductible.

189. With regards to co-operation and communication between the tax and law enforcement authorities, the tax authorities, as any other state authorities, have to inform the public prosecutor if, in the course of auditing taxpayers, they find data which lead to the suspicion of a penal violation prosecuted *ex officio*, pursuant to article 145 of the Criminal Procedure Code. Bribery and money laundering are considered such criminal offences.⁶⁸ The Slovenian authorities add that tax officials have also a duty to respond to a public prosecutor’s request for further information, and can exchange information with foreign tax authorities on the basis of bilateral or multilateral agreements.

⁶⁶ Official Gazette No. 40/04

⁶⁷ Official Gazette No. 54/04

⁶⁸ Article 145(1): “All state agencies and organisations having public authority shall be bound to report criminal offences liable to public prosecution of which they have been informed or which were brought to their notice in some other way.”

EVALUATION OF SLOVENIA

General Comments

The Working Group commends the Slovenian authorities for their co-operation and openness during the examination process and recognises their efforts in providing an understanding of their laws.

The Working Group acknowledges that Slovenia is the first country to accede to the Convention since its adoption in 1997. Since then, Slovenia introduced the offence of bribery of foreign public officials in the Slovenian Penal Code in March 1999 and established the Commission for the Prevention of Corruption, which is an important part of the overall legal and institutional framework for preventing and suppressing corruption in Slovenia. Article 268 of the Penal Code sanctions the active bribery of “officials” and article 126 defines “officials” as covering both Slovenian and foreign public officials. The Working Group considers that overall Slovenia’s legislation conforms with the standards of the Convention, subject to the issues noted below. In addition, some aspects of the Slovenian legislation might benefit from follow-up during the Phase 2 evaluation process.

Specific issues

Waiver for punishment for effective regret

Article 268(3) of the Penal Code sets forth a waiver of punishment for effective regret in cases of solicitation by the public official, which the judge can discretionarily permit. Although the Convention does not exclude the application of general defences as general provisions of the Criminal Codes of the Parties, the general feeling of the Working Group is that the waiver for punishment for effective regret specific to bribery could be misused. In particular, the Working Group is concerned that this waiver may amount in practice to a specific defence that goes beyond the general defences mentioned above, and that its application may lead to a significant loophole in the implementation of the Convention. In addition, the court may decide to restore the seized bribe to the briber. In the event of the application of effective regret, the principle of mandatory prosecution does not apply as the prosecutor has discretion on whether to proceed with the case. The Working Group therefore encourages the Slovenian authorities to consider making the necessary changes in relation to bribery of a foreign public official and will specifically focus on this issue during the monitoring of Phase 2.

Definition of officials

Article 1.4 of the Convention provides an autonomous definition of foreign public officials to which national legislation should conform. However, the definition of “foreign public official” in Slovenian law is not autonomous, as it is necessary to determine whether the person in question would conform to the definition of a “Slovenian public official”. The Slovenian authorities refer to the principle of legality and do not make a direct application of the Convention in the fields of crimes and punishments. This raises problems in relation to “*de facto*” officials, who are not covered by the definition of “Slovenian public official”. In addition, the definition of foreign official excludes officials of an organised area or entity, other than an internationally recognised State. The Slovenian authorities are of the view that the explicit reference to the definition of “Slovenian public official” is not an obstacle to the prosecution of bribery of foreign public officials and does not violate requirements of Article 1 of the Convention since the substantive criteria in place for domestic public

officials cover all conceivable “types” of public officials. The Group recommends that Slovenia consider expanding the definition of “foreign public official” to include “*de facto*” officials and officials of non internationally recognised countries.

Moreover, in most cases, the law enforcement authorities will have to in practice consider the law of the country in which the person exercises his/her functions. The Working Group therefore considers that such an approach is not in conformity with the autonomous definition set out in Article 1 of the Convention as well as with the objectives of the Convention which aim at guaranteeing a homogenous application of the Convention. The Working Group expressed concerns that the double test principle and the reference to the law of the foreign country could affect the implementation of the Convention. This issue might benefit from further discussion during Phase 2 of the evaluation process.

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

Under Slovenian law, bribery of foreign public officials is punishable only where the bribe is offered, promised or given in exchange for an “official act” to be performed or omitted “within the scope of [the public official’s] official authority”. The fulfilment of these conditions depends on the legal or regulatory provisions defining the rights and obligations of the foreign public official in that particular country. In addition, there is uncertainty as to whether the standard of the Convention, which requires under article 1.4.c that the offence covers “any use of the public official’s position, whether or not within the official’s authorised competence” is met. The Slovenian authorities consider that cases outside the official’s authorised competence can be captured through other criminal offences such as trading in influence or instigation of a foreign public official’s abuse of office. Therefore they consider that all cases would be covered in practice. The Working Group remains concerned by the absence of direct coverage of bribery for acts in relation to but not strictly within the scope of duties of the officials, and recommends that this issue is followed-up in Phase 2.

Liability of legal persons

Article 28 of the *Liability of Legal Persons for Criminal Offences Act* on “Expediency of Initiation of Proceedings”, states that the prosecutor “may decide not to request the initiation of criminal proceedings against a legal person if the circumstances of the case show that this would not be expedient because the legal person’s participation in the criminal offence was insignificant ...”. The Slovenian authorities clarify that this exemption must be based on well-grounded reasoning of the prosecutor. In the absence of supporting case law, the Working Group will revisit this issue during the Phase 2 of the evaluation process.

Direct applicability of the Convention and extradition

Extradition from Slovenia is possible only in instances provided for by international treaties binding on the Republic of Slovenia. Under the Slovenian law, in the absence of an extradition treaty with another Party to the Convention, the Convention in conjunction with the Code of Criminal Procedure, will be the basis for extradition. The Working Group notes that this direct applicability of the Convention has never been confirmed in practice and thus recommends that this issue be monitored in Phase 2.