



POLAND: PHASE 2

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 18 January 2007.

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EXECUTIVE SUMMARY

The Phase 2 Report on Poland by the OECD Working Group on Bribery evaluates and makes recommendations on Poland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. While the issue of domestic corruption is at the centre of public attention in Poland, awareness of the offence of bribery of foreign public officials is generally low among both the public and private sector. Poland should work to raise awareness of foreign bribery in both the public administration and the private sector.

To date, no cases of foreign bribery have been brought before Polish courts, nor have there been any investigations. Therefore, a more proactive approach in detecting, investigating and prosecuting cases of foreign bribery is recommended by the Working Group. The Working Group finds that the Law on Collective Entities contains prerequisites for the establishment of corporate liability for foreign bribery that may be obstacles to pursuing legal persons, *e.g.* a requirement that an individual be convicted before proceeding against a legal person. The Working Group recommends amendment of the law to eliminate this requirement and welcomed Poland's declaration to undertake legislative steps, to address this issue.

With respect to the non-tax deductibility of bribes, the Working Group recommends that Poland amend its legislation to clearly confirm that bribes are not tax deductible. The report also highlights concerns about an 'impunity' provision in the Polish Penal Code which allows a perpetrator of the foreign bribery offence, subject to certain conditions, to automatically escape punishment by notifying the authorities of the offence. It is recommended that the provision be reviewed to exclude its application to the foreign bribery offence, or significantly limit its scope by imposing further conditions for its application, or in some other appropriate way ensure that the law does not contravene the Convention. Poland should consider strengthening safeguards to ensure that prosecutorial decisions cannot be affected by those considerations set out in Article 5 of the Convention, in order to prevent potential risks of undue influence that may arise from the dual role of the Prosecutor General and Minister of Justice.

The Working Group also highlights positive aspects of Poland's work to fight foreign bribery. In this regard, it has developed a flexible and responsive system for dealing with mutual legal assistance matters. Poland is strengthening its investigative capacities to combat foreign bribery and other major crimes by creating a new structure of organised crime units within the prosecution authority. The Working Group also found that the Polish export credit institution is actively developing and strengthening its procedures to deter and detect foreign bribery. Similarly, authorities' ongoing efforts and close co-operation to fine tune the anti-money laundering reporting system provide a good foundation for the detection of the laundering of funds related to foreign bribery. Another promising development has been the creation of several specialised anti-corruption police units in 2004.

The report and the recommendations therein, which reflect findings of experts from Turkey and the United Kingdom, were adopted by the OECD Working Group. Within one year of the Group's approval of the report, Poland will make an oral follow-up report on its implementation of the recommendations, and will submit a written report within two years. The report is based on the laws, regulations and other materials supplied by Poland, and information obtained by the evaluation team during its five-day on-site visit to Warsaw in May 2006, during which the team met with representatives of the Polish public administration, the private sector, civil society and the media.

A. INTRODUCTION

1. On-Site Visit

1. The Phase 2 on-site visit to Poland was undertaken by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) from 15 to 19 May 2006 in Warsaw.¹ The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), was to study the structures in place in Poland to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Poland's compliance in practice with the Revised Recommendation.

2. The examining team was composed of lead examiners from Turkey² and the United Kingdom,³ and representatives of the OECD Secretariat.⁴ During the on-site visit, meetings were held with officials from the Polish government (and related bodies) and representatives from civil society, business associations, companies, the legal profession, the judiciary, and the national parliament.⁵ In preparation for the on-site visit, the Polish authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained questions specific to Poland. The Polish authorities also submitted relevant legislation and regulations, case law, statistical information and various government and non-government publications. The examining team reviewed these materials and also performed extensive independent research to obtain non-government viewpoints. It focused on the implementation of the Convention and the Revised Recommendation from the perspective of the Polish government, as well as the perspective of civil society and the private sector on the fight against foreign bribery in Poland.

3. The examining team is grateful to the Polish authorities for their co-operation, in particular the Ministry of Justice, who organised all the participants and the extensive logistics involved, which ensured the smooth running of the on-site visit. Leading up to and following the on-site visit, the Polish authorities responded to many requests for information and documentation. The examination team appreciates the

¹ The Phase 1 examination of Poland took place in 2001. The purpose of the Phase 1 examination is to assess whether a Party's laws for implementing the Convention and the Revised Recommendation comply with the standards there under.

² Turkey was represented by: Professor Dr. Fusun Sokullu-Akinci, Chair, Department of Criminal Law, Istanbul University, Law School and Director of Criminal Law and Criminology, Istanbul University, Law School; Ulku Guler, Judge, General Directorate of International Law and International Relations, Ministry of Justice; and Namik Kemal Uyanik, Head of Department, Ministry of Finance.

³ The United Kingdom was represented by: Alan Bacarese, Senior Crown Prosecutor, Policy Directorate, Crown Prosecution Service; Anna Hodgson, Head of Section, External Relations, EU Enlargement and Near Neighbours, Home Office; and Jeremy Rawlins, Head of Proceeds of Crime Delivery Unit, Business Development Directorate, Crown Prosecution Service Head Quarters.

⁴ The OECD Secretariat was represented by: Brian Pontifex, Co-ordinator of the Poland Phase 2 Examination, Legal Consultant, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs (DAF) OECD; Gwenaëlle Le Coustumer, Administrator, Lawyer, Anti-Corruption Division, DAF, OECD; and Helen Green, Consultant, Anti-Corruption Division, DAF, OECD.

⁵ See attached list of institutions encountered in Annex 1 of this report.

high level of co-operation of the Polish authorities at all stages of the Phase 2 process, ensuring a thorough review of Poland's implementation of the OECD Convention and Revised Recommendation.

2. General Observations

a. *Economic system*⁶

4. Poland, with a population of 38.17 million, has the largest population of any country in central and Eastern Europe. Following the collapse of communism in 1989, Poland emerged to be one of the fastest growing economies in Europe, accelerated by its accession to the European Union (EU) on 1 May 2004, after 15 years of economic and political transition. The post-communist transformation has been marked by a spectacular rise in trade, and the emergence of a large and vibrant services sector. The Polish economy is ranked as the 14th largest among 30 OECD economies and has had a record of steady economic growth reaching 5.3% in 2004, before declining to 3.2% in 2005. Recent Ministry of Economy's forecasts expect that economic growth will strongly pick up in 2006 (GDP growth 5.5%) as domestic demand strengthens. The growth in the market economy is evident from the Warsaw Stock Exchange which had five listed companies in April 1991, a figure that had grown to 253 listed companies (247 domestic and 6 foreign companies) by March 2006. A key challenge for the Polish authorities is the ongoing high level of government borrowing. With continuing relatively high unemployment (14.8% in November 2006) successive governments have found it difficult to reduce public expenditure. Major economic reforms have included the floating of the currency and a large scale, but sometimes controversial, privatisation programme. The privatisation programme in Poland, particularly in the banking industry, has been the subject of fierce political debate over allegations of corruption and the issue of maintaining Polish control and ownership over "national assets".

5. The massive economic and structural reforms following the collapse of communism has played an important role in attracting significant foreign investment to Poland. In 2005 foreign direct investment (FDI) in Poland amounted to EUR 7.7 billion, which according to the National Bank of Poland, is constituted principally by FDI from the Netherlands (21.6%), Germany (16.3%), France (12.5%), and the United States (7.1%). As concerns Polish direct investment abroad, FDI constituted about EUR 3 billion in 2005. An area recording spectacular growth has been Polish exports to the world which, in the past ten years, have increased nearly four times from USD 2.03 billion in January 1996 to USD 8.08 billion in January 2006. The World Trade Organisation states that Poland accounts for 0.82% of the world's export of goods and 0.94% of the world's import of goods. The main destination of Polish exports is the European Union (79.1%)⁷ followed by the Russian Federation (3.9%), Ukraine (2.7%) and the United States (2.4%). The most rapidly growing part of the economy is in industry, particularly manufacturing, including production of machinery and equipment, medical and optical equipment, motor vehicles, furniture, construction materials and food and drinks. In the mining sector, Poland remains one of the world's largest coal producers, and also produces large quantities of copper and silver. The agricultural sector remains significant, but is characterised predominantly by small land holdings, generating only about 2.6% of GDP. The entry of Poland into the European Union however, has led to increased food exports to the EU and

⁶ Statistics have been taken from: OECD, *Economic Surveys: Poland* (2004); OECD Factbook 2005, *Economic, Environmental and Social Statistics*; Economist Intelligence Unit, *Country Profile 2005: Poland*; The Economist Intelligence Unit, *Country Report: Poland*, March 2006; Warsaw Stock Exchange: www.gpw.com.pl Ministry of Economy www.mg.gov.pl, National Bank of Poland www.nbp.pl; OECD, *Recent trends in Foreign Direct Investment in OECD Countries*, 13 December 2005; OECD Monthly Statistics of International Trade – Data: see www.oecd.org; World Trade Organisation, Trade Profiles, Poland, September 2005: www.wto.org.

⁷ EU export partners (2004) included Germany 29.9%, France 6%, Italy 6%, UK 5.5% & Czech Rep. 4.3%.

also higher farm incomes. Major import partners are the European Union (68.2%)⁸, the Russian Federation (7.2%), China (4.6%) and the United States (2.4%).

b. Political and legal framework

6. Poland is a parliamentary republic, with a directly elected president as head of state. The president is elected for five years. The legislative authority of the Republic is vested in the bicameral parliament, composed of the *Sejm* (lower house) of 460 deputies and the Senate (upper house) of 100 senators, elected for four-year terms. The national government consists of a Council of Ministers, headed by the prime minister, which is responsible to parliament. The country is divided into 16 provinces (*województwa*) and the provinces are divided into *poviats*. The basic administrative unit is a commune (*gmina*). The Constitution, adopted in 1997, includes a number of fundamental rights and freedoms including basic rights with respect to criminal proceedings (e.g. the right to due process, the right to defence, and the presumption of innocence) as well as social and economic rights, such as free healthcare and education, a minimum wage, and equality between the sexes.

7. The binding sources of law in Poland, pursuant to Article 87 of the Constitution are the Constitution itself, statutes enacted by parliament, ratified international agreements, and regulations. Polish authorities point out that Article 91 of the Constitution provides that a ratified international agreement, after its publication in the Polish Journal of Laws, constitutes a part of the domestic legal order, and is directly applicable unless its application depends on the enactment of a statute. Moreover, an international agreement ratified upon a “prior consent granted by statute” has precedence over provisions of a domestic law if they do not reconcile with the agreement. It is important to note that, with respect to imposing sanctions under criminal law, Article 42.1 of the Constitution expressing the legality principle⁹, states that “only a person who has committed an act prohibited by a statute in force at the moment thereof, and, which is subject to a penalty, shall be held criminally responsible.” Accordingly, if an element of the foreign bribery offence required under the OECD Convention is not covered by the offence in a statute, e.g. the Penal Code, the missing element could not be implicitly applied by reference to the Convention.

c. Implementation of the Convention and Revised Recommendation

8. In compliance with the Convention and the Revised Recommendation, Poland has enacted laws to combat bribery of foreign public officials in international business transactions. Poland signed the Convention on 17 December 1997, and deposited its instrument of ratification with the OECD Secretary-General on 8 September 2000. The implementing legislation came into force on 4 February 2001. Amendments have been made to laws relevant to the foreign bribery offence in the Polish Penal Code in 2003, and a new law has been enacted governing the liability of legal persons in Poland. In general, the lead examiners have formed the view, to the extent possible, that the foreign bribery offence in the Polish Penal Code is in accordance with the standards established under Article 1 of the Convention. This assessment will require further consideration by the Working Group on Bribery once the Polish courts have had an opportunity to apply and interpret the Penal Code offence. Importantly, this Report identifies a number of other areas related to the implementation of the Convention and Revised Recommendation that require further attention by Polish authorities, including concerns about: potential deficiencies in the new law applicable to legal persons; the effectiveness of the tax provision applicable to non-tax deductibility of bribes; the independence of the office of Prosecutor General; the broad scope and application of immunities from prosecution enjoyed by many public office holders including parliamentarians, judges and prosecutors; and the impact of a new “impunity” provision in the Penal Code which allows a perpetrator of

⁸ EU import partners (2004) included Germany 24.2%, Italy 7.8%, France 6.7%, and Czech Rep. 4.3%.

⁹ The legality principle - *nullum crimen nulla pena sine lege*

the foreign bribery offence, subject to certain conditions, to automatically escape punishment by notifying the authorities of the offence.

9. Independent surveys have highlighted that corruption remains a serious issue in Poland. The Transparency International Corruption Perceptions Index, which measures perceptions of corruption, and not actual corruption, gave Poland a relatively poor ranking for perceived levels of domestic corruption in its 2006 survey.¹⁰ Within the Council of Europe, the Group of States Against Corruption warned in 2001 that the corruption phenomenon endangered the functioning of many “public spheres” in Poland.¹¹ The issue of corruption dominated the national election campaign in 2005. A number of participants in the Phase 2 Review, including representatives from various government ministries, industry and civil society, indicated that there was a high level of awareness of the domestic corruption problem in Poland. An important aspect of the government’s approach to combating the problem was the adoption in 2002 of an Anti-Corruption Strategy which, among other things, assigned certain actions to be taken by a number of public bodies, within a specified time-frame, designed to strengthen the fight against corruption. At the forefront of Poland’s more recent anti-corruption efforts has been the development of new initiatives to combat this widespread and insidious problem through the enactment of laws, renewed efforts to raise awareness and prevent corruption, and the re-structuring of law enforcement and prosecution agencies to strengthen their ability to investigate and prosecute allegations of corrupt activity. An initiative of considerable interest to the lead examiners was the recent establishment of a new Central Anti-Corruption Bureau (CBA) created to combat corruption, primarily within Polish institutions and society.

10. The strength of awareness and commitment demonstrated in combating domestic corruption in Poland was not as evident however, in the fight against foreign bribery. The lead examiners concluded that whilst the fight against foreign bribery had received some attention by government authorities in Poland, including the recent incorporation of foreign bribery into the Polish Anti-Corruption Strategy, further efforts were still required to strengthen the awareness, detection, and prevention of the offence and other obligations under the Convention and Revised Recommendation. With the dramatic growth in Polish exports, and increased trade by Polish citizens and companies in markets where bribery is an acknowledged risk, the need to address issues of foreign bribery has become more urgent, and it is this concern that forms a major basis of this Report.

d. Cases involving the bribery of foreign public officials

(i) Investigations, prosecutions and convictions

11. At the time of the on-site visit, Poland had not recorded any convictions, nor did it have any ongoing or terminated investigations or prosecutions, for the offence of bribery of foreign public officials in the context of international business transactions.

12. The lead examiners were briefed by Polish authorities on one high profile transnational crime investigation that had implicated a number of Polish and foreign entities, resulting in charges against persons suspected of perpetrating the crimes of money laundering, fraud, and the forgery of documents. At

¹⁰ In the latest survey, in 2006, Poland was ranked 61st out of 163 countries surveyed. It was given a low score of 3.7 out of a possible 10, suggesting a serious problem of perceived domestic corruption in Poland. This represented an improvement on the 2005 results, which had given Poland 3.4 out of 10. These results should be applied with caution as the index score relates not to actual corruption but to the perceptions of the degree of domestic corruption as seen by business people and country analysts and ranges between 10 (highly clean) and 0 (highly corrupt): see www.transparency.org.

¹¹ Group of States against corruption (GRECO) *First Evaluation Round: Evaluation Report on Poland*, Greco Eval I Rep (2001) 11E Final (adopted 11 March 2002), para. 158.

the time of the on-site visit there had been no investigations or charges in relation to the offence of bribing a foreign public official. The case did serve however, to demonstrate some of the strong capabilities of Polish police and prosecution authorities. The lead examiners also sought information on newspaper reports in 2006 alleging that a Polish entity had engaged in corrupt conduct abroad. The lead examiners were informed that the Military Prosecutor's Office had initially looked into the matter, but had determined that it did not have jurisdiction to launch an investigation. At the time of the on-site visit, there was not any information available indicating whether preliminary or formal investigations had been conducted by the police or the State Prosecution Authority, nor information as to whether there had been any checks to ascertain the veracity of allegations. Although the lead examiners recognised that the press does not necessarily report this kind of information correctly, they were surprised that it did not appear that even initial steps to verify potentially important information in the media had been undertaken. However, after the on-site visit the State Prosecution Authority confirmed that law enforcement authorities had in fact been looking at this matter as far back as 2005, and that proceedings in connection with suspicions of a money laundering offence had commenced. In relation to this matter, there have been no investigations or charges in relation to the offence of bribing a foreign public official to date.

13. Given that Poland has experienced significant growth in exports and its companies have invested and conducted trade with many emerging markets that have a high risk of corruption, it could be expected that a Polish company or citizen might have been the subject of a foreign bribery investigation. The primary focus of Polish authorities however, has been on domestic corruption and it was clear to the lead examiners that further efforts are required to uncover and investigate allegations of the foreign bribery offence. In short, a more proactive approach to the detection, investigation and prosecution of the foreign bribery offence is required.

(ii) *Independent Inquiry Committee into the UN Oil-For-Food Programme*

14. Following the publication of the final report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (IIC) in 2005, prosecution authorities in Poland confirmed that a contact point had been established for inquiries and information, but because no specific allegations had been made against Polish companies in the report, no steps had been taken by Poland to liaise with the IIC in New York.

3. Outline of Report

15. This report is structured in four parts. Part A provides background information on the Polish economic, legal, and political systems. Part B examines prevention, detection and awareness of foreign bribery in Poland. Part C develops issues related to the investigation, prosecution and sanctioning of foreign bribery and related offences. Part D sets out the recommendations of the Working Group and identifies issues for follow-up.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

16. Public awareness of domestic corruption is generally widespread, as domestic corruption has been the focus of ongoing public debate, most particularly in recent election campaigns. There have been numerous allegations of corruption of politicians and calls for change from the general public.

a. Government initiatives to raise awareness

(i) The Anti-Corruption Strategy

17. The Anti-Corruption Strategy outlines the government's formal programme to combat corruption. A "work item" specifically focused on corruption in international business was incorporated into this strategy in 2005. The Convention is raised in a general section of the strategy document as part of the body of relevant international legal instruments to be complied with by Poland. The strategy calls for several government agencies and ministries to carry out "educational activities in the public and private sector" related to foreign bribery. A report on the first two years of activities pertaining to fighting corruption in international business is to be completed in the first half of 2007.

18. This initial step to include international corruption in the scope of the strategy, which primarily addresses issues concerning domestic corruption, constitutes a necessary basis from which efforts to raise awareness about foreign bribery and the Convention should continue to multiply. In addition, the Polish government has taken other steps to raise awareness about the offence of foreign bribery. The relevant OECD texts, translated into Polish, have been posted on websites of the ministries of justice, economy and treasury, including the text of the Convention, the 1997 Revised Recommendation, the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, as well as texts of Poland's implementing legislation. There are references to the OECD Guidelines for Multinational Enterprises, the Action Statement on Officially Supported Export Credits, and the OECD Phase 1 Report of Poland.

(ii) Awareness raising and training for public officials

19. Many of the anti-corruption awareness-raising activities described by Polish officials were still in the planning phase at the time of the on-site visit. As part of the civil service training activities, the Office of the Civil Service is planning to include the Convention in future ethics training programmes. Information campaigns on the Convention are also planned for staff of Polish diplomatic missions, particularly in countries where Polish development aid is delivered. (See also Sections 4 and 5 on official development aid and on foreign diplomatic representations)

20. Among the awareness-raising and training currently available for public officials were activities of the Ministry of Finance, where it was reported that tax officers received training and detailed information on the offence of bribery of foreign public officials. It was acknowledged by Polish authorities that this information does not mention the non-tax deductibility of bribes or the obligation to report bribes to law enforcement authorities if they are detected. Polish authorities maintain that these elements are inherent in tax officials' regular training and general professional knowledge. However, lead examiners consider that specific emphasis on these elements in training and awareness-raising materials is of great importance, especially given that the non-deductibility of bribes is not expressly provided for in Polish tax legislation. Although it was stated that tax officers received information on the offence of foreign bribery in training programmes, the lead examiners formed the view that training seemed more focused on domestic corruption than on foreign bribery. It was also evident that officials present at the on-site visit

were themselves unaware of the OECD Bribery Awareness Handbook for Tax Examiners, although this has since been rectified. (See also Section B. 6., The Tax Authorities)

21. The Ministry of the Interior carries out training on corruption for the police, however foreign bribery does not feature prominently among the subjects covered. Recent programmes, including twinning programmes in conjunction with other cities in Europe have generated interest in developing training and awareness-raising activities further. In addition, the Convention was discussed in a joint training session, held by the organised crime division of the police and a police training institute¹² for 137 police officers working in specialised units fighting corruption in Poland. More far reaching, specialised activities to increase knowledge of foreign bribery within the general police ranks has yet to take place. As such the level of awareness of foreign bribery among the police was considered to be low. (See also Section C. on the police)

(iii) *Awareness raising and training for the business sector*

22. The Ministry of Economy reported that they provide training for the business sector, including small and medium sized enterprises, on good business practices, developing entrepreneurship, preventing corruption and, to some extent, about foreign bribery and the Convention. Information on the Convention directed to entrepreneurs has been displayed on information boards at the Ministry's premises, and information has been disseminated to entrepreneurs' associations and trade unions. In addition, the Ministry of the Treasury published the *Principles on Corporate Governance in Companies with Treasury's share and Other Public Legal Persons* in October 2005, which included a Polish language version of the *OECD Guidelines of Corporate Governance in state-owned enterprises*. These *Principles of Corporate Governance* are applicable to every enterprise supervised by the Ministry of the Treasury and are intended to be a benchmark for other enterprises with a State Treasury share. During meetings of departments supervising state-owned enterprises with board members in December 2005 and January 2006, the Ministry of Treasury prepared and distributed an information notice on the OECD Convention among board members and executive management of companies where the treasury was the sole or majority shareholder. At the local level, a representative from a regional appellate prosecution authority informed the lead examiners of attempts to organise training sessions on foreign bribery for local businesses in her border region where there is extensive cross-border trade with Germany. She reported however that it was very challenging to attract businesses to attend and persuade them of the importance of such training. Business representatives present at the on-site visit had not participated in any of these awareness-raising activities and were unaware of such activities carried out by the government.

23. With regard to other private sector entities, Polish officials reported on government efforts to raise awareness among certain groups of professionals. The Ministry of Justice addressed letters to the Supreme Advocates Council and the Supreme Chamber of Legal Advisors drawing the attention of legal professionals to the importance of the Convention, and signalling the Ministry's website as a source of further information. As concerns accounting and auditing professionals, the Ministry of Finance prepared information material concerning the provisions of the Convention and sent it to the National Chamber of Statutory Auditors and the Accountants Association in Poland with a request that it be disseminated among members of both institutions. The objective of the material is to draw the attention of accountants and statutory auditors to the need of disclosing in their everyday work situations which might indicate the bribery of domestic or foreign public officials. (See also Section 7, Accounting and Auditing)

¹² Division for Combating Organised Crime of the Central Investigation Bureau of the National Headquarters of the Police and the Institute for Training of Officers of State Agencies Combating Organised Crime and Terrorism of the Higher Training School of the Police.

b. Private sector initiatives to raise awareness

24. The participation of private sector representatives at the on-site visit was somewhat limited, with only a very small number of companies represented. Representatives of the private sector present at the on-site visit seemed quite aware of the problem of corruption domestically, recognising that in the past corruption was very widespread but thought that progress has been made in recent years. Representatives of business organisations expressed their view that when entrepreneurs are organised, they are more able to carry out their business without having to resort to bribes. They also mentioned conducting research and risk analysis to improve upon areas where there may be particular risks for corruption, such as public procurement. However, when private sector representatives were asked specifically about foreign bribery and the potential for liability of legal persons under Polish law, it was not apparent that they considered the foreign bribery offence to be of great concern to them. When asked about how one major Polish company would deal with a demand for a facilitation payment at a border crossing, the representative answered that he “could not imagine” such an instance. To the same question, a representative of a state-owned company replied that that “was not part of how they do business” and that with all the control mechanisms in place, it was simply not a possibility. In terms of awareness of the Convention, a parliamentarian present at the on-site visit reported that research carried out in 2005 found that chambers of commerce were unaware, and even surprised at the existence of an international convention against foreign bribery.

Commentary

The level of awareness about domestic corruption in Poland, and efforts by authorities to combat it, has significantly increased in recent years. Work to raise awareness about foreign bribery has begun. However, the awareness and understanding in Poland about the foreign bribery offence remains low across both the public and private sectors. The lead examiners recommend that Poland take steps to implement awareness-raising and training programmes that specifically address foreign bribery and public officials’ responsibilities in relation to the OECD Convention across relevant public sector bodies. Polish authorities are encouraged to ensure that such programmes be integrated into the training initiatives that were in the planning stage at the time of the on-site visit. In relation to the business sector, the lead examiners were disappointed with the degree of interest in the issue of foreign bribery, and recommend that Polish authorities take steps to increase the awareness of businesses and business associations about the Convention and the potential for liability of legal persons under Polish law.

2. Reporting Foreign Bribery Offences and Whistleblower Protection

25. Reporting to law enforcement authorities of suspicions or alleged cases of foreign bribery by the employees of private corporations or public entities, contractors, competitors, journalists or members of the general public can play an important role in the detection of violations of Polish legislation on foreign bribery.

a. Duty to report crimes to law enforcement authorities

26. The obligation to report a crime is specified in article 304 of the Polish Code of Criminal Procedure. Article 304.1 contains a general obligation for anyone with knowledge of the commission of a crime, including corruption, to inform a prosecutor or the police. This is described in the law as a “civic duty” and thus is not subject to any criminal law sanctions. This provision also applies to the members of the civil service corps. Citizens can supply information on corruption or any other crime, through special anonymous phone lines in operation in the general headquarters of the police and the provincial, city and county headquarters of the police.

27. Article 304.2 imposes a legal obligation on state or local government institution staff, who in connection with the performance of their duties learn about the commission of crimes prosecuted *ex officio* (which includes the foreign bribery offence), to report such crimes immediately to the public prosecutor, or the police. A public official who fails to meet this obligation is subject to criminal liability under article 231 of the Penal Code for failure to perform duties and acting to the detriment of a public or individual interest. The sanction envisaged in this article is the penalty of deprivation of liberty up to three years. In the event the perpetrator acts unintentionally and causes substantial damage, the article provides for the penalty of a fine, the restriction of liberty or deprivation of liberty up to two years. A public official's failure to report corruption can also trigger a disciplinary procedure as non-reporting can be classified as the violation of the specific reporting duties of a member of the civil service corps defined in article 48 of the Law on Civil Service.¹³

28. The lead examiners inquired whether any reports of suspicions or occurrences of foreign bribery had ever been made pursuant to the reporting obligation. None of the officials, including law enforcement officials, present at the on-site visit were aware of any such reports. An official from the Office of the Civil Service informed lead examiners that no data is available on how often public officials make reports¹⁴ nor on criminal and disciplinary sanctions for failure to report. A representative of the Ministry of Interior and Administration informed the lead examiners that the obligation to report crimes was covered in ethics training, and that all Polish administration employees would know about their duty to report, and how to report.

29. The lead examiners were not able to assess clearly the degree to which the reporting obligation is known and understood by the general public and public officials. The Civil Service administration is planning steps to raise awareness about public officials' obligation to report. An ethical advisor is to be named in each government office; and a "transparent office programme" is being established to inform both public officials and clients of their rights inside a government office. Polish officials at the on-site visit were of the view that these measures would help to encourage people to come forward with information about corruption.

b. Whistleblowing and whistleblower protection

30. In general, companies have not taken steps to raise the awareness of their employees on the risk of bribery in international business transactions (see above Chapter 1.b). Similarly, the representatives of the civil society met at the on-site visit indicated that a very few Polish companies had adopted anti-bribery provisions in their codes of conducts and put in place mechanisms to enable employees to give information anonymously on possible violations of the law within their company. In addition, a representative of a trade union reported cases where the mechanisms put in place by subsidiaries of international companies were inadequately designed and inefficient.

31. A Ministry of Interior and Administration official informed lead examiners that there were no specific whistleblower protection provisions in Polish law, but the labour law anti-mobbing provisions in the Polish Labour Code might assist in addressing these issues. Representatives of a trade union and the press considered however that there was no protection available in practice to prevent professional or

¹³ A member of the civil service corps is obliged to refuse to carry out an order if it could lead to committing a crime and is obliged to report such an order to the director-general of his/her office: Article 48, Law on Civil Service.

¹⁴ The Polish authorities present at the on-site visit nevertheless indicated that there have been cases of public officials notifying their superiors or prosecution authorities of active domestic corruption. The majority of the cases are proceedings in which police officers (in particular road traffic police) submit information on promises for pecuniary advantages or on attempts to grant such advantages to them.

personal retaliation subsequent to divulging information about crimes of corruption. Polish authorities did point out that protection of whistleblowers may take place pursuant to legal provisions designed to protect employees against, in particular, unlawful dismissal, termination of contract, or mistreatment. In appropriate circumstances measures of protection under the criminal law may also be applied to whistleblowers who subsequently act as witnesses in criminal proceedings.¹⁵ Officials at the on-site visit acknowledged that the issue of whistleblower protection was difficult, as it was essential to respect the rights of both whistleblowers and the accused.

Commentary

The obligation of public officials to report a crime is specified in article 304 of the Polish Code of Criminal Procedure. It is not clear to the lead examiners that the reporting obligation is effective in practice. The lead examiners recommend that Poland take steps to ensure that the obligation to report instances of bribery of foreign public officials, and the procedures and reporting channels to do so, be made clear to all public officials who may play a role in the detection and prevention of this type of offence, or who, by virtue of the type of work they perform, are most likely to become aware of such activity.

It is also recommended that Poland consider introducing stronger whistleblower protection measures for employees who report suspicious facts that may indicate foreign bribery in order to encourage them to report such facts without fear of retaliation.

3. Officially Supported Export Credits

a. Awareness-raising efforts

32. The export credit agency in Poland is the Export Credit Insurance Corporation Joint Stock Company (KUKI). It has two shareholders: (1) the State Treasury, which is the majority shareholder, represented by the Minister of Finance; and (2) the Bank Gospodarstwa Krajowego. In 2004 KUKI provided insurance coverage to Polish exporters operating in over 190 markets worldwide. It is therefore, uniquely placed to both raise awareness about the Convention with its client companies, and also to detect foreign bribery cases.

33. Representatives from KUKI indicated at the on-site visit that KUKI complies with the 2000 OECD Action Statement of the Working Party on Export Credits and Credit Guarantees (2000 Action Statement). In that regard, KUKI stated that it informs all applicants requesting official export credit support about the legal consequences of bribery in international business transactions. This is accomplished by the text used in the application forms for official export credit support. The application form does not explicitly set out the exact terms of the offence, but it does refer applicants to “the penal responsibility for deeds stipulated in article 229.5 and article 230a of the Polish Penal Code, which fulfil the characteristics of the crime of bribery of foreign public officials.” The application form also highlights legal consequences of illegal acts (including bribery) arising under agreements entered into with KUKI, including “(1) refusal of insurance if there is sufficient evidence that the loan agreement has been concluded as a result of bribery; (2) refusal of indemnity payment if after conclusion of insurance agreement it is evidenced that the loan agreement has been concluded as a result of bribery.” Finally, the application form invites applicants to make a declaration or give an undertaking that the export contract or

¹⁵ The protective mechanisms that can be made available to witnesses include: ‘incognito witness’, ‘immunity witness’, or the right to restrict information concerning the address of the witness for the prosecutor’s or the judge’s exclusive use, under article 191 of the Penal Procedure Code. (See part C.2.(vi) of the Report).

loan agreement “has not been/will not be concluded as a result of an illegal act, in particular bribery of a foreign public official...” This is a prerequisite for obtaining official support. These requirements are also included in the General Conditions of Insurance, and on the KUKÉ website. KUKÉ requires its staff to be familiar with the requirements of the 2000 Action Statement.

b. *Detection of foreign bribery*

34. Apart from scrutinising the information provided in the application forms for official support, KUKÉ’s procedures include a requirement for its staff to verify that the relevant parties involved in a transaction are not included in the list of firms debarred by the World Bank due to fraud and corruption. The Polish export credit system does not presently require applicants to provide any specific details on agents’ commissions, primarily because agents’ commissions are not eligible for official support. However, in the light of the 2006 OECD Recommendation to deter bribery in Officially Supported Export Credits the Polish authorities indicated that the Ministry of Finance and KUKÉ were re-examining this issue, and other relevant issues, with the view to revising and amending procedures by the end of 2006.

c. *Duty to report bribery of foreign public officials*

35. KUKÉ representatives stated that they were bound by the obligations in article 304.1 and 304.2 of the Code of Criminal Procedure to report a crime (including the foreign bribery offence) to the police or prosecution authorities. It was stated that, in practice KUKÉ personnel would report a suspicion of foreign bribery both to law enforcement authorities and also the Ministry of Finance, although in practice they indicated that there had been no such case so far.

Commentary

Processes and procedures introduced by KUKÉ to detect and combat the bribery of foreign public officials by applicants for, and recipients of, official export credit support are of a high standard. However, Polish authorities should ensure that procedures for assessing applications for officially supported export credits are reconsidered and strengthened, in particular, to include closer scrutiny of agents’ commissions, in order to more effectively combat foreign bribery in international business transactions. In that regard, the lead examiners welcome the review by the Ministry of Finance and KUKÉ of export credit procedures in the light of the 2006 OECD Recommendation to deter bribery in Officially Supported Export Credits.

4. Official Development Assistance

36. With a total aid budget of USD 205 million in 2005, Poland is still a modest aid giver, although its official development assistance has grown rapidly over recent years, and will continue to grow to comply with the objectives and principles of development assistance of the EU.¹⁶ Poland should therefore develop an adequate anti-corruption policy. Some 60% of Polish official development assistance is channelled through the EU and the United Nations. The remaining 40% is handled mainly by the Ministry of Foreign Affairs and the Ministry of Finance. The Ministry of Foreign Affairs is responsible for the technical assistance projects, mainly through calls for proposals to Polish non-governmental organisations (NGOs). The Ministry of Finance is responsible for preferential credits (including tied aid), foreign debt relief and co-funding of the operations of international financial institutions. Polish diplomatic missions are involved as well.

¹⁶ See Ministry of Foreign Affairs, Poland’s development co-operation, Annual Report 2004, at http://www.msz.gov.pl/files/docs/pomoc_pwr_en.pdf.

a. Awareness-raising efforts

37. The Ministry of Foreign Affairs has not organised training sessions nor issued brochures to raise awareness of their officials and contracting partners to the risk of bribery of foreign public officials in the award or implementation of aid contracts. Following the on-site visit, Polish officials advised that the Ministry of Finance had organised a training session for its employees who deal with grants of tied aid, although details about the date or the content of the training were not supplied.

38. The existing aid system of the Ministry of Foreign Affairs is structured in a way that effectively minimises the risk of bribery of foreign public officials. In that regard, contracts are awarded directly by the Ministry to Polish NGOs through calls for proposals and involve limited amounts. No foreign public officials are involved in the awarding of the contracts. However, the Ministry envisages developing a new strategy for Poland's development co-operation, including decentralisation and new procedures (such as public tenders open to private companies). Depending on the features of the future system, the potential for bribery of foreign public officials might increase, and a full anti-corruption policy would be required. Indeed, the Ministry envisages including anti-corruption clauses in its contracts, and training embassy personnel on the implementation and control of aid contracts. In addition, the Ministry informed the lead examiners of its interest in benefiting from the experience of other Parties or international institutions in implementing the Convention.

39. The tied aid provided by the Ministry of Finance is much more exposed to bribery of foreign public officials.¹⁷ The foreign country is responsible for the choice of the Polish company that will obtain the contract and the Ministry is required to check the contract and request the contracting company to sign an anti-corruption declaration. The contracting company also obtain texts of the OECD Convention and the Revised Recommendation, Commentaries on the Convention and information on regulations implementing the Convention into Polish law along with relevant extracts from the Penal Code. In that context, it remains important that the Ministry of Finance continue to ensure that officials in charge of the monitoring of the contracts are trained and well aware of the risks of bribery of foreign public officials.

b. Detection of foreign bribery and the duty to report foreign bribery

40. Officials of the ministries of foreign affairs and finance are bound by the general reporting duty of article 304.2 of the Code of Criminal Procedure (See Part B, Chapter 2.a on duty to report crimes). Neither the Ministry of Foreign Affairs nor the Ministry of Finance had detected cases of bribery of a foreign public official in relation to the Polish development aid at the time of the on-site visit. The Ministry of Foreign Affairs has not developed a systematic monitoring programme on the implementation of the contracts awarded to NGOs. After the on-site visit, the Ministry of Foreign Affairs indicated that, on a case-by-case basis, it establishes special groups to control the legality, efficiency and economic viability of expenditures. Project supervision involves implementation appraisal, which – if found unsatisfactory – may lead to withdrawal of the allocated funds. In the case of tied aid administered by the Ministry of Finance, applicant companies might be tempted to bribe foreign public officials to obtain the contract. It is therefore important that the Ministry of Finance pay due attention to particular risk areas when assessing contracts, for instance, agents' commissions.

Commentary

The lead examiners encourage the Polish authorities to provide training and awareness-raising programmes to the officials in charge of development aid on the risks of bribery of

¹⁷ Development aid is "tied" when the recipient country is obligated to purchase the goods or services in the donor country in exchange for credit agreements.

foreign public officials and ways to prevent and detect offences. Awareness raising initiatives on foreign bribery should also be envisaged for NGOs and companies benefiting from aid contracts.

5. Foreign Diplomatic Representations

a. Awareness-raising efforts

41. Diplomatic missions abroad have an important role to play in enhancing the awareness of enterprises that seek advice when they consider or conduct international business transactions.¹⁸ They can also be an important source of guidance and support to enterprises faced with solicitation of bribes. However, the level of awareness of foreign bribery of personnel in Polish foreign diplomatic representations and the extent to which personnel undertook activities to raise awareness of Polish enterprises utilising the services of embassies, consulates and other representations abroad appeared to be low. Lead examiners were informed by a representative of the Ministry of the Interior and Administration that Polish consular service staff are trained on the provisions of the Convention as part of their main duty. However, a representative of the Ministry of Foreign Affairs reported that awareness of the foreign bribery offence and the Convention among staff of diplomatic representations was “scattered”.

42. A new division of responsibilities concerning the work carried out in embassies and consulates between the Ministry of Foreign Affairs and the Ministry of Economy will certainly have a bearing on the training received by staff of diplomatic representations and the awareness-raising activities they conduct in turn. A Ministry of Foreign Affairs representative reported that, for the first time, a budget item specifically dedicated to awareness-raising and training activities was being allocated in the ODA budget. Materials in preparation for these activities will cover the Convention, and ambassadors and NGOs working with development aid would be among the first targets for this training. Plans to conduct training are set for the year 2007. Many awareness-raising activities planned for staff in Polish diplomatic missions will specifically address the OECD Convention in the context of development aid, in view of planned decentralisation of the Polish development co-operation programme (See also Section 4 on official development assistance).

b. Detection of foreign bribery and the duty to report foreign bribery

43. The employees of Polish diplomatic representations enjoy a privileged relationship with Polish companies active abroad, given their responsibility to promote trade between Polish companies and host country enterprises. A representative of one large company stated that while he had no specific experience of receiving advice or information specifically about foreign bribery, he thought that staff in Polish diplomatic representations were very helpful in giving opinions on entrepreneurship in general and that there was good co-operation with diplomatic staff. Thanks to this relationship and their familiarity with local markets, staff of diplomatic representations are well-positioned to detect corruption in international transactions. However, officials present at the on-site visit were unaware of any case where a staff member of a Polish diplomatic representation abroad had detected or reported a case of foreign bribery.

44. Another specific responsibility of embassy staff is to oversee Polish NGOs who carry out technical assistance projects funded by official development assistance in foreign countries. There was no

¹⁸ On the basis of an Agreement of 7 February 2006 between the Ministry of Foreign Affairs and the Ministry of Economy concerning the establishment of a framework for economic diplomacy, a division of duties with regard to economic and commercial responsibilities abroad has taken place. In accordance with the Agreement, the Polish Trade Promotion and Investment Sections, supervised by the Ministry of Economy, are responsible for relations with enterprises.

indication of any specific, systematic measures taken for the detection of foreign bribery in these activities carried out by Polish NGOs, nor any particular mechanisms for reporting suspicions if any were to arise.

45. Article 304.2 of the Code of Criminal Procedure stipulates that government institution staff must report crime to the public prosecutor or the police (see also Section B.2., Reporting Foreign Bribery Offences and Whistleblower Protection). This article applies to employees of Polish diplomatic representations. It was acknowledged that without a centralised mechanism to receive reports, it was difficult to assess to what extent, if any, reports of suspected crimes were made. One official at the on-site visit explained that foreign bribery would be reported depending on whether the act had an important bearing on the activity of the company and based on the “level of the infringement of the law”. Reporting was described as spontaneous and lead examiners were told that there was no particular procedure.

Commentary

Given the unique interface they have with Polish companies active in foreign markets, diplomatic representation personnel should be provided with systematic, regular, in-depth training on the foreign bribery offence, the provisions of the OECD Convention, how to report foreign bribery and concrete steps to take if suspicions or indications of foreign bribery should arise. The current re-structuring of duties and responsibilities over consulates and embassies, to be shared between the Ministry of Foreign Affairs and the Ministry of Economy provides an opportunity to ensure that a comprehensive training and awareness-raising programme, and clear guidelines on measures to be taken to report allegations of foreign bribery be established. These activities should encompass personnel working under the direction and supervision of both ministries and should address how the staff of the two ministries should interact and work together on awareness, detection and reporting of foreign bribery.

6. The Tax Authorities

a. Tax treatment of bribes

46. The applicable taxation laws in Poland do not expressly deny the tax deductibility of bribes to foreign public officials. However, the Polish tax authorities strongly maintained that law and practice in Poland do not allow the deductibility of bribes in any circumstances. The relevant laws are contained within identical provisions of article 2.1(3) of the Corporate Tax Act, and article 2.1(4) of the Personal Income Tax Act, which provide that the tax legislation does not apply to “revenues resulting from activities which cannot be considered the subject of a legally effective contract”.¹⁹ The Polish authorities explained that because the revenue from an illegal contract does not form part of the tax base, the costs of obtaining that illegal contract are not deductible. Moreover, a bribe to a foreign public official is not deductible because a contract to perform a criminal act such as bribery would be an illegal contract, and would fall outside the sphere of what constituted a “legally effective contract” for the purposes of the tax provisions. In the Phase 1 Review however, the Working Group expressed doubts about the provisions, and recommended re-visiting this legislation to ensure that the proceeds of a criminal offence are not taxable, and that the tax deductibility of bribes is comprehensively prohibited.

47. At the on-site visit, Polish tax officials re-affirmed that the purpose of article 2 in the tax legislation is to exclude certain revenues from the tax system, including revenues derived from illegal

¹⁹ See article 2.1 of the Act of 26 July 1991 on natural persons’ income tax (consolidated text: Journal of Laws 2000, No. 14, item 176 with subsequent amendments); and also article 2.1 of the Act of 15 February 1992 on legal persons’ income tax (consolidated text: Journal of Laws 2000, No. 54, item 654 with subsequent amendments).

activities (such as bribery). The concept of “revenues”, in relation to a legally effective contract, is broadly interpreted under Polish tax law to include not just income, but also expenses. On this basis, Polish tax officials stated that a bribe paid to a foreign public official by a Polish entity, is an illegal contract and is excluded from the tax system. Furthermore any “revenue” derived from the act of bribery (income or expenses) is also excluded from the tax system, and thereby cannot lawfully be considered, nor qualify for a deduction under the tax legislation.

48. In practice, the Polish tax authorities explained that all costs incurred for the purpose of making revenue have to be appropriately evidenced; this may typically include documents such as VAT invoices, customs files, and accounts. Tax authorities, during a fiscal investigation or a tax investigation in particular, have an obligation to verify if costs incurred by the taxpayer are correctly evidenced and recognized as revenue earning costs.²⁰ Further, Poland stated that its tax authorities have an obligation to investigate whether particular activities can be considered the subject of a “legally effective contract” in order to ensure the taxation system does not tax, nor provide deductions in relation to, illegal revenues. Polish authorities have not conducted specific audits of taxpayers, targeting revenues potentially derived from corruption, including foreign bribery.

49. The lead examiners appreciated the explanations given by the Polish tax officials, which sought to provide re-assurances that the operation of the Polish tax laws are designed to exclude the proceeds of a criminal offence from the tax regime and that bribes are not capable of being deducted under the tax system. The lead examiners however, still had misgivings about the operation of the existing tax legislation, and whether in practice it was effective. The lead examiners are concerned that the approach in the Polish tax legislation of excluding from the tax base “revenues resulting from activities which cannot be considered the subject of a legally effective contract” may not, for example, comprehensively exclude revenues in the following two important circumstances:

(a) Where the revenue is derived from contracts, which have been secured by, or used as a vehicle for, foreign bribery. If, for example, a public procurement contract is secured on the basis of a bribe, the lead examiners questioned whether the revenue derived from the subsequent contract that is entered into will necessarily be excluded from the tax base in Poland since the public procurement itself could be considered a “legally effective contract”.

(b) Where the revenue is derived from an existing valid contract. For instance, it is not clear that revenue from a long term, and otherwise valid Polish contract to supply goods to a foreign client would necessarily be excluded from the tax base if the supplier, during the term of the contract, agreed to pay a substantial bribe to a foreign public official to enable the delivery of the goods.

50. These examples are used to highlight the concern of the lead examiners that the Polish tax law in its current form may be deficient. The lead examiners remain concerned that bribes to foreign public officials in some very common international business transactions, or the proceeds of such bribery offences, could form part of the tax base and thereby qualify for tax deductions under the existing tax legislation. Indeed, the Polish approach appears to only exclude from the tax base revenues obtained where the bribe payment itself represents the legal consideration in a contract with a foreign public official. Poland continues to refute these criticisms and concerns. The tax authorities argue that in example (a) above, there would be a contract of bribery which is legally ineffective under the law and a public procurement contract which is legally effective. It was stated that the bribe cannot be included in the costs of obtaining revenue since it can not be treated as an expenditure which results from an act which is the

²⁰ The obligation is based on articles 180-200 of the Tax Ordinance of 19 August 1997 (Official Journal of 2005, No. 8, item 60).

subject matter of a legally effective contract. The same arguments were applied by Poland in relation to the person giving the bribe in example (b) above.

51. The lead examiners enquired during the on-site visit as to whether consideration had been given by Poland to an express provision to deny the deductibility of bribes. It was confirmed that discussions and debates had taken place on reforming the existing tax provisions, including consideration of an express provision on the non-deductibility of bribes. Polish tax officials explained that their dilemma however, was that to include an express provision in the current legislation, would be contrary to the existing framework of the Polish tax laws, because revenues and expenses derived from all illegal sources are excluded from the operation of the tax legislation for all crimes. It was argued that to include an express provision on the non-deductibility of bribes would require a major re-write of the taxation laws and could necessitate all other crimes being identified and listed. Nevertheless, the lead examiners have formed the view that Poland, through sole reliance on the existing legislative provisions, has not sent a clear signal to its business community about the unacceptability and non-deductibility status of bribes to foreign public officials in international business transactions. The lead examiners recommend that Poland amend the law to confirm that bribes cannot be deducted under Polish tax law including consideration of an express provision to prohibit the tax deductibility of bribes to foreign public officials.

b. Awareness, Training and Detection

52. Polish authorities reported that a task force at the Ministry of Finance was established in 2005 to facilitate the implementation of the provisions of the Convention and Revised Recommendation. This was said to have been “inspired” by the OECD Phase 2 examination. Consisting of 18 subteams, it conducted an audit of current awareness of corruption issues, including awareness of the Convention and Revised Recommendation. The Ministry of Finance officials present at the on-site visit stated that the results indicated that in some units, awareness was very low, whilst others had sought to address the issue in regular training sessions. Overall, it was acknowledged, from the results of the audit, that the Convention and Revised Recommendation “posed new challenges” for the Ministry, including tax officials. Following the audit, a training schedule was developed to raise awareness of the Convention and the Revised Recommendation at each level of the Ministry, including at the central national level, the provinces, fiscal and customs chambers and fiscal and customs offices, as well as fiscal audit offices, covering some 63 000 personnel. Although welcoming this proactive initiative, the lead examiners were not satisfied that this process expressly highlighted or informed officials of the 1996 Recommendation about the non-tax deductibility of bribes to foreign public officials, nor the obligation of officials under Polish law to report suspicions of a crime, including foreign bribery, to law enforcement authorities. Given that the non-deductibility of bribes is not expressly provided for in Polish tax legislation, the lead examiners hold the view that the development and implementation of guidelines for tax inspectors, along with training and awareness raising initiatives are vital to ensure that the Convention, Revised Recommendation and 1996 Recommendation are effectively observed and implemented. A similar point was highlighted by the Council of Europe in 2004.²¹ Following the on-site visit, Polish authorities informed the lead examiners that the Tax Administration Department, within the Ministry of Finance, has taken recent steps to initiate the process for developing guidelines for personnel conducting tax audits.

53. The lead examiners were disappointed that there seemed to be a general lack of awareness in Poland about the OECD Bribery Awareness Handbook for Tax Examiners (Handbook). The Handbook is designed to assist countries to make their tax examiners aware of the techniques used for bribery as well as providing them with tools to detect and identify bribes to foreign public officials and also other types of bribes. In the circumstances, the lead examiners are of the view that use of this Handbook, translated into

²¹ Greco Report, Second Evaluation Round: Evaluation Report on Poland, 14 May 2004, [Greco Eval II Rep (2003) 6E.] p. 20.

Polish, would be an essential tool to strengthen training regimes and raise awareness on practical issues relating to the implementation of the Convention, Revised Recommendation and the 1996 Recommendation. Following the on-site visit, the Ministry of Finance informed the lead examiners that in September 2006 a Polish version of the Handbook was sent to tax chambers and tax offices in Poland for use in training programmes and also to assist those employees who deal with tax audits. The Ministry of Finance has observed that the Handbook may also prove useful in enhancing the effectiveness of techniques to identify and combat cases of bribery involving domestic public officials.

c. *Duty to Report Bribery of Foreign Public Officials and Sharing of Information*

54. Polish tax officials confirmed that they have a general duty to report “suspicions” of crimes to a prosecutor or the police, pursuant to article 304.2 of the Code of Criminal Procedure. Although no statistics were made available at the time of the on-site visit, assurances were given to the lead examiners that tax officials do, in practice, report suspicions of criminal activity to the authorities, although they were not aware of any reports relating to the offence of foreign bribery. Following the on-site visit further information was provided that statistical data on cases of bribery of foreign public officials within the period of 2003 – 2005 had been gathered by the Tax Administration Department from all tax chambers and tax offices. In that period, there were no notifications of crimes related to the bribery of foreign public officials.

55. In relation to the sharing or provision of tax information with other agencies, this is most evident where actions are pending before the courts. In those circumstances, access to information on taxpayer’s files may be made available to courts or the public prosecutor, in connection with the action pending by the head of the Tax Office and of the relevant Customs Office or the director of the Fiscal Audit Office.²² The Polish Tax Administration is able to itself request and obtain information from banks, other financial institutions and legal persons. In relation to sharing of information on tax files with authorities abroad, this may be made available pursuant to, *inter alia*, mutual legal assistance arrangements and other ratified international agreements that Poland or the EU is a party.²³

Commentary

With respect to the tax treatment of bribes to foreign public officials, the lead examiners express concerns that the current tax laws do not explicitly refer to the non-tax deductibility of bribes. Poland should amend its taxation laws to confirm that bribes are not deductible and, in that regard, seriously consider enacting an express provision to prohibit the tax deductibility of bribes to foreign public officials.

Clear guidelines should be developed and training given to tax officials as a matter of priority in order to maximise the possibility of detection of potential criminal conduct relating to the bribery of foreign public officials including information on the non-deductibility of bribes and the obligation of tax officials to report suspicions of crimes to law enforcement authorities. In that regard, the lead examiners note the recent steps taken by the Tax Administration Department, within the Ministry of Finance, to initiate the process for developing guidelines. Further, the lead examiners welcome the recent initiative of the Ministry of Finance to send the OECD Bribery Awareness Handbook for Tax Examiners, translated into Polish, to tax offices and tax chambers. It is recommended that the Handbook be used to assist strengthen

²² Pursuant to article 297.1 item 3 of the Act of 29 August 1997 – Tax Ordinance (Journal of Laws of 2005, No 8, item 60, as amended) and pursuant to article 34a.5 item 5 of the Act of 28 September 1991 on Fiscal Audit (Journal of Laws of 2004, No 8, item 65, as amended).

²³ Article 305a of the Tax Ordinance.

training regimes and raise awareness on practical issues relating to the implementation of the Convention, Revised Recommendation and the 1996 Recommendation.

7. Accounting and Auditing

a. Accounting and auditing standards

56. The Ministry responsible for the regulation of accounting and auditing requirements in Poland is the Ministry of Finance, whilst the body responsible for preparing and issuing national accounting standards is the National Accounting Standards Committee. Accounting and auditing requirements in Poland are regulated by the Act of 29 September 1994 on Accountancy (Accountancy Act)²⁴ which is in compliance with the requirements of the relevant directives of the European Union²⁵ and to a significant extent with the International Accounting Standards and International Financial Reporting Standards. The main entities applying provisions of the Accounting Act are: commercial companies, financial institutions (banks, insurance companies, pension funds, investment funds) and state enterprises.²⁶ In total, Polish authorities advised during the on-site visit that approximately 21 000 entities in Poland were required to be audited in 2004.

57. Article 4 of the Accountancy Act requires entities to not only apply the relevant accountancy principles but ensure a true and fair presentation of the financial condition, material status, financial result, and profitability of the entity. This obligation is developed in articles 20-22: Companies and other entities conducting an economic activity are obliged to maintain books and to enter every economic operation performed during the reporting period. Every operation should be recorded on the basis of proper “source” documents which ascertain the performance of a given economic operation. Accounting documents should reflect the true course of the economic operation and be free from accounting errors.

58. Articles 45-48 require companies and other entities subject to the Accountancy Act to prepare annual financial statements and annual economic activity reports. The annual financial statement consists of a balance sheet, a profit and loss account, and notes to the financial statement including additional notes and explanations necessary to reflect honestly and clearly the financial status, financial result and profitability of the entity concerned. In the case of companies which are subject to mandatory audit the financial statement additionally includes a cash flow statement and a statement of changes in equity. After approval by an approving body, financial statements must be submitted to the court register. In addition, Polish authorities informed the lead examiners that, pursuant to article 70 of the Accountancy Act, financial statements, together with an auditor’s opinion (if the financial statement was subject to an audit) must be published. These requirements are also applicable to entities which prepare their financial statements in accordance with International Financial Reporting Standards and International Accounting Standards.²⁷ The Polish authorities stated that under these rules, it is forbidden to: make “off-the-book” or inadequately identified transactions; record non-existing expenditures; enter liabilities with incorrect identification of their object; or use false documents.

²⁴ This act was amended on 9 November 2000. The amendments entered into force on 1 January 2001.

²⁵ Including EU directives regulating accounting standards (Fourth Directive 78/660/EEC on the annual accounts of certain types of companies, Seventh Directive 83/349/EEC on consolidated accounts, Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions, Directive 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings)..

²⁶ Article 2, Accountancy Act. The lead examiners were informed by officials that there are no separate regulations applicable to the accounting or auditing of commercial companies owned or controlled by the State Treasury.

²⁷ Article 2.3, Accountancy Act.

59. Article 64 of the Accountancy Act requires that an independent auditor examine the annual financial statements of related entities including annual financial statements of capital groups, and the annual financial statements of banks and insurance companies, stock companies, investment funds, pension funds, and entities that fulfil two or more conditions of the following: (1) employ more than 50 persons, (2) have assets at the year end amounting to at least EUR 2 500 000, and (3) net income from the sale of goods and financial operations amounting to at least EUR 5 000 000. Auditors are obliged to prepare an audit opinion together with an audit report declaring whether the financial statement has been prepared on the basis of properly maintained books, whether it has been prepared in accordance with the provisions of the law, and whether it reflects honestly and clearly all information relevant to a proper and complete evaluation of the entity concerned.²⁸

60. The Accountancy Act includes provisions on the independence of auditors. Article 66 requires that an independent auditor should not be connected with the entity in question as a shareholder or stockholder (including an entity subordinated or dominated by the company), an employee, manager or a board member during the last three years, or have participated during the last three years in keeping the books or the preparation of the financial statement of the entity. Additionally, the provisions of the Act on Statutory Auditors and Their Self-governing Body (based on the 84/253/EEC Company Law directive) require statutory auditors to possess the knowledge, skills and qualifications needed for the fulfilment of his or her duties. In that regard, auditors are required to possess appropriate knowledge to enable the identification of violations of the law.

b. Awareness and Training

61. At the on-site visit, Polish authorities and members of the profession indicated to the lead examiners that there had been some awareness raising and training initiatives targeted at the accounting and auditing professions about the Convention. Further details about particular initiatives were provided after the on-site visit. In that regard, the Accounting Department of the Ministry of Finance recently organized a training session on the Convention in which representatives of accounting and auditing professional bodies (the National Chamber of Statutory Auditors and Accountants' Association in Poland) participated. The participants received some training materials with a request to disseminate them among members of the above mentioned bodies. Additionally the Ministry of Finance prepared information material concerning the provisions of the Convention and the role of accountants and auditors in detecting cases of bribery of domestic or foreign public officials. The material was sent to the both organisations and posted on their websites.

62. Despite recent awareness raising efforts, the lead examiners are concerned that, in general, the accounting and auditing professions in Poland are not sufficiently informed about the Convention and Revised Recommendation, the reporting obligations where foreign bribery is suspected, and the requirement to report suspicious transactions to the General Inspector of Financial Information pursuant to anti-money laundering legislation. This conclusion was arrived at following quite frank and open discussions with the accounting and auditing professions at the on-site visit. In relation to the obligation to report suspicious transactions to the General Inspector of Financial Information, Polish authorities emphasise that auditors are aware of the reporting obligation due to the provisions of the Act on Statutory Auditors and Their Self-governing Body (Article 4a), which releases them from the requirement of professional secrecy in cases of information provided pursuant to the anti-money laundering legislation. Whilst acknowledging the information provided by Polish authorities, including about recent awareness-raising efforts, the lead examiners maintain that more work is required to raise awareness about the Convention, the Revised Recommendation, and reporting obligations within the accounting and auditing professions within Poland.

²⁸ Article 65, Accountancy Act.

c. Duty to Report Bribery of Foreign Public Officials

63. Members of the accounting and auditing profession informed the lead examiners during the on-site visit that any suspected breach of the law is required to be reported to company management, or if the breach is on the part of the management, the report is made to the supervisory body. In that regard, the professional standards for auditors which regulate general principles for auditing financial statements require auditors to report to the entity's management suspected criminal activities or irregularities. Furthermore, with respect to entities such as banks,²⁹ insurance companies, investment funds and pension funds, auditors are obliged to report to the competent state supervisory body (e.g. the Insurance and Pension Fund Supervisory Commission) any activity which breaches a law. In circumstances where an auditor is concerned that the company or supervisory body has failed to either take adequate action to redress irregularities or has not reported a suspected crime to authorities, the lead examiners were informed that there is no obligation under accounting or auditing rules for the auditor to then report suspicions of crimes to the Polish law enforcement authorities. Polish authorities did state however, that pursuant to article 304.2 of the Code of Criminal Procedure supervisory bodies are obliged to inform the state prosecutor or the police when they receive information of suspected criminal activity from auditors. The members of the accounting and auditing profession present at the on-site visit indicated that there had not been, as far as they were aware, any reports made to authorities of suspected criminal activity related to foreign bribery.

Commentary

The lead examiners note that bribe payments made to foreign public officials in the context of international business transactions can be detected by accountants and auditors through analysis of books and records of Polish entities. The lead examiners recommend that as regards the reporting of suspicions of foreign bribery by auditors, the Polish authorities consider requiring auditors to report all such suspicions to the competent authorities.

The Polish authorities should work closely with the accounting and auditing professions to develop further initiatives: to raise awareness within the professions about requirements under the Convention and Revised Recommendation; to give practical guidance about the types of transactions typically used to mask corruption; and to publicise within the professions the obligation to report suspicions of bribery to appropriate authorities, including the General Inspector of Financial Information in appropriate cases pursuant to anti-money laundering requirements. The initiatives developed should be incorporated into training programmes and guidelines in order to maximize the opportunities for detection and prevention within the business community.

8. Money Laundering

a. Suspicious transaction reporting

64. The prevention of money laundering and reporting of suspicious transactions in Poland is governed by the Law of 16 November 2000,³⁰ which applies to a broad range of entities including: institutions within the financial sector (banks, insurance companies, investment funds, etc); professional service providers (lawyers, auditors and tax advisors) and other important entities such as real estate

²⁹ Auditors are obliged to report suspected criminal activity, etc. to the state supervisory body (i.e. the Banking Supervision Commission) also under the Banking Law.

³⁰ Law of 16 November 2000 on Counteracting Introduction into Financial Circulation of Property Values Derived From Illegal or Undisclosed Sources and on Counteracting the Financing of Terrorism.

agents, casinos, etc, in accordance with Financial Action task Force (FATF) Recommendations and the relevant EU Directives. These so-called “obligated institutions” are required to report suspicious transactions to the General Inspector of Financial Information (GIFI), which fulfils the role of the Financial Intelligence Unit in Poland. The GIFI is an under-secretary of state in the Ministry of Finance, assisted by an organisational unit (of over 40 personnel) created for that purpose in the Ministry of Finance.

65. The Act stipulates that when an obligated institution is requested by a client to execute a transaction, in circumstances suggesting that the transaction may have originated from illegal or undisclosed sources, it must record the transaction regardless of its value and nature and report it in writing to the GIFI, including all details stipulated in the Act related to customer identification (for both natural and legal persons).³¹ The obligated institutions, with a few exceptions, must also record all transactions worth in excess of EUR 15 000.³² This threshold can be triggered in circumstances where there are multiple, but related transactions, which together exceed EUR 15 000.

66. Following receipt of the suspicious transaction reports the GIFI analyses the information to ascertain whether the suspicions of money laundering or terrorism financing are well founded. In that regard, the GIFI checks additional information about persons who perform suspicious transactions, with the assistance of its own databases, together with relevant criminal information that it is able to access. If the GIFI has well-founded suspicions of money laundering or terrorism financing, a report is sent to the public prosecutor. In addition the GIFI can, in response to a written application from a public prosecutor or law enforcement agency, provide the authorities with information about particular transactions. A prosecutor who is notified by the GIFI about the account blocking or suspension of the transaction may take action to discontinue the transaction or block an account for a specified period of time, not exceeding three months from the moment of notification.³³

67. Polish authorities report that there have not been any suspicious transactions linked to the offence of bribery of foreign public officials that have been detected to date. In 2005, there were 1 558 suspicious transactions filed with the GIFI, with a further 67 642 transactions electronically referred to the GIFI. Polish authorities informed the lead examiners that, of the suspicious transactions reported in 2005, a total of 175 notifications were made to the public prosecutor and there were 5 transactions suspended and 34 accounts blocked.

68. Most of the suspicious transaction reports are received from the reporting entities in the financial sector. The representatives from banks present at the on-site visit demonstrated a clear understanding of the reporting obligations under the Act, and they were very supportive of the efforts of the GIFI to provide assistance and training to the relevant banking staff. Many of the banks had developed internal systems that supported their basic reporting obligations. Furthermore, although Polish law does not currently require obligated institutions to have enhanced knowledge of customers that fall into the category of so-called politically exposed persons, the lead examiners were informed that many banks represented at the on-site visit had taken it upon themselves to establish a data base to monitor these persons.³⁴ By contrast, it was

³¹ See articles 8.3 and 9 of the Law of 16 November 2000.

³² The obligated institutions not required to record transactions exceeding EUR 15 000 include real estate agents, electronic money institutions, legal advisers, auditors and tax advisers.

³³ Chapter 5, Act of 16 November 2000.

³⁴ Politically exposed persons (PEPs) are defined in the Glossary to the 40 Recommendations of the Financial Action Taskforce (FATF) as follows: “individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials”. See: www.fatf-gafi.org.

noted that there had been very few suspicious transaction reports received from lawyers and accountants. The representatives of GIFl informed the lead examiners that there had been some reluctance on the part of both these professions to report suspicious transactions largely due to concerns about client confidentiality. It was also apparent to the lead examiners however, that further efforts were required by Polish authorities to raise the awareness of the reporting obligations within the accounting and legal professions.

69. An area of concern acknowledged by some participants at the on-site visit, particularly from the financial sector, was that employees are sometimes fearful of the consequences that could follow from reporting suspicious transactions to authorities, or from acting to block transactions or freeze accounts, particularly if the customer transaction is believed to be linked to organised criminal activity or terrorism. The bank representatives indicated that they had sought to dispel the fears of their employees through adopting internal processes that provide anonymity for employees by requiring all suspicious transactions to be referred to a special unit within the bank, which then lodges the necessary report with the GIFl.

70. An important strength of the Polish system for suspicious transaction reporting has been the good co-operation between the GIFl, the police and prosecutors. Prosecutors at the on-site visit mentioned that reports from GIFl to the State Prosecution Authority had formed the basis of about 85% of money laundering prosecutions. In 2003, a Council of Europe select committee report questioned whether GIFl was being provided with the relevant information by law enforcement authorities for the purposes of updating its data bases. The data bases are important and essential tools in supporting the analysis of transactions undertaken by the GIFl.³⁵ Following the on-site visit, Polish authorities informed the lead examiners that GIFl currently has direct access to the National Centre of Criminal Information. Moreover, Polish authorities stated that GIFl and the State Prosecution Authority recently held a meeting designed to strengthen cooperation after the notification of a “money laundering” offence. The lead examiners were informed that both bodies entered into an agreement to work out the rules for the exchange of information during an investigation. Further details about the agreement, including any expected outcomes from this process, have not been made available to the lead examiners.

71. The obligated institutions represented at the on-site visit indicated that they had not been routinely receiving feedback on suspicious transaction reports that they submitted to the GIFl. It was acknowledged by some banking representatives that feedback could be useful, although one stated that the receipt of an order to freeze a transaction or an account was of itself, a form of feedback. Nevertheless, the provision of formal feedback by GIFl to obligated institutions about the reports that they are making and how suspicious transaction data is being used by the authorities could enhance the responsiveness of the system.

b. Sanctions

72. A breach of reporting obligations can attract significant penalties, including imprisonment for a period of up to three years for any person acting for an obligated institution who, pursuant to with the Law of 16 November 2000: (1) fails to record suspicious transactions (including required details about the transaction and the client); (2) fails to notify GIFl about a suspicious transaction; or (3) fails to suspend a transaction or block the account when required to do so. If the offence is committed unintentionally, its perpetrator is liable to a fine.³⁶ If a request for information from the GIFl is refused or transaction data is withheld or untrue, then the person is liable to a penalty of imprisonment for a period of three months to

³⁵ European Committee on Crime Problems, Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures, *Second Round Evaluation Report on Poland: Summary*, Strasbourg, 12 December 2003, para 21.

³⁶ Article 35.3 of the Law of 16 November 2000.

five years.³⁷ A person, who perpetrates an offence which causes a considerable loss, will be subject to imprisonment for a period of six months to eight years.³⁸ The authorities informed the lead examiners that, at the time of the on-site visit, there was one case before the Polish courts involving the failure of persons within an obligated institution to report suspicious transactions in accordance with the Act.

73. The supervision of obligated institutions in Poland, to ensure compliance with their reporting obligations, is carried out by the GIFI and also a number of supervisory bodies including the Banking Supervision Commission and the Polish Financial Supervision Authority. The inspections verify whether the obligated institutions have observed the rules of registration and notification of transactions in accordance with the provisions of the Act. In addition, inspectors assess the adequacy of internal procedures for *inter alia* the identification, recording and reporting of suspicious transactions, and the training of employees in relation to obligations under the Act. The banks represented at the on-site visit had all been audited by the Supervisory Authority and expressed satisfaction with the process, and they had provided full access to records and personnel as requested by inspectors.

c. Typologies and Guidelines

74. In order to improve the awareness and the compliance of obligated institutions with their reporting obligations, the GIFI informed the lead examiners that they had developed a guide book outlining the requirements, procedures and controls that must be followed pursuant to the Law of 16 November 2000. The guide book was despatched to a large number of the obligated institutions, including all banks, brokers and insurance companies. It includes a typology of money laundering cases, and is primarily used as a tool for training relevant staff and as a reference manual. A number of representatives from banks at the on-site visit commented that it had been useful in assisting them to comply with their reporting obligations. The officials from GIFI stated that they are obligated to provide training to the obligated institutions, and the guidebook was an important tool in this task. The guide book had also been widely circulated to law enforcement, the judiciary, and to a range of supervising institutions across Poland. Furthermore, GIFI announcements about relevant obligations, together with the answers to frequently asked questions of obligated institutions about the implementation of the Act, and related information concerning suspicious transaction reports, are published on the GIFI official website. It has also been made available on-line. The representatives from the banks emphasised that, in concert with the GIFI, their employees had developed a high level of understanding on issues related to customer identification and reporting requirements. Furthermore, where doubts arose as to whether a transaction should be reported, many of the banks had found that staff of the GIFI could be contacted for advice, and that good working relationships had been developed.

Commentary

The ongoing efforts of Polish authorities and reporting entities to fine tune the anti-money laundering reporting system in Poland is acknowledged and welcomed. The co-operation between the GIFI, police and prosecutors has provided strength to the effectiveness of the anti-money laundering reporting system. A range of obligated reporting institutions, predominantly from the financial sector, expressed a high level of satisfaction with the professionalism, advice, guidelines, and training provided by GIFI which has assisted in ensuring compliance with reporting obligations. The lead examiners acknowledged the efforts of Polish financial institutions in not only complying with their obligations under the Act, but also adopting additional measures, such as the monitoring of transactions related to politically exposed persons.

³⁷ Article 36 of the Law of 16 November 2000.

³⁸ Article 37 of the Law of 16 November 2000.

In relation to the legal and accounting professions, the lead examiners recommend that further initiatives be developed by authorities to ensure that members of both professions are made aware of their legal obligations to report suspicious transactions to the GIFI.

In order to enhance the responsiveness of the suspicious transaction reporting system, the GIFI is encouraged to consider improving the flow of information and feedback to obligated institutions, in order to assist in explaining how the reports that they make are being used by the authorities.

C. INVESTIGATION, PROSECUTION, AND SANCTIONING OF FOREIGN BRIBERY

1. Institutional Framework

75. In the Polish system, there are a number of investigative authorities responsible for detecting and investigating corruption offences including the police (and specialised divisions such as the Criminal Bureau and the Internal Affairs Bureau), the Prosecution Authority, the Internal Security Agency, the Military Prosecution Authority, and the Military Gendarmerie. At the time of the on-site visit, a powerful new Central Anti-Corruption Bureau was being developed, which is primarily intended to combat domestic corruption, although it may in the future have a broader role in detecting and investigating instances of foreign bribery. The main responsibility for the investigation of cases involving foreign bribery in the context of international business transactions rests with the police and the Prosecution Authority.

76. In relation to the prosecution of foreign bribery cases, the Prosecution Authority in Poland is responsible for instituting and conducting proceedings on behalf of the state. In that regard, the State Prosecution Authority (based in Warsaw) is specifically responsible for supervising all cases connected with corruption. The Code of Criminal Procedure also empowers an injured party to participate in judicial proceedings, either as a subsidiary prosecutor (which is applicable to foreign bribery) or alternatively, by bringing an indictment as a private prosecutor (in cases of crimes prosecuted by way of private prosecution, *e.g.* libel or defamation, but not applicable to cases of foreign bribery).³⁹

a. The Police

77. All investigations of corruption offences by the police are undertaken in concert with, or under the supervision and direction of, the State Prosecution Authority. The investigation of crimes by police, including corruption offences, can be handled by any branch or division of the police, including those personnel located at the General Police Headquarters in Warsaw, the police headquarters in each of the provinces, or locally based police stations throughout Poland. The investigation of economic offences including corruption, was a key responsibility of the Criminal Bureau within the General Police Headquarters. However, in February 2006 the supervision and co-ordination of corruption cases was transferred to the Criminal Department within General Police Headquarters. This department assumed responsibility for a number of specialised anti-corruption units located in 16 Provincial (*Voivodships*) Headquarters of the Police, and the Unit for Combating Economic Crimes and Corruption of the General

³⁹ See articles 53 and 59, Code of Criminal Procedure.

Police Headquarters in Warsaw. These units, established in 2004, include some 244 specially trained anti-corruption officers.⁴⁰

78. The level of awareness and training of the Police in relation to the specific issue of foreign bribery was assessed by the lead examiners to be low. This was partly a function of the higher priority and resources committed by the Police to combat domestic corruption, and also limited awareness raising initiatives and training available to the Police on foreign bribery issues. Nevertheless, the Polish authorities stated that police are actively involved in the organisation of training programmes related to the elimination of the crimes of corruption, particularly for the police anti-corruption units. In 2005 a letter containing the text of the Convention was dispatched to Heads of Police Divisions and Sections for Combating Corruption. The Deputy Chief Commander of the police also recommended that senior police officers, both nationally and within the provinces, conduct training and acquaint officers with the requirements of the Convention. Furthermore, the Convention was also discussed during a recent training session offered to 137 Police officers specialising in combating the crime of corruption.⁴¹ Despite these positive efforts, discussions with officers from the General Police Headquarters in Warsaw and from the provinces, suggested that more awareness raising and training efforts are required.

b. The Prosecution Authority

79. The Prosecution Authority is composed of: the State Prosecution Authority, which is a part of the Ministry of Justice; 10 appellate prosecution authorities; 44 provincial prosecution authorities; 325 district prosecution authorities; units of the Military Prosecution Authority; and the Institute of National Remembrance, in charge of prosecuting crimes against the Polish nation. The State Prosecution Authority includes the Bureau for Organised Crime, which is in charge of supervising investigations and prosecutions of the most severe kinds of crimes, including cases of corruption.⁴²

80. The Prosecution Authority supervises all criminal investigations, including corruption cases, and it is also empowered to institute and conduct criminal investigations, usually in concert with the police. The Prosecution Authority is also responsible for instituting and conducting criminal proceedings before the Polish courts on behalf of the state in foreign bribery matters. The Prosecution Authority is a hierarchically organised structure headed by the Prosecutor General, a position occupied by the Minister of Justice, a member of the government directly responsible to the Parliament. This dual role performed by the Minister for Justice is discussed further in Section C.3.b below.

81. Currently, a special Bureau for Organised Crime operates within the State Prosecution Authority in Warsaw, and the departments for organised crime operate in appellate and provincial prosecution authorities. These departments deal with organised crime, both criminal and economic, including corruption cases. On the higher level, in the appellate prosecutor's offices, prosecutors from such departments tend to deal with the biggest and most difficult cases, including international cases and those that could concern bribery of foreign public officials. Economic experts work in all appellate prosecutors' offices to deal with problems concerning economic investigations both in appellate and regional offices. Polish authorities informed the lead examiners that the prosecution authorities also use independent international consulting firms in cases involving economic aspects in the international sphere. Polish

⁴⁰ In 2005 these police units employed up to 232 officers.

⁴¹ The training for the 137 officers was organised by the Division for Combating Organised Economic Crime of the Central Investigation Bureau of the National Headquarters of the Police and the Institute for Training of Officers of State Agencies Combating Organised Crime and Terrorism of the Higher Training School of the Police in Szczytno.

⁴² The duties of the State Prosecution Authority are set out in the Law on the Prosecution Authority of 21 June 1985.

authorities stated that the prosecutors working in the organised crime departments, especially in appellate offices, are the most experienced both in economic and corruption cases and are chosen on the basis of their investigative experience.

82. The lead examiners were informed by prosecutors that, in a major development, the organised crime departments within the Prosecution Authority will be re-structured. As part of this re-structure, a number of new organised crime departments will be established in some Polish cities. These offices will be directly linked to the State Prosecution Authority, and not to the existing appellate or provincial prosecution authorities. Polish authorities stated that the changes should strengthen the investigative capabilities of the organised crime departments to combat major crimes, including the foreign bribery offence. In addition, following the on-site visit, Polish authorities informed the lead examiners, that new economic crime units in provincial prosecutors' offices are planned to be created. However, for the time being it is the Bureau for Organised Crime and the departments for combating organised crime that remain responsible for dealing with cases of foreign bribery.

83. The impression was given by prosecutors that the re-structured organised crime departments would be ideally suited to prosecuting foreign bribery offences. However, the details of the new arrangements, including: the exact scope of the responsibilities of the new offices; the type of expertise and experience to be centralised in these offices; the expected resources; and the arrangements for co-ordinating work with law enforcement and other prosecution offices, had not been fully developed at the time of the on-site visit. Indeed, members of the legal profession and academics in Poland informed the lead examiners that they were unaware of the new re-organisation plans within the State Prosecution Authority, and could not comment on whether this initiative would be likely to strengthen efforts to combat foreign bribery.

84. In relation to training and awareness of prosecutors in Poland about the Convention, the lead examiners were informed by prosecutors and officials from within the Ministry of Justice that there had been no specific initiatives. In 2005, the EU funded training programmes conducted for between 50 to 150 prosecutors and judges on issues that included money laundering, mutual legal assistance, and anti-corruption, but not the foreign bribery offence. Polish authorities maintain that there is no practical reason for limiting training programmes to specific issues covered in the Convention, given that any investigation concerning bribery of foreign public officials would be conducted using the same methods adopted in domestic corruption cases, as well as utilising the various instruments that are available and regularly used in international cases, including MLA or European Arrest Warrants. Officials involved in administering the training programmes stated that substantial reform of training for judges and prosecutors was imminent. A new training centre would commence work on 1 September 2006 to provide training to judges and prosecutors. The new programme aims to provide training on corruption, although the lead examiners were informed that so far organisers have felt little need to hold training sessions specifically on the Convention because of the absence of cases in this area. Training personnel confirmed however, that current training programmes do in fact cover aspects of the Convention and that there are plans to develop the topic more thoroughly in future programmes.

c. The Central Anti-Corruption Bureau

85. At the time of the on-site visit, the Parliament was debating the Law of 9 June 2006 on the creation of a powerful new investigative body, the Central Anti-Corruption Bureau.⁴³ The Central Anti-Corruption Bureau (CBA) commenced operations on 24 July 2006, the day that the Act came into force. An English translation of key provisions of the Act was provided to the lead examiners after the on-site visit. The CBA is required to detect and fight abuses in central and local government institutions, combat

⁴³ The acronym "CBA" reflects the Polish title of the new body: *Centralne Biuro Antykorupcyjne*.

corruption in commerce and securities trading, and verify the property declarations of members of parliament and high government officials.⁴⁴

86. Government officials at the on-site visit suggested that the scope of the CBA's activities whilst primarily focused on the prevention, detection and investigation of domestic corruption offences, could also extend to the foreign bribery offence.⁴⁵ Article 1 of the CBA Act declares that the CBA is a special force for combating "corruption" in public and "economic life". The term "corruption" is broadly defined and includes the notion of active bribery, whilst "economic life" is not expressly defined. The CBA is particularly focused on combating corruption in institutions at the state and local government level, as well as for eliminating activities threatening the "economic interest of the state". An activity threatening the economic interest of the state is further described as any conduct that might subject the property of entities of the public finances sector; entities that receives public funds; or an entrepreneur with a share of the State Treasury or a unit of local government, to "considerable damage".⁴⁶ The duties of the CBA defined in article 2 of the Act predominantly relate to domestic corruption (for example, the combating of crimes against the activity of institutions of the state and territorial self-government, the judiciary; or elections and referendums) but there are also duties for the CBA to investigate cases of non-compliance with legally binding procedures related to privatisation, financial support, awards of public procurement, and awards of licences, permits etc by the government.⁴⁷ Given the broad scope of the CBA powers in articles 1 and 2 of the Act, it is arguable that an allegation of foreign bribery would be investigated by the CBA.

87. The CBA is led by the Head of the CBA and the organisation is supervised by the Prime Minister. Although its duties have been prescribed by Parliament in Article 2 of the CBA Act, the Prime Minister determines the directions of the activity of the CBA by means of guidelines. To date, no formal guidelines have been issued by the Prime Minister to the CBA. There is also a requirement for the Head of the CBA to each year seek the approval of the Prime Minister for an annual schedule of CBA activities for the following year.⁴⁸ The target number of CBA officers is 500, operating across the country, with its headquarters established in Warsaw. CBA officers are able to conduct auditing, investigative, operational, and intelligence gathering work, and have access to search, electronic surveillance, and controlled deliveries powers. In exceptional circumstances officers will be able to use firearms and coercive powers.

88. In conclusion, the examining team observed that the information available on the CBA suggested that, despite its wide powers, the primary focus of the body would be on fighting domestic corruption within the various levels of government administration in Poland. Indeed, members of the legal profession in Poland and academics present at the on-site visit suggested that the clear priority of the CBA was to target domestic corruption within the national, provincial and local public administrations, rather than targeting corrupt commercial activities in international business transactions of Polish companies and

⁴⁴ Media Release of the Chancellery of the Prime Minister for the Republic of Poland, "Central Anti-Corruption Bureau to be established," 12 May 2006.

⁴⁵ The Law of 9 June 2006 on CBA state that the scope of the CBA's activities will cover Articles 228-231 § 2 and art. 250a, 296a, 296b of Polish Penal Code. The foreign bribery offence is contained in article 229 of the Penal Code.

⁴⁶ The term "considerable damage" is cross referenced in the CBA Act with Article 115.7 of the Penal Code, which in turn is linked to articles 115.5 and 115.6 of the Penal Code. In that regard, expressions like "considerable damage" and "damage of great dimensions" are applied to "property of considerable value", meaning damage to property whose value at the time of the commission of the prohibited act, exceeded 200 times the lowest monthly salary; and "property of great value", meaning damage to property whose value exceeded 1000 times the lowest monthly salary.

⁴⁷ Law of 9 June 2006 on the Central Anticorruption Bureau, article 2.4.

⁴⁸ See articles 12.1 and 12.2 of the Law of 9 June 2006 on the Central Anticorruption Bureau.

citizens abroad. This is a matter that the lead examiners believe the Working Group should monitor, as the role and functions of the CBA develops in practice.

d. The courts

89. The administration of justice in Poland is implemented by the Supreme Court, the common courts, administrative courts and military courts. The organisation of the civil and criminal courts includes district, provincial and appellate courts.

90. There are no specialised courts that deal with economic crimes or corruption in Poland. A judge interviewed during the on-site visit said that such cases are capable of being covered by all judges in the common courts, with the proceedings usually falling within the jurisdiction of district or provincial courts as the court of first instance, depending on the nature of the case. It was emphasised that constitutionally, judges are authorised to rule on all cases. Moreover it was stated that the absence of a specialised court would not necessarily preclude certain judges, where practical, from concentrating more on economic crimes including corruption cases.⁴⁹

91. Court delays were not highlighted by either judges, members of the legal profession or civil society as an extensive problem within Poland, although like in most legal systems, it remained a matter of ongoing concern. With respect to the training of judges, it was confirmed that there had been no specific training in relation to the Convention, although this is being considered for future training programmes on corruption, with the commencement of a new training centre on 1 September 2006 which will provide training to judges and prosecutors.

Commentary

The lead examiners are concerned about the poor level of awareness within police ranks of the offence of foreign bribery, including those personnel with specialised anti-corruption roles. Understandably, many initiatives to date have clearly had a strong bias towards fighting the problem of domestic corruption. However, a higher priority and greater focus should be given to combating foreign bribery to support the ability of police to detect and investigate this crime. Similar efforts are required in relation to the Prosecution Authority and the judiciary to ensure that training programmes incorporate more detailed information about the offence of foreign bribery and related offences.

The Working Group should follow-up with Poland on the anti-corruption functions and powers of the new CBA with the view to ascertaining whether the CBA has developed a role and capacity in Poland for combating foreign bribery in international business transactions.

2. Investigations

a. Conduct of Investigations

(i) Commencement and Termination of Investigative Proceedings

92. Under the Polish system both the police and the prosecutors play integral roles in the investigation of crimes. Article 303 of the Code of Criminal Procedure stipulates that if there is good reason to suspect that an offence has been committed, an investigation must be instituted. Article 10 of the

⁴⁹ The judge interviewed informed the examining team that, in general, a panel of three judges, with a representation of lay judges, sit on economic crimes and corruption cases.

Code provides that the agency responsible for prosecuting offences shall have the duty to institute and conduct the preparatory proceedings, and the public prosecutor shall have also the obligation to bring and support charges, with respect to an offence prosecuted *ex officio* (which is applicable to the offence of foreign bribery). The Polish authorities remained adamant that, in accordance with the principle of mandatory prosecution, there is no scope for police, prosecutors, or other agencies responsible for prosecuting offences to exercise any discretion to screen out foreign bribery cases.

93. An investigation forms part of the “preparatory proceedings” under the Code of Criminal Procedure. The objectives of preparatory proceedings include: to establish whether a prohibited act has been committed and whether it constitutes an offence; to detect the perpetrator of the crime; to ascertain the circumstances of the case and to collect, secure and record evidence for court proceedings.⁵⁰

94. In Poland there are no special rules, principles or guidelines that apply to the examination of allegations of the foreign bribery offence. Allegations or information related to foreign bribery, as with any other criminal offence, would be investigated either by the police, the state prosecutor or both, but the investigation would always be under the supervision of the state prosecutor. In general, a foreign bribery investigation would employ the same measures, powers and investigative techniques that are available in relation to other crimes pursuant to the provisions of the Penal Code, the Code of Criminal Procedure, and the Law on the Police. There is, however, a special procedure that applies to corruption matters, which requires every prosecutors’ office in Poland to notify significant corruption cases to the Bureau for Organised Crime within the State Prosecution Authority. It is the Bureau’s role to co-ordinate and to supervise all significant corruption cases. Polish authorities informed the lead examiners that this procedure would apply to all foreign bribery cases.

95. If an investigation fails to disclose grounds sufficient to justify the preparation of an indictment, the inquiry must be formally discontinued by an order containing the decision and reasons for the discontinuance, usually issued by the state prosecutor supervising the case. There are however, provisions which enable discontinued investigations to be reinstated. This may be done pursuant to an order from a state prosecutor or, where required in the Code, an order for re-instatement will be required from a state prosecutor more senior than the prosecutor who had issued the order of discontinuance. In the case of any re-opened preparatory proceedings, a court must discontinue the proceedings if it finds that there were insufficient grounds for re-opening them.⁵¹

96. In relation to the commencement of an action against legal persons, the police and prosecutors responsible for investigating organised crime and corruption cases in Poland informed the lead examiners that they had not had any experience with investigating legal persons since the enactment of the law on the Liability of Collective Entities.⁵² This law, and its operation in practice, is discussed in section C.5.

(ii) *Ongoing investigations*

97. In examining the practical conduct of criminal investigations in Poland, the lead examiners were briefed on a high profile transnational crime investigation involving Polish interests and foreign entities in Poland and abroad. It was confirmed that investigations were being conducted into a commercial racket by organised crime networks principally within Poland and another country, implicating a number of Polish and foreign entities, and resulting in charges of money laundering, fraud, and the forgery of documents. The investigation in Poland involves an investigating team of prosecutors from a number of organised

⁵⁰ Article 297, Code of Criminal Procedure.

⁵¹ On discontinuance of an investigation, see articles 322 and 327, Code of Criminal Procedure.

⁵² Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty.

crime departments in Poland and is co-ordinated by the Organised Crime Bureau in the State Prosecution Authority. By November 2006, the case had resulted in 16 indictments before the courts, against 126 persons. At the time of the on-site visit there had been no investigations or charges in relation to the offence of bribing a foreign public official in the context of international business transactions. Nevertheless, the case did serve to demonstrate some of the capabilities of Polish authorities when investigating a major and complex crime, including the use of dedicated expertise, close co-ordination between Polish and foreign enforcement and prosecution authorities, and the use of special investigative techniques and mutual legal assistance in order to obtain necessary evidence. It was readily agreed during the on-site visit that this was an exceptional case in terms of the large number of parties involved, the high profile nature of the case, the seriousness of the alleged crimes, and the significant resources committed to the investigation in both countries. Nonetheless, the lead examiners were interested to learn of the approach taken by the authorities in this investigation.

98. In relation to the foreign bribery offence, there have been no investigations initiated in Poland to date. Given that Poland has experienced significant growth in exports and its companies have invested and conducted trade with many emerging markets that have a high risk of corruption, it could be expected that a Polish company or citizen might have been the subject of a foreign bribery investigation. The lead examiners sought to explore with police and prosecution authorities possible explanations as to why Poland has not launched any investigations. The police indicated that the major impediment had been the absence of complaints or information from the public, government agencies or businesses which would give good reason to suspect that an offence of this nature had been committed. Whilst acknowledging the proposition that to find corrupt activity it is often necessary to seek it out, police representatives indicated that the difficulty in detecting this type of crime is magnified because the briber and the recipient of a bribe have little interest in disclosing the illegal conduct. In that regard, it was observed by the police that law enforcement authorities in Poland have very little contact or links with the business sector and have no established lines of communication that could assist in the fight against foreign bribery. Moreover it was suggested that those companies that offer bribes in the course of international business transactions would seek to avoid contact with the police. The lead examiners have however, formed the view that improved links and closer co-operation, between the police and the business sector in Poland could assist the police in detecting and preventing the offence of foreign bribery.

99. The difficulties in detecting and investigating foreign bribery described by police are not uncommon, but nor are they insurmountable. The lead examiners have formed the view that investigative authorities in Poland require not only greater awareness of the Convention, but need to be better equipped through enhanced training, and with sufficient resources for the detection and investigation of foreign bribery offences. This could include ensuring that specialised financial investigators, as well as investigators with adequate experience and training in conducting international investigations are available to anti-corruption units within the police. Moreover, given the acknowledged difficulty of detecting foreign bribery expressed by police, together with the rapid growth in Polish exports and investment abroad, the lead examiners considered that Poland's efforts would benefit from a more proactive stance to investigating this crime, a matter that is further examined below. In relation to the specialised financial expertise available to prosecution authorities, the lead examiners were informed that there are experts on economic and financial issues within all appellate prosecution authorities. The Polish authorities confirmed, after the on-site visit, that in the planned restructure of the prosecution authorities, the experts will be available to assist prosecutors in each of the new organised crime departments. It was also noted that there are examples of cases where the prosecution authorities have, where necessary, used independent economic experts, including from international consulting firms.

(iii) *Sources of information used for launching investigations*

100. Representatives of the police and the prosecution authorities explained to the examining team that, in practice, an investigation is commonly instituted upon a complaint filed by a person or entity; in response to intelligence reports; or following the emergence of other potential offences in the context of another investigation. It was also confirmed that an investigation may be launched based on information sourced from, *inter alia*, the media, company reports, and mutual legal assistance requests. It was reiterated by authorities that under the Polish legal system, the Prosecution Authority is obliged to launch a prosecution when there is a justifiable suspicion of an offence being perpetrated. Polish authorities stated that all allegations of crimes reported in the media and information obtained from other sources frequently are factors that trigger an investigation.

101. In relation to information sourced from media reports, prosecution authorities stated that this often had value, but was not always reliable. In assessing the veracity of criminal allegations reported in the media, a prosecutor stated that article 308 of the Code of Criminal Procedure provided a mechanism for police and prosecutors to carry out an initial inquiry to ascertain the credibility of information before deciding whether to launch a formal investigation.⁵³ If, arising from allegations of a crime in media reports, there is good reason to suspect that an offence has been committed, then article 303 of the Code of Criminal Procedure requires that an investigation must be instituted. An example from the media, referred to by the lead examiners, involved newspaper reports in 2006 of allegations that a Polish entity had engaged in corrupt conduct abroad. The lead examiners were informed that the Military Prosecutor's Office had initially looked into the matter, but had determined that it did not have jurisdiction to launch an investigation. At the time of the on-site visit, there was not any information available indicating whether preliminary or formal investigations had been conducted by the police or the State Prosecution Authority, nor information as to whether there had been any checks to ascertain the veracity of allegations. Although the lead examiners recognised that the press does not necessarily report this kind of information correctly, they were surprised that it did not appear that even initial steps to verify potentially important information in the media had been undertaken. As confirmed by authorities after the on-site visit, law enforcement authorities had in fact been looking at this matter as far back as 2005, and that proceedings in connection with suspicions of a money laundering offence had commenced. However, there have been no investigations or charges in relation to the offence of bribing a foreign public official to date.

102. Another potential source of information for detecting foreign bribery includes irregularities disclosed in company reports by companies or their external auditors. The authorities stated that there was no systematic review of company reports lodged with Polish regulators. In relation to companies where the State Treasury is a shareholder however, these companies are required by law to notify authorities of particular irregularities, and accordingly this information is reviewed by police or prosecutors.

103. Finally, the lead examiners are of the opinion that Polish authorities are not, as a matter of common practice, using MLA requests from abroad as a source of information for determining whether independent Polish investigations should be initiated. It was explained by authorities that all incoming MLA requests are handled and scrutinised by experienced prosecutors and, on the basis of an MLA request, if there is good reason to suspect that a crime has been committed then the prosecutor must commence an investigation. Nevertheless, the lead examiners are of the view that the use of incoming MLA applications as a source of information, is an area that must be developed by Poland, and is an important element in a more proactive approach to combating foreign bribery.

⁵³ Article 308 of the Code of Criminal Procedure addresses the actions that can be taken by authorities in order to prevent the loss, distortion or destruction of evidence, in cases not amenable to delay. This provision is particularly relevant in homicide matters to permit the urgent taking of blood and hair samples at the scene of a crime.

104. In relation to outgoing MLA applications made by Poland, the statistics outlined in section C.2.b(i) clearly indicate that MLA is used as a regular tool for obtaining evidence in cases conducted by Polish authorities. Indeed, in the previously mentioned high profile transnational crime investigation conducted by Poland and another country, the Polish authorities had used MLA for the purposes of obtaining evidence from witnesses.

(iv) *Investigative techniques*

105. In Poland police have a wide range of investigative methods at their disposal which, subject to certain safeguards, can be used in the investigation of corruption offences, including wiretapping, the recording of images and sound, room bugging, as well as controlled delivery or the acceptance of a pecuniary advantage by police.⁵⁴ The techniques available also include powers that would enable the search and seizure of financial and company records, pursuant to the Code Criminal Procedure. The application and use of the special investigative techniques must be approved by a court. In urgent cases it is possible for the police to proceed with utilising special investigative techniques without initial approval, provided that authorisation is sought within 5 days of their use. If the court subsequently declines to authorise the application, the technique must be stopped and the material already obtained cannot be used in any case and has to be destroyed.

106. Polish officials have stated that, so far, the special investigative techniques have not been utilised in relation to allegations or information related to the bribery of foreign public officials by Polish entities or citizens, although they have been regularly used in domestic corruption cases.

107. The procedures, safeguards and use by the authorities of special investigative techniques in investigating corruption cases, were regarded by representatives from the legal and academic professions in Poland as appropriate. The only cause for concern identified was the growing number of investigative bodies who were being given access to these powers, the latest being the CBA, which it was argued increased the difficulty of monitoring the use of the powers, thereby raising the possibility that any abuse could remain undetected.

(v) *Bank Secrecy*

108. Polish authorities rejected any suggestion that bank secrecy requirements in Poland, or the time taken to obtain financial information requested, had acted as an impediment to criminal investigations. Article 105 of the Act on Banking Law requires banks to disclose confidential information at the request of, among others: the Commission for Banking Supervision and the Chairperson of the Polish Securities and Exchange Commission in connection with their supervisory duties; the courts or the public prosecutor in connection with legal proceedings for criminal or fiscal offences or in response to a mutual legal assistance request from a foreign country; the police where this is necessary for effective crime prevention or detection or to establish the perpetrators of a crime and gather evidence in accordance with article 20 of the Police Act; and the General Inspector of Fiscal Audit or the director of the Fiscal Audit Office in connection with the preparatory proceedings initiated in cases involving criminal offences, petty offences and fiscal offences or fiscal petty offences or in connection with control proceedings. There were no particular complaints made by authorities to the examining team about the difficulty of obtaining information from financial institutions, nor the time taken to respond to requests.

⁵⁴ Article 19 and 19a of the Law on the Police.

(vi) *Witness Protection Measures*

109. The witness protection measures available in Poland enable witnesses: (1) to apply to become an “incognito witness” in the case of a justified risk of danger to life, health, or property of great value to a witness or to nearest relatives, which requires information concerning the personal details and identity of a witness to be kept secret, and the application of special rules to guarantee the security of a witness and nearest relatives;⁵⁵ and (2) to seek to become an ‘immunity witness’, which allows a suspect to provide evidence to prosecution authorities for crimes in which he/she has participated, and thereby avoid prosecution. If the life or health of the witness or of the nearest relatives is unsafe, personal protection may be organised together with a change of domicile, new job, and other assistance is also possible. The ‘immunity witness’ measures relate only to offenders for some types of crime. In that regard, perpetrators of manslaughters and persons directing criminal groups are excluded. After the on-site visit, the lead examiners were informed of an amendment to the law relating to immunity witnesses, which entered into force on 31 August 2006. The amendment extended the application of the immunity witness measures to a wider range of offences, including the foreign bribery offence. The measures are applied at the stage of prosecution proceedings and may continue after the prosecution is concluded. Polish authorities confirm that the measures have already been used for witnesses in proceedings for the domestic bribery offence.

110. Another witness protection measure that is available under the Code of Criminal Procedure is included in article 191 which provides that in cases of a justified risk of violence or threat against a witness or his/her nearest relative, a witness is allowed to restrict information of his/her address for a prosecutor’s or a judge’s exclusive use. In that situation documents would be delivered to the place of work of the witness or to another specified address.

(vii) *Co-ordination and information sharing between investigative authorities*

111. Given that the competence for investigating the offence of foreign bribery involves various central and provincial divisions of the police, the Prosecution Authority, and possibly the new CBA, the co-ordination, co-operation and sharing of information between these organisations is essential for effectively combating this serious crime.

112. In relation to the police, there are no strict written procedures or guidelines applicable to the handling and referral of foreign bribery cases by police units to the General Police Headquarters. The specialised anti-corruption unit within the General Police Headquarters may assume a leading role in cases that cut cross provincial borders or that have international elements. Depending on the nature of a foreign bribery allegation though, an allegation of this type of crime could involve both the anti-corruption police units in Warsaw and the Provinces, co-ordinated and supervised by the Criminal Bureau within General Police Headquarters. The examining team were not informed of any major concerns with regard to reporting channels and co-operation between various divisions of the police responsible for investigating corruption matters.

113. In relation to prosecutors, because the decision in Poland to re-structure the organised crime departments within the Prosecution Authority is relatively recent, the lead examiners were unable to fully assess the new arrangements. An important issue to be considered, as practice develops, is whether the new structure fosters strong cooperation and co-ordination between the relevant offices and departments of the Prosecution Authority for the effective supervision and conduct of proceedings into serious offences, including foreign bribery.

⁵⁵ The ‘incognito witness’ provisions are defined in Article 184 of the Criminal Procedure Code.

114. The participants from the police and the State Prosecution Authority were unsure at the on-site visit as to the exact mechanisms that would be available for co-operation with the new CBA. At the time of the on-site visit the CBA had not commenced operations and the CBA Act had not entered into force. The police suggested that a bilateral agreement may be agreed, to provide a framework for co-operation between police and CBA personnel. However, as explained by Polish authorities following the on-site visit, the coordination powers will remain within the Prosecution Authority which is to supervise all investigations including matters conducted by the CBA. Cooperation between the CBA and prosecutor's offices will be based on the same procedures or approach that applies to existing relationships between the Prosecution Authority, the police, and other relevant agencies.

(viii) *Period for investigations*

115. The Code of Criminal Procedure imposes a deadline for the conduct of investigations by authorities. Article 305 of the Code states that a law enforcement agency is obliged to commence an investigation immediately after receiving information that the offence was committed, by way of a decision to commence investigation. Article 310 further stipulates that an investigation should be completed within three months. Polish authorities informed the lead examiners that the period begins to run from the date of the decision to commence an investigation. In justifiable cases the state prosecutor supervising the investigation (or a more senior prosecutor) may extend the time-limit for a period not exceeding one year. Where the investigation is not completed within that time, the supervising state prosecutor (or a more senior prosecutor) may extend its duration for another specified period. In practice, Polish authorities could not identify any corruption cases that have been terminated due to the expiry of the time limits stipulated within the Code. Both police and prosecutors present at the on-site visit emphasised that the setting of statutory time limits acted as a discipline on authorities when managing caseloads. Moreover it was confirmed that there is little difficulty in obtaining an extension on the time limits, particularly where cases are complex or require evidence to be obtained from abroad.

Commentary

The lead examiners believe that Poland should be proactive in investigating allegations of foreign bribery, with the view to advancing investigations and bringing prosecutions. They recommend that police and prosecutors at the national and provincial levels, and particularly within specialised corruption fighting units, are made aware through training or other means of the importance of investigating the foreign bribery offence. The Polish authorities should remind police and prosecutors of the importance of actively looking into possible sources of detection of foreign bribery, including information reported to police and prosecutors by Polish agencies, potential bribery offences identified in the context of other investigations for separate offences, irregularities identified in company reports or reported by external auditors, information contained within incoming mutual legal assistance requests from abroad, and serious allegations reported in the media. In order to assist the police in detecting and preventing the offence of foreign bribery, steps should also be taken to improve links, and to encourage closer co-operation, between the police and the business sector in Poland.

The lead examiners recommend that greater use be made of specialised financial investigators within the anti-corruption units of the police and the State Prosecution Authority.

The Working Group should follow-up on the emerging relationships between the new Central Anti-Corruption Bureau the police and the State Prosecution Authority and the effectiveness of arrangements established to help co-ordinate the work of these bodies in investigating foreign bribery cases.

b. Mutual legal assistance and extradition

(i) Mutual legal assistance

116. The system for providing and requesting mutual legal assistance (MLA) on criminal matters in Poland is governed by several bilateral and multilateral treaties, including the European Convention on mutual assistance in criminal matters of 1959, and its additional Protocols.⁵⁶ On accession to the European Union, Poland entered into the Convention of 2000 on mutual legal assistance in criminal matters between the Member States and its Protocol and the Convention of 1990 implementing the Schengen Agreement. In the absence of a treaty, MLA is governed by provisions of the Code of Criminal Procedure. The lead examiners were informed that the most advanced bilateral MLA treaty that Poland has entered into is with Germany. This agreement enables regional prosecution authorities in both Germany and Poland to deal directly with each other when making and executing MLA requests.

Incoming requests

117. In 2005 there were 659 MLA requests received by the State Prosecution Authority (as regards the Ministry of Justice its statistics do not include data on incoming and outgoing requests by Polish courts due to the fact that with many countries cooperation between courts takes place directly). The authorities have only received one request for MLA in relation to a corruption case since the Convention entered into force in Poland. In this matter the request was executed by the Appellate Prosecution Authority in Katowice. After receiving an MLA request the Ministry of Justice, checks whether the request meets the formal legal requirements, including any relevant MLA treaty, and refers it to the Polish court that has jurisdiction or the relevant prosecutor, depending on the nature of the request. On execution of the request, the Ministry arranges for the communication of the response to the foreign authorities. When a request is made directly to a regional prosecution authority, they perform the necessary formalities. The execution of an MLA request to Poland follows the provisions of article 588 of the Code of Criminal Procedure and regulations.⁵⁷

118. Decisions to grant or refuse incoming MLA requests are made by the competent courts or public prosecutors. In relation to the latter, each regional prosecution authority has an assigned prosecutor to deal with MLA and extradition applications. A decision to refuse legal assistance by a court or prosecutor is subject to appeal.

119. The forms of MLA that are available are set out in article 585 of the Code of Criminal Procedure which include non-coercive measures (the service of documents, and giving access to information on the criminal record of the accused) and coercive measures which would require appropriate authorisation by a court (inspection and searches of dwellings and persons, and confiscation of material objects). MLA must be refused if the request conflicts with the legal order of Poland.⁵⁸ The other grounds for refusal, pursuant

⁵⁶ Including in appropriate cases agreements on supplementing and facilitating the use of the European Convention of 2000 on legal assistance in criminal matters, Poland has concluded bilateral treaties concerning legal assistance in criminal matters with the following countries: Algeria, Austria, Belarus, Canada, China, Cuba, Egypt, France, Germany, Iraq, Libya, Mongolia, Morocco, North Korea, Slovakia, Syria, Thailand, Tunisia, the United States and Vietnam. At the time of the on-site visit a bilateral agreement had also been reached with the Hong Kong special administrative region of the People's Republic of China.

⁵⁷ See §§ 4, 6 – 9, 48 – 54 and 62 – 63 of the Regulation of the Minister of Justice of 28 January 2002 on particular actions of courts in cases related to international civil and criminal proceedings in international relations (Journal of Laws of 2002 No. 17 item 164 as amended).

⁵⁸ See article 588.2, Code of Criminal Procedure.

to article 588.3 of the Code of Criminal Procedure, are discretionary and include circumstances where the request is not an offence under Polish law, or where there is no guarantee of reciprocity.

120. The Banking Law, pursuant to article 105.1(2)(b) and (c), provides a legal basis for Poland to respond to MLA requests by foreign authorities for financial information. Article 105.1(c) requires banks to disclose information that is subject to the obligation of banking secrecy at the request of a court or prosecutor in connection with an MLA request which “on the basis of a ratified international agreement binding on the Republic of Poland, has the right to request information that is subject to the obligation of bank secrecy”. The OECD Convention, pursuant to Article 9.3, could provide a basis for the lifting of bank secrecy requirements by Poland for MLA requests from any one of the 35 other Parties to the Convention. It also remains possible that bank secrecy will not be lifted for MLA requests from States who are not party to the OECD Convention unless there is another convention, ratified by Poland, which can be relied upon. In this regard, the Polish authorities re-iterated that the first step after receiving an MLA request is for the court or prosecutor to determine whether there are legal grounds to provide MLA. If the court or the prosecutor decides to render MLA (either on the treaty basis or on the basis of reciprocity) and the request requires a bank to disclose information subject to bank secrecy, the bank must comply with the request. In practice, authorities stated that Poland has not declined an MLA request on criminal matters on the grounds of bank secrecy or confidentiality. The lead examiners were informed that the requests are usually dealt with expeditiously, within one to three weeks.

121. In relation to MLA requests concerning legal persons, Poland can provide MLA in response to a request concerning criminal proceedings against a legal person on either a treaty or a non-treaty basis pursuant to article 41 of the Law on Liability of Collective Entities which stipulates that “in matters concerning the liability of collective entities for acts prohibited under penalty the court and prosecution render legal assistance on request from the relevant agency of the foreign country”. Polish authorities informed the lead examiners, after the on-site visit, that provision of MLA is not confined to those offences which are listed as being “prohibited under penalty” pursuant to section 16 of the Act. It was emphasised that article 41 of the Act refers to all acts prohibited under penalty in Poland and, accordingly, this enables the courts and prosecutors to render MLA at the request of foreign countries investigating legal persons, including for accounting offences not encompassed in article 16, but within the scope of the Convention.

122. On the basis of the information provided by the authorities, the lead examiners concluded that Poland has sought to develop a flexible and responsive system to deal with MLA requests which was evident by the arrangements implemented both at a central and regional level. The officials indicated a clear determination by Poland to execute MLA requests expeditiously and not, for example, cause delay due to minor errors in applications or slight deviations from formal MLA requirements.

Outgoing requests

123. MLA requests filed by Polish prosecutors or courts to agencies of foreign states are forwarded to these agencies by the Ministry of Justice, except for cases when an international agreement of which Poland is a party provides for direct communication between Polish and appropriate foreign agencies. The code of conduct adopted by Polish courts when filing an MLA request abroad is regulated in the provisions of article 585 – 586 of the Code of Criminal Procedure and by Regulation.⁵⁹ The Polish authorities have reported that in 2005 there were 1 116 outgoing MLA requests made through the State Prosecution Authority (as regards the Ministry of Justice its statistics do not include data on incoming and outgoing requests by Polish courts due to the fact that with many countries cooperation between courts takes place

⁵⁹ See §§ 10 – 15, 39 – 40, 42 – 44, 46 57 – 61 of the Regulation of the Minister of Justice of 28 January 2002 §§ 10 – 15, 39 – 40, 42 – 44, 46 57 – 61 on particular actions of courts in cases related to international civil and criminal proceedings in international relations.

directly). Polish authorities confirmed that none of the MLA requests related to bribery of a foreign public official.

(ii) *Extradition*

124. Poland may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral and multilateral extradition treaties, or under the provisions of the Code of Criminal Procedure if there is no applicable treaty. In addition, the Polish authorities have stated that, in the absence of an extradition treaty with another Party, it will consider the Convention as a legal basis for extradition in respect of the offence of bribing a foreign public official. Requests for extradition are transmitted by the prosecutor to the provincial court. These proceedings take place to determine whether extradition could be granted pursuant to Polish law. A decision of the Court on whether to extradite is referred to the Minister of Justice who makes the final decision.⁶⁰ The decision of the Minister of Justice is not subject to appeal. In matters involving the European Arrest Warrant, these are examined and executed by the provincial court having jurisdiction over the case.

125. Article 604.1 of the Code of Criminal Procedure provides that extradition must be refused, *inter alia*, if the person whose extradition is sought is a Polish citizen or has the right of asylum in Poland. The prohibition on extraditing nationals is also enshrined in article 55 of the Polish Constitution. The Polish prosecution authorities have a legal obligation to institute criminal proceedings where there is a reasonable suspicion that an offence has been committed. The Polish authorities consider that a request for extradition creates such a suspicion, and would thereby provide the basis for instituting criminal proceedings. In the period 2004–2005 the Minister of Justice filed abroad 59 extradition applications. In the same period the Minister of Justice issued decisions on 74 persons to foreign states, which included the refusal to extradite 14 persons. The grounds for the grant or the refusal of extradition were not available to the lead examiners. In 2004–2005 in Poland there were no criminal proceedings involving the refusal to extradite persons on the grounds of Polish nationality.

126. Another important issue discussed at the on-site visit was the impact of a new “impunity” provision in article 229.6 of the Penal Code which allows a perpetrator of the foreign bribery offence, subject to certain conditions, to automatically escape punishment by notifying the authorities of the offence. It emerged at the on-site visit that a person the subject of an extradition application who had been granted impunity could not be extradited. This issue is discussed in section C.3.c(ii).

Commentary

Poland has well developed practices and procedures for dealing with mutual legal assistance and extradition matters. In particular, the lead examiners observed that Polish authorities have sought to develop a flexible and responsive system to deal with incoming mutual legal assistance requests from abroad.

3. Prosecution

a. Mandatory Prosecution

127. It is mandatory under Polish law that crimes are prosecuted. Article 10 of the Code of Criminal Procedure stipulates that the agency responsible for prosecuting offences has the duty to institute and conduct preparatory proceedings, and the public prosecutor is required to bring and support charges. The Code of Criminal Procedure further declares that, except for cases described by statute or international law, no one may

⁶⁰ Article 603.5, Code of Criminal Procedure.

be discharged from liability for a crime committed. The Prosecution Authority is responsible for the supervision and prosecution of criminal offences in Poland on behalf of the state, including foreign bribery cases.

128. Although obliged to bring and support charges for offences, state prosecutors are also empowered under the Code of Criminal Procedure to issue an order to discontinue criminal proceedings. Article 17 provides that criminal proceedings must not be instituted or, if previously instituted, must be discontinued when, *inter alia*: there have not been sufficient grounds to suspect that the act has been committed; the accused is deceased; the prescribed statute of limitations has lapsed; it has been established by law that the perpetrator is not subject to penalty (*e.g.* if a perpetrator is granted impunity for the foreign bribery offence in article 229.6 of the Penal Code); the act constitutes an insignificant social danger; or where the required permission to prosecute an act (*e.g.* to enable the revocation of an immunity from prosecution for a judge, prosecutor or parliamentarian) has not been granted. The issues of immunity from prosecution and the statute of limitations are discussed in sections C.3.c(i) and C.3.e respectively. In relation to the circumstances constituting “insignificant social danger” prosecutors said that this could cover offences such as minor cases of shop lifting. Polish prosecutors referred to article 1.2 of the Penal Code which expressly provides that “a prohibited act whose social consequence is insignificant shall not constitute an offence.” A court must, among other things, consider the nature of the damage and the intent and motivation of the perpetrator, in assessing the level of the social consequences of an act⁶¹. The Polish authorities were adamant that these provisions would not be applicable to acts constituting foreign bribery, even if the prohibited conduct involved a bribe constituting a small facilitation payment (as described under Commentary 9 to the Convention) made by the perpetrator to a foreign public official.

b. The role of the Minister of Justice as Prosecutor General

129. The Prosecution Authority is a hierarchically organised structure headed by the Prosecutor General, a position occupied by the Minister of Justice, a member of the government directly responsible to the parliament. Although responsibility for the supervising the prosecution of foreign bribery cases primarily rests with the State Prosecution Authority, Polish prosecutors confirmed that the Prosecutor General has the authority to review all files in criminal cases, and can exercise powers under the Code of Criminal Procedure to make decisions or issue orders relating to investigations and proceedings. The lead examiners were informed that it was also a regular occurrence for the Prosecutor General to require an investigation to be commenced. In relation to the closure of cases however, prosecutors were not aware of any proceedings where the Prosecutor General had sought to terminate a case. The Prosecutor General has not issued any directives requiring certain cases to be submitted for his approval, and there are no such requirements of approval in the law. However, the State Prosecution Authority acting on behalf of the Prosecutor General monitors and collects information about all significant cases related to corruption, and the Prosecutor General is usually informed about such cases.

130. Given that the office of the Prosecutor General is occupied by a person holding political office, it was important to establish that the independence of the prosecution in dealing with foreign bribery cases is safeguarded in the Polish system, in particular, to ensure that the exercise of prosecutorial powers could not be influenced by considerations prohibited in Article 5 of the Convention. The Polish authorities rejected the suggestion that the authority and powers exercised by the office of Prosecutor General in the Polish system would give rise to the potential for the investigation and prosecution of foreign bribery cases to be influenced by: considerations of national economic interest; the potential effect upon relations with another state; or the identity of the natural or legal person involved, contrary to Article 5 of the Convention. Polish prosecutors reaffirmed the position that it is mandatory under Polish law that crimes are prosecuted, and that the Prosecution

⁶¹ See article 115.2, Code of Criminal Procedure.

Authority, including the Prosecutor General, are obliged to act according to the law binding in Poland, which includes the Convention.

131. A member of the legal profession in Poland stated that the issue of the independence of the office of Prosecutor General and the question of the separation of powers arises from time to time in political debate within Poland, but so far has not resulted in any serious moves to ensure that the office of the Prosecutor General is made independent of the executive or the parliament. Polish prosecutors dismissed concerns about the potential for persons occupying the office of Prosecutor General to influence the investigation and prosecution of foreign bribery cases, and highlighted the fact that a significant safeguard in the process for instituting and terminating proceedings is the requirement for court supervision of such decisions. All motions for instituting or discontinuing proceedings must be filed with the court, pursuant to provisions of the Code of Criminal Procedure. This argument however, does not adequately address the concern that a Prosecutor General could exert a decisive influence on whether or not an investigation is initiated in the first place. On this point however, prosecutors commented that instances of inaction by the state, for whatever reason, would still enable an injured party to separately initiate judicial proceedings. In that regard, members of the legal profession observed that this option does not necessarily act as an adequate safeguard, because the cost and time burdens involved for an injured party to bring a subsidiary prosecution were often too prohibitive to initiate proceedings.

132. The lead examiners noted that the Minister of Justice, in performance of the powers and functions of the Prosecutor General, is not required to report to parliament on cases initiated or terminated by his/her direct intervention. That said, officials commented that many members of parliament pay close attention to prosecutorial decisions made in relation to corruption cases, to the extent that they are aware of such decisions.

133. It is important to note that the lead examiners were not presented at the on-site visit with any information of undue political interference in the handling of corruption cases in Poland. The question was whether, as a matter of principle, the Polish system sufficiently guaranteed or safeguarded the independence of the Prosecution Authority for the exercise of their powers in foreign bribery cases.

Commentary

Although responsibility for the supervision of foreign bribery cases primarily rests with the State Prosecution Authority, the lead examiners have noted that the office of Prosecutor General, a position occupied by a member of the government of the day, has the authority to review all files in criminal cases, and can exercise powers under the Code of Criminal Procedure to make decisions or issue orders relating to criminal investigations and proceedings.

There are a number of safeguards in the Polish legal system to ensure that prosecutors remain independent and are able to faithfully adhere to the principle of mandatory prosecution. However, the lead examiners believe that Poland should consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers (in particular, for the foreign bribery offence) are not to be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

c. Grounds for precluding or terminating proceedings

(i) Immunities

134. Under the Polish legal system there are a wide range of public office holders that enjoy immunity from prosecution. The immunities, in most cases, are enshrined in the Constitution of the Republic of Poland, and are further governed by statutes, procedural regulations, and rules of the parliament. The beneficiaries of the immunity of prosecution include parliamentarians, judges, members of the Tribunal of

State, the President of the Supreme Chamber of Control, and the Commissioner for Citizens' Rights.⁶² Immunity is also afforded to prosecutors, pursuant to article 54 of the Act of 20 June 1985 on the Prosecution Authority.

135. If there is good reason to suspect that a crime has been committed by a person holding an office that is subject to immunity from prosecution, article 17.1.10 of the Code of Criminal procedure provides that criminal proceedings must not be instituted, or if instituted, must be discontinued, unless the requisite permission has been granted to prosecute the matter. With respect to prosecution of members of parliament, a resolution of the *Sejm* (for Deputies) or Senate (for Senators) must be adopted in order for criminal proceedings to be commenced or continued. Polish authorities state that permission for prosecution with respect to judges and prosecutors must be sought from the inner disciplinary courts. The discontinuance of proceedings because of a failure to seek the required permission is not an obstacle for a resumption of proceedings if the permission is subsequently granted.

136. The lead examiners are concerned that the existing immunities are too wide and could undermine the credibility and authority of the offices and institutions they are designed to protect. In that regard, there is a danger that the immunities could impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences, contrary to Article 5 of the Convention. The lead examiners believe that a system based on functional immunity, that is, immunity only in respect of acts carried out in the performance of the officeholder's duties, would be sufficient to ensure their independence and to protect them from unfounded or malicious prosecutions connected with the carrying out of their duties. The Polish authorities have informed the lead examiners that the immunities granted to parliamentarians, the judiciary and certain other officeholders are a constitutional guarantee to ensure the proper functioning of the highest state institutions, and any change would require an amendment to the Constitution. Poland has so far ruled out proposals requiring changes to the Constitution,⁶³ but is considering options to simplify the procedure for revoking the immunity of judges and prosecutors.

137. In practice, the State Prosecution Authority informed the lead examiners that cases requiring the revocation of immunities of parliamentarians are decided on by Parliament relatively fast and refusals are quite rare. In relation to cases against judges and prosecutors however, the State Prosecution Authority has acknowledged some concerns. The main difficulty for law enforcement authorities is the length of time taken before a request to revoke the immunity is finally determined by the courts. Polish authorities have informed the lead examiners that a draft law has been prepared by the government which proposes to eliminate the possibility of a refusal to issue permission for the prosecution of a judge or a prosecutor in a situation when there is a reasonable suspicion that an offence has been committed by the person, and to streamline the procedure for obtaining such permission.

Commentary

The lead examiners recommend that the Polish authorities consider, within the constitutional principles of the state, measures that may be taken in order to ensure that immunity does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences and that it is consistent with Article 5 of the Convention. In that regard, whilst welcoming steps being considered by Poland to streamline the process for lifting the immunity applicable to judges and prosecutors, measures should also consider clearly limiting the immunity applicable to designated office holders in Poland, to acts done in the performance of the office holder's duties (functional immunity).

⁶² See provision for immunities in Articles 105, 181, 196, 200, 206, and 211 of the Constitution.

⁶³ See discussion in: Group of States Against Corruption (GRECO) First Evaluation Round: Compliance Report on Poland adopted 28 June-2 July 2004, [Greco RC-1(2004) 5E], para 65.

(ii) *Impunity Provision in Article 229.6 of the Penal Code (“effective regret”)*

138. In amendments to the Penal Code in 2003, a so-called “impunity” provision for bribers was enacted by parliament. Article 229.6 of the Penal Code specifically requires that the bribe (or a promise thereof) must have been accepted by the public official, and that the perpetrator reported this fact to a law enforcement agency, revealing all the essential circumstances of the offence before the authorities were notified of the offence. If the conditions of the provision are satisfied, then the perpetrator will not be liable to punishment and proceedings will not be instituted, or if already commenced, they will be discontinued. As is the case with any decision taken by prosecutors, the decision to grant or refuse impunity can be challenged by the parties to the proceedings in front of the higher prosecutorial authority, and subsequently appealed in court to determine whether the prosecutor lawfully applied the conditions set in article 229.6. The Polish authorities sought to provide strong policy arguments for this approach, stating that it has proved effective in practice by breaking the “solidarity” between the briber and the recipient of the bribe, and it had been an important influence in increasing the detection rate for domestic corruption within Poland.

139. The lead examiners, in considering the policy arguments advanced by the Polish authorities, concluded that the appropriateness and utility of the impunity provision in the context of the foreign bribery offence is doubtful given that the act of the foreign public official is rarely within the jurisdiction of Poland and thus cannot be prosecuted by Polish authorities following the briber’s confession. Furthermore, the Convention requires that the offence of foreign bribery be not only criminalised, but that it is punishable by effective, proportionate and dissuasive criminal penalties. A perpetrator of the foreign bribery offence, who satisfies the conditions under article 229.6, cannot be prosecuted nor punished (*i.e.* neither the prosecutor nor the court has discretion under the provision), an outcome that runs contrary to the Convention. Furthermore, the impunity provision could enable an individual employee, contractor or agent of a Polish company who initiated the act of bribing a foreign public official to avoid prosecution (*i.e.* the provision is not limited to situations where the bribe is solicited). However, the decision not to proceed against the “effective regretter” does not preclude the possibility of proceeding against any co-perpetrators or the legal person, nor does it prevent the confiscation of the proceeds of the crime. Finally, the lead examiners were concerned by the impact that impunity might have on international co-operation. It was confirmed at the on-site visit that if a perpetrator of a bribery offence had been granted impunity under article 229.6, any subsequent extradition application for that person would be refused by Poland. The operation of article 229.6 could therefore frustrate Poland’s ability to extradite persons sought for cases of active bribery. However, Polish prosecutors were able to confirm that the impunity provision would not preclude Poland from providing mutual legal assistance to foreign authorities.

140. The lead examiners were informed by various participants from the legal profession and the judiciary that this type of provision had been variously enacted, removed and then enacted again in Polish criminal law over the last sixty years. The 2003 amendments however, introduced the mandatory requirement to grant impunity to the perpetrator where the conditions in article 229.6 are satisfied. This was considered by members of the legal profession in particular, as the most far reaching impunity provision so far, and the most contentious. The lead examiners were informed by members of the legal profession that there had been considerable political pressure to re-introduce an impunity provision in the 2003 amendments to the Penal Code, coupled with an increase in sanctions, with the view to more effectively combat domestic corruption.

141. It was acknowledged by authorities that the intention for introducing this provision was to combat domestic bribery and corruption within Poland. Polish authorities stated that within the first six months of the introduction of the new provisions (in the period from 1 July through 31 December 2003), the Prosecution authorities across Poland instituted a total number of 53 preparatory proceedings on the basis of notifications filed by perpetrators of active corruption who took advantage of the impunity

provision. In the course of these proceedings, a total number of 83 crimes of corruption were said to be disclosed. Nevertheless, despite its stated success in combating domestic corruption, the lead examiners believe that the application of article 229.6 of the Penal Code to the foreign bribery offence runs contrary to the Convention, a view also expressed by members of the Polish legal profession present at the on-site visit. Poland has indicated that a change to the Penal Code to exclude the application of the impunity provision to foreign bribery, while maintaining it for the domestic bribery offence, could contravene the Polish Constitution.

Commentary

The lead examiners recommend that Poland review the impunity provision, within article 229.6 of the Penal Code and either exclude its application to the offence of foreign bribery, or significantly limit its scope by imposing further conditions for its applications, or in some other appropriate way ensure that the law does not contravene the Convention. Poland should report on progress to the Working Group in one year.

d. Jurisdiction

(i) Territorial jurisdiction

142. Territorial jurisdiction is established in Poland pursuant to article 5 of the Penal Code which states that the “Polish penal law shall be applied to the perpetrator who committed a prohibited act within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which the Republic of Poland is a party stipulates otherwise”.⁶⁴ Pursuant to article 6.2, an offence is deemed to be committed at the place where the offender has acted or omitted an action which he/she was under an obligation to perform, or at the place where the criminal consequence has ensued or has been intended to ensue. The Penal Code does not elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction. The Polish authorities have not highlighted any obstacles in establishing territorial jurisdiction for natural persons for criminal investigations and prosecutions, as long as there is good reason to suspect that an offence has been committed. The Polish authorities informed the lead examiners that a promise of a bribe made by a telephone call, fax, or e-mail emanating from Poland is sufficient to establish territorial jurisdiction. Furthermore, a telephone call, *etc.* made in furtherance of a promise, *etc.* (e.g. a confirmation of a promise) would also trigger territorial jurisdiction. There are no cases available to demonstrate the establishment of jurisdiction in such situations.

(ii) Nationality jurisdiction

143. Polish criminal law is applicable to Polish citizens who have committed an offence abroad, as provided under article 109 of the Penal Code. A requirement however, is that the act is likewise recognised as an offence by a law in force “in the place of its commission” (*i.e.* dual criminality). The Penal Code provides that if there are differences between the Polish criminal law and the law of the place of commission, the court may take these differences into account in favour of the perpetrator.⁶⁵ Further, article 113 states that “notwithstanding regulations in force in the place of commission of the offence, the Polish criminal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of

⁶⁴ Poland confirmed (in Phase 1) that “unless an international agreement to which the Republic of Poland is a party stipulates otherwise” is intended to widen the scope of territorial jurisdiction under an international agreement.

⁶⁵ Article 111, Penal Code.

Poland is obligated to prosecute under international agreements.” The requirement of dual criminality is lifted by article 113 in respect of the foreign bribery offence, as the Convention obliges Poland to prosecute the bribery of a foreign public official. Accordingly, where the offence is committed by a Polish citizen, Poland will always establish jurisdiction.⁶⁶

144. In relation to the application of nationality jurisdiction to legal persons that commit offences, Polish officials stated that the nationality of a legal person is determined on the basis of the place of its registry. There is no case law available to demonstrate this point, primarily due to the recent introduction into law of the liability of legal persons. The jurisdiction over legal persons however, is dependent on the existence of jurisdiction over a natural person. The Law on Liability of Collective Entities requires a prohibited act to have been committed by a natural person (over whom Poland has jurisdiction) and the criminal proceedings to have been concluded, before separate proceedings under the Law can be commenced against the legal person.

Commentary

Given the absence of case law on foreign bribery, the lead examiners recommend that the application by Poland of territorial and nationality jurisdiction be monitored to evaluate its effectiveness in enforcing foreign bribery legislation, particularly in relation to legal persons, and offences committed in whole or in part abroad.

e. Statute of limitations

145. Article 101.1 of the Penal Code contains the rules prescribing the statute of limitations for criminal offences, including the foreign bribery offence. The applicable limitation period is related to the penalty provided for each offence. The “amenability to punishment” for the bribery offences ceases, after 15 years, except for the mitigated offence of article 229(2), for which it ceases after five years. The abovementioned limitation periods reflect amendments introduced since the Phase 1 review. In that regard, the Law of 3 June 2005 on the amendment of the Penal Code⁶⁷ increased the limitation period for the bribery offences in article 229.1, 229.3, and 229.4, from 10 years to 15 years. The limitation period starts running from the time of the commission of the offence. Amendments to article 102 of the Penal Code also provide that if, during the limitation period, criminal proceedings against the perpetrator are instituted, the limitation period is extended for a further 10 years (previously five years) for the more serious bribery offences in articles 229.1, 229.3 and 229.4, and for a further five years (unchanged) in the case of the mitigated offence in article 229.2 of the Penal Code. In regard to legal persons, the Law on Collective Entities provides that no fine, forfeiture, ban or public pronouncement of the ruling shall be adjudicated against the collective entity 10 years after the issuance of a decision against the natural person for a prohibited act, pursuant to article 4 of the Law.

Commentary

The lead examiners welcome the amendments made by Poland to the Penal Code which provide for a longer period of time for authorities to prosecute the foreign bribery offence.

⁶⁶ Phase 1 Report, section 4.2.

⁶⁷ The Law of 3 June 2005 on the amendment of the Penal Code (Journal of Laws No. 132, item 1363).

4. The Offence of Bribery of Foreign Public Officials

a. Overview

146. The offence of bribing a foreign public official is contained in article 229 of the Polish Penal Code (see Annex 3). The amendments implementing the Convention, introduced in 2001, extended the application of the existing domestic bribery offence in the Polish Penal Code by adding a new paragraph to the provision, specifically article 229.5, which established criminal liability for the active bribery of a foreign public official. Although this provision does not utilise the precise terms used in Article 1 of the Convention, the approach gives the ability for Poland to rely on existing case law concerning domestic bribery for interpretative guidance. In that regard, case summaries provided by Poland indicate that there has been judicial consideration of important elements of the domestic offence including: intention; offer; promise; giving a bribe; use of intermediaries; an “undue pecuniary or other advantage”; and “in relation to the performance of official duties”.

147. As there have been no cases of foreign bribery in Poland, the relevant Penal Code provision in article 229.5 has not been directly considered by the courts, and remains untested. In Phase 1 however, the Working Group formed the general opinion that the relevant Polish laws, including article 229, largely conformed to the standards of the Convention. Nevertheless the Working Group did recommend that Poland take remedial action to ensure that the offence of foreign bribery covered the case where a “personal benefit” goes to a third party. Certain aspects of the Convention’s definition of “foreign public official” were also discussed in relation to the Penal Code provisions. In particular, the scope of the definition of a “public official” defined in the Penal Code and its relation to the notion of a “person performing a public function”, an expression used in article 229.5 of the Penal Code, implementing the Convention. The law has subsequently been amended in relation to both these issues.

b. Elements of the offence

(i) Third Parties beneficiaries

148. In 2001 the Working Group observed that the foreign bribery offence in article 229.5 of the Penal Code did not expressly refer to third party beneficiaries. At that time, Poland stated that third party beneficiaries were covered by the definition of “material benefit” in article 115.4 which defined a material benefit as applying to: (1) the person himself; (2) another natural or legal person; (3) an organisational unit not having the status of a legal person; or (4) a group of persons pursuing an organised criminal activity. This definition appeared in the general part of the Penal Code under the title “Explanation of Terms of the Law”, and is therefore applicable to all the offences within the Penal Code, including bribery of a foreign public official. In Phase 1, the Working Group agreed that the Polish law covered the case where a “material benefit” (*i.e.* a pecuniary benefit) goes to a third party. However, because the provision did not refer to a “personal benefit” (*i.e.* a non-pecuniary benefit), it was considered that where such a benefit did go to a third party, this was not covered under the Penal Code.

149. The gap in the law identified by the Working Group was addressed by Poland through amendments enacted in the law of 13 June 2003 (Journal of Laws No 111 item 1061). An express reference to third party beneficiaries in the foreign bribery offence in article 229.5 was not introduced. The approach taken by Poland followed the previous formulation by amending the definition of “material benefit” in article 115.4 of the Penal Code. A new definition of “material or personal benefit” was introduced, and was defined as “the benefit for the person or for somebody else”, thus covering any recipient third party, whether a natural or legal person (or other organisational entity). The Penal Code does not stipulate precisely what is covered by the term “personal benefit”. Polish authorities have stated that a “personal” benefit is one that, in principle, has no pecuniary value, a position that is reflected in an academic

commentary on the Penal Code.⁶⁸ Nevertheless, because the Penal Code does not stipulate what is covered by the term “personal benefit” the lead examiners are concerned to ensure that, as practice develops, the courts are able to apply the definition in article 115.4 to non-pecuniary and intangible benefits.

(ii) *The Definition of Foreign Public Official*

150. Under Polish law, the foreign bribery offence, pursuant to article 229.5 of the Penal Code, applies to bribes given to a “person performing public functions in another country or an international organisation in connection with these functions”. At the time of the Phase 1 review, it was observed that the Polish Penal Code defined, the term “public official” (in article 115.13) within the general definitions of the Penal Code, but the term “person performing a public function” was not defined. According to Poland, the courts had stated that a person defined as a “public official” is always performing a public function and, on this basis, it was argued that the term “person performing a public function” had a broader scope than the definition in article 115.13.⁶⁹ In Phase 1 there were also some other potential shortcomings discussed with the Polish authorities in applying the general definition in the Code to foreign public officials for the purposes of the Convention. In that regard, the definition of “public official”: (1) whilst applying to ‘public officials’ it was unclear, in the absence of a court determination, how the term would in practice be applied to foreign public officials; (2) excluded employees of a state administration performing only “service type work”; and (3) did not expressly cover a person who exercises a public function for a public agency or public enterprise, although it was the belief of Polish authorities that the courts would interpret the notion of “public function” broadly enough to cover all categories of foreign public officials enumerated in the Convention.⁷⁰

151. Since Phase 1, a new provision has been introduced into the Penal Code to define the term “person performing public functions.” The new provision, in article 115.19, provides that: “a person performing public functions is a public official, a member of the local government authority, a person employed in an organisational unit which has access to public funds, unless this person performs exclusively service type work, as well as another person whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding for the Republic of Poland”. This provision must therefore be read in conjunction with the definition of “public official” in article 115.13 of the Penal Code. Polish authorities have acknowledged that the new statutory definition in article 115.19 was introduced because the previously undefined notion of “persons performing public functions” had led to differences in interpretation. As there have been no cases however, Polish authorities have not been able to provide any jurisprudence with respect to the definition of a “person performing public functions” in article 115.19, nor its application with respect to the foreign bribery offence in article 229.5 of the Penal Code.

152. The statutory definition in article 115.19 does not apply to employees of state administrations performing exclusively “service type work”. It was explained that this excluded from the scope of the definition people undertaking cleaning services and similar service functions not connected in any way with the actual performance of public authority or official functions with a public institution and was, therefore, to be narrowly construed. The lead examiners questioned whether, in the absence of supporting case law, the concept of “service type work” is too vague in the legislation and could be widely interpreted to cover categories of persons not originally contemplated by legislators. Polish authorities disagreed, and have indicated to the lead examiners that to provide clarity by attempting to identify an exhaustive list of

⁶⁸ Potulski J., Commentary to article 115 of the Penal Code (Journal of Laws 97.88.553).

⁶⁹ See Phase 1 Report on Poland, section 1.1.6.

⁷⁰ See paragraph 1.1.6 of the Phase 1 Report of Poland, 2001.

the types of work covered by the term would be difficult, and removing the term is neither practicable nor reasonable.

c. Defences and Exemption from Punishment

(i) Circumstances excluding liability for a prohibited act

153. Articles 28 to 30 of the Polish Penal Code provide the general conditions pursuant to which a person is exempted from liability for a prohibited act: (1) being in error as to a circumstance constituting a feature of a prohibited act; (2) justified but mistaken conviction that a circumstance has occurred which excludes unlawfulness or guilt (“circumstances excluding guilt” and “circumstances excluding unlawfulness”); and (3) being justifiably unaware of the act’s unlawfulness. These defences pertain to the notion of mistake of fact and mistake of law. Polish authorities have stated that ignorance of the law, including of article 229 of the Penal Code, would not be covered by these defences.

(ii) Exemption from punishment: Impunity under Article 229.6 of the Penal Code

154. Article 229.6 of the Penal Code allows a perpetrator of the foreign bribery offence, subject to certain conditions, to automatically escape punishment by notifying the authorities of the offence. This so-called “impunity” provision is discussed in 2. d. (ii) of this report.

Commentary

Recent amendments made to the Penal Code designed to ensure that the foreign bribery offence comprehensively covers bribes to third parties, and to clarify the applicable statutory definitions that relate to the concept of a “foreign public official”, are welcomed. However, given the absence of case law in this area, the lead examiners recommend that the Working Group follow-up on the application of the foreign bribery offence in the Penal Code, as case law develops, including its coverage of bribes made to third parties and to all aspects of the term “foreign public official” (as defined in the Convention).

In addition, the lead examiners recommend that the Working Group follows up on the exception for “service type work” in the definitions of “public official” and “a person performing public functions” to ensure that it refers only to cleaning services and similar service functions, and is not connected in any way with the actual performance of public authority or official functions with a public institution.

5. Liability of Legal Persons

a. Establishing liability of legal persons

(i) New legislation

155. At the time of the Phase 1 Review in 2001, Poland had a system of administrative liability for legal persons in place which was applicable for the offence of foreign bribery. A number of features of this system caused concern for the Working Group including the requirement, in most cases, of a prior conviction of the natural person, the exclusion of parallel criminal and administrative proceedings,⁷¹ and

⁷¹ The exclusion of parallel proceedings referred to the fact that administrative proceedings against the legal person in Poland could not be instituted until after final judgment or decision in the criminal proceedings against the natural person.

sanctions that were based on the revenue of the legal person in the preceding year. Subsequently, a new law was enacted, the Law of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty, which is now applicable for the liability of legal persons in Poland (Law on Liability of Collective Entities).⁷² This law was enacted in connection with Poland's accession to the European Union as well as other international obligations such as the OECD Convention. In 2004, the Polish Constitutional Tribunal found a number of key provisions of the Law on Liability of Collective Entities unconstitutional. In the following year, the Parliament enacted amendments specifically designed to ensure that the legislation was constitutional, and to address previous doubts raised about its interpretation. The Law itself represented a significant new approach to the liability of legal persons in Poland. Indeed, following the constitutional challenge, and subsequent amendments to the law in 2005, there has been only a short period of time to test and assess the application of the new provisions in practice. Given that the new law, as amended, has not been subjected to a Phase 1 analysis, a more detailed review of its key provisions is undertaken below.

(ii) *Definition of Collective Entities*

156. Under the Law on Liability of Collective Entities, collective entities appear to be broadly defined. Article 2 defines two categories of collective entities which cover (1) legal persons and/or organisations without personality at law for which specific legal provisions grant legal capacity (with the exclusion of the State Treasury, territorial self-government units and their associations, or state and territorial self-government bodies); and (2) commercial companies with equity participation of the State Treasury, a territorial self-government unit or association, a commercial company in organisation, an entity in liquidation, and an entrepreneur other than a natural person, as well as a foreign organisational entity. This definition expressly covers *inter alia* all legal persons under Polish law and as such is capable of covering the more common forms of legal entities, including companies limited by shares, private companies, associations, and co-operatives. The Polish authorities specifically informed the lead examiners that state-owned and state-controlled entities are covered by the definition. Furthermore, the term 'collective entity' used in the law is very broad and intended to cover, apart from all legal persons, those organisations without formal personality at law for which 'specific legal provisions grant legal capacity'. It was explained that this included a number of business and non-business associations of people and property without formal personality at law (e.g. certain forms of entrepreneurs, such as partnerships, under the Code of Commercial Companies).

(iii) *Liability of Collective Entities*

157. The Polish authorities contend that the Law on Liability of Collective Entities satisfies the obligation in Article 2 of the Convention on the responsibility of legal persons. Article 2 requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." In that regard, article 1 of the Polish law declares that its purpose is to define the principles of liability of collective entities for criminal or fiscal offences, and also to establish the principles governing the procedure to be followed with respect to such liability. The Convention also requires, in Article 3.1, that legal persons shall be subject to effective, proportionate and dissuasive criminal sanctions for foreign bribery and, pursuant to Article 3.2, in the event that a Party's legal system does not provide for the criminal responsibility of legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions. The Law on Liability of Collective Entities establishes a non-criminal form of responsibility for collective entities. At the time of the on-site visit, no legal person had been convicted for bribery of a foreign public official or other offences covered under the Act. As will be discussed below, the lead examiners have formed the view that the Law on Liability of Collective Entities, whilst a welcome initiative, has nevertheless created some potential legal barriers which could impede the

⁷² Relevant provisions of the Law on the Liability of Collective Entities are extracted in Annex 3.

investigation and prosecution of legal persons and could preclude the imposition of effective, proportionate and dissuasive sanctions.

158. The principle provisions governing the conduct for which legal entities are held liable are contained in articles 3, 4, 5 and 16 of the Law on Liability of Collective Entities. In general, there is no basis for liability against collective entities in Poland without first securing a valid and final conviction of a natural person for an offence listed under article 16 of the Law on Liability of Collective Entities. The list of prohibited acts in article 16 includes the offences of foreign bribery, domestic bribery, and money laundering. In addition, articles 3, 4, and 5, outlined below, are inter-connected and each provides important requirements in establishing the liability of collective entities in Poland.

159. The first requirement for the liability of collective entities is established in article 3 of the Law on Liability of Collective Entities. Article 3.1 provides that a collective entity is liable for a prohibited act arising from the conduct of a natural person who is authorised or required to act for or on behalf of the collective entity or whenever such person abuses the authority or neglects the duty to represent it (*i.e.* a leading person). Liability is also triggered if a natural person is allowed to act because of the exceeding of authority or neglect of duty by the leading person referred to in article 3.1 (see article 3.2); or where the natural person acts in the name of the collective entity on the consent or at the knowledge of the leading person (see article 3.3). A positive aspect of the approach taken in this provision is that the liability of collective entities is not necessarily confined to the actions of senior management, but is framed to apply to the conduct of all persons (*e.g.* employees, contractors, agents, personnel in a subsidiary company, etc) that have a relationship with the collective entity (based on the authority, duty and consent to act etc).

160. The liability of collective entities outlined in article 3 is founded on a requirement that the conduct of the natural person did or could have given the collective entity an advantage, even of a non-financial nature. It was not clear to the lead examiners how this requirement will be applied in practice because there are no examples to demonstrate the types of advantages contemplated by the drafters, or considered by the courts. Polish authorities consider however that the situation where a foreign public official is bribed to obtain a public procurement contract for which the public entity could not have fulfilled; or the foreign public official does not have the authority to provide the advantage sought by the briber could be covered, as the briber usually seeks to obtain an advantage, but that such instances would be considered on a case-by-case basis. It remains as one of the elements that must be proven by the prosecutor or injured party instituting the proceedings against the collective entity.

161. The second requirement for liability of collective entities is established in article 4 of the Act. It stipulates that the natural person, identified in article 3, must have committed an offence listed under article 16 of the Law on Liability of Collective Entities, which has been confirmed by way of a “valid and final convicting judgement, judgement on conditional discontinuation of penal proceedings, decision to leave such person a voluntary submission to liability, or a decision to discontinue the proceedings for circumstances excluding the prosecution of the perpetrator”. The Ministry of Justice, by way of example, indicated during the on-site visit that proceedings against a legal person are possible, in the absence of a conviction of a natural person, where the natural person benefits from the impunity provision within section 229.6 of the Penal Code after proceedings against this person have been formally and validly discontinued. The requirement of an order however, is problematic for the effective application of the law against legal persons in Poland. It remains the concern of the lead examiners that if the alleged perpetrator cannot be identified, or has taken flight, there will not be any judgment or decision against the natural person, described in article 4, and therefore the collective entity will escape liability, even if there was clear evidence of its culpability. In addition, during the on-site visit, the Polish authorities indicated that proceedings against a legal person were also possible, in the absence of a conviction of a natural person, where the natural person is deceased but the prosecutor established that he/she was perpetrator of the offence, or where Polish courts do not have jurisdiction over the perpetrator (for example, where a foreign

citizen bribed a foreign public official abroad in the name of a Polish company). However, after further analysis, the Polish authorities have concluded that proceedings against the legal person would not be possible in the circumstances described, thereby further justifying the concerns of the lead examiners about the effectiveness of the Law in practice.

162. The third requirement for liability of collective entities is established in article 5 of the Act. This provision provides that the collective entity shall be held liable if the offence has been committed “in the effect of at least absence of due diligence in electing the natural person referred to in Articles 3.2 or 3.3, or of at least the absence of due supervision over this person by an authority or a representative of the collective entity.” The Statement of Reasons for the 2005 amendments describes the formulation in article 5 as confirming that the perpetration of a prohibited act by a natural person will trigger liability of the collective entity where the act occurred as a result of negligence on the part of the authority or representative of the collective entity. It would appear that article 5 provides the basis for prosecuting a collective entity, where the prohibited act occurred as a result of either a lack of due diligence in selection of, or a lack of supervision over, the perpetrator of the prohibited act (that is, a natural person defined in article 3.2 and 3.3) by the collective entity. As regards the issue of who must have been responsible for this absence of due diligence in electing the person in article 3.2 or 3.3, or the absence of supervision in section 3.2 or 3.3, article 5 refers to “an authority or a representative of the collective entity” in this respect, but not specifically to the leading person in article 3.1.⁷³ The Polish authorities explain that given the vast range of the collective entities in existence, the type of ‘authority’ or ‘representative’ that is responsible for selection or supervision will depend on the type of entity.

163. In the opinion of the lead examiners, the conditions provided for in articles 3, 4, 5 and 16 of the Law on Liability of Collective Entities may potentially provide a significant barrier to initiating proceedings against collective entities in Poland. The requirement of a prior conviction of a natural person (or an order for discontinuance of proceedings, etc) before taking legal action against the collective entity under the Act, remains the most serious barrier to give effect to the liability of legal persons, pursuant to the Convention. In particular, this approach could result in a substantial and potentially damaging delay for a prosecutor or injured party wishing to institute proceedings against a legal person. Secondly, an action against the collective entity could be completely frustrated or denied if the natural person, referred to in article 3: cannot be identified, or takes flight even though evidence clearly points to the culpability of the legal person. These concerns, in the view of the lead examiners, must be addressed and will require a further re-consideration and amendment of this law by Polish authorities.

b. The Investigation and Prosecution of legal persons

164. Proceedings against collective entities are governed by the Law on Liability of Collective Entities, and also the Code of Criminal Procedure. Article 27 of the Law on Liability of Collective Entities, provides that proceedings are instituted either by way of motion of the prosecutor or the injured party. If both seek to institute proceedings, the court must try the motion from the public prosecution, and decide whether to admit the injured party to join the proceedings.⁷⁴ Article 23 states that the burden of proof rests with the party that files the evidence. This provision in principle requires that the burden of proof rests with the person who moves the motion to institute proceedings, namely the public prosecutor or the injured party.

⁷³ The Statement of Reasons for the 2005 amendments indicate that the collective entity would be held liable when the perpetration of the prohibited act occurred as a result of the improper organisation of the entity which failed to prevent the prohibited act in circumstances where the perpetrator was a leading person under article 3.1 and the exercise of due diligence of the collective entity would have prevented the prohibited act.

⁷⁴ Law on Liability of Collective Entities, article 32.

165. Article 36.1 declares that the court determines the facts and legal issues lying within the scope of the motion independently and using its sole discretion, and expressly states that the judgments referred to in article 4 (against the natural person) are binding. Accordingly, in proceedings against the collective entity, it is not open to the court, nor the prosecution or defence to seek to re-try or challenge the judgment or conviction secured against the natural person. Article 36.2 stipulates that the case against the collective entity is “determined on the exclusive basis of the prohibited act the collective entity has been or to be held liable for”.

166. The Statement of Reasons of the Law on Liability of Collective Entities states that “proceedings (the stage of proceedings before the court) in cases of the liability of a collective entity can commence *only after* a valid and final judgement is rendered in proceedings related to a punishable prohibited act”. A sanction can be imposed on a legal person up to 10 years after the decisions concerning the natural persons under article 4 has been issued. Polish authorities did confirm however, that law enforcement authorities should, where practicable, investigate alleged offences against the natural person and the potential liability of the legal person within the same investigation.

167. In practice, due to the constitutional challenge and subsequent amendments to the law in 2005, there has been only a short period of time to test and assess the practical operation of the new provisions. The lead examiners observed that this could explain a possible systemic bias in favour of prosecuting the natural person under the Polish legal system. At the on-site visit a prosecutor effectively acknowledged existing shortcomings: it was by seeking information from prosecutors’ offices to prepare for the OECD visit that the prosecutor realised that the number of ongoing investigations involving legal persons was low despite the principle of mandatory prosecution in Poland, and that all of the cases related to tax offences. The prosecutor commented that this probably revealed a need to adapt minds and habits in Poland to the new concept of liability of collective entities, and confidence was expressed that steps would be taken, such as the dissemination of guidelines to prosecutors. At the time of the on-site visit, no guidelines had been issued to police or prosecutors to assist with the investigation or prosecution of legal persons. Apart from addressing issues of particular concern about the Act, it was clear to the lead examiners that further efforts are required by Poland to raise awareness about the Law with the law enforcement and prosecution authorities, to ensure that possible contraventions of the law by legal persons are actively investigated and, where necessary, prosecuted.

Commentary

The lead examiners have formed the view that the Law on Liability of Collective Entities, whilst a welcome initiative, has nevertheless created a number of potential legal barriers which could impede the investigation and prosecution of legal persons and, contrary to the Convention, could preclude the imposition of effective, proportionate and dissuasive sanctions. The lead examiners recommend that the law be amended to eliminate the requirement that a natural person be finally and validly convicted as a prerequisite to proceeding against a collective entity.

In relation to the liability of collective entities, the requirement in article 3 of the Law, that the conduct of the natural person did or could have given the collective entity an advantage, should be followed up by the Working Group to ascertain how this provision is applied in practice.

Given the limited experience of police and prosecution authorities in investigating offences against legal persons, it is recommended that Poland take further measures to raise awareness about the Law on Liability of Collective Entities to ensure that possible contraventions of the law by legal persons are actively investigated and prosecuted. This could include: (1) the

issuance of guidelines to police and prosecutors to assist with the investigation and prosecution of legal persons pursuant to the Law; and (2) the provision of further training for police and prosecutors about the operation of the Law.

6. Sanctions for Foreign Bribery Offence

168. No foreign bribery case has been brought before the Polish courts to date. Thus, it is difficult to evaluate at this stage the effective, proportionate and dissuasive effect of sanctions with specific regard to the foreign bribery offence.

a. Principal Sanctions: Deprivation of Liberty and Fines

(i) Sanctions against natural persons

169. Under the Polish Penal Code penalties are identical for foreign and domestic bribery. For natural persons, the following sanctions apply:⁷⁵

- Article 229.1 – basic offence of bribery of a person performing public functions – deprivation of liberty from 6 months to 8 years.
- Article 229.2 – mitigated offence for act of “less significance” – a fine, a restriction of liberty from 1 to 12 months, or a deprivation of liberty from 1 month to 2 years.
- Article 229.3 – aggravated offence of bribery to induce a public official to breach the law – deprivation of liberty from 1 to 10 years.
- Article 229.4 – particularly aggravated offence when the bribe is “a material benefit of a considerable value” – deprivation of liberty from 2 to 12 years.

170. The system of fines⁷⁶ applicable to the bribery offences in Poland enables the courts to: (1) impose a fine “in addition to the penalty of deprivation of liberty, if the perpetrator has committed the act in order to gain a material benefit or when he/she has gained such a benefit”;⁷⁷ (2) impose a fine when the penalty of deprivation of liberty is suspended;⁷⁸ and (3) in cases of mitigated bribery, impose a fine as the principal penalty, as an alternative to imprisonment or restriction of liberty.⁷⁹ The Polish authorities presented examples of cases illustrating these three possibilities in relation to the domestic bribery offences.

171. In practice, almost all cases of domestic bribery in Poland have related to the offences in Articles 229.1 and 229.3 of the Penal Code and have led to suspended prison sentences. In half of these cases, a fine was imposed. Several participants from the judiciary and civil society considered that a fine was the most appropriate sanction in these cases. However, in more serious cases of bribery, in contravention of article 229.4, a judge and a prosecutor stated that a non-suspended sentence of imprisonment was more appropriate. They presented a recent case of trading in influence to illustrate their opinion: in that case, the offender was sentenced to two years imprisonment (non-suspended) and a fine of PLN 100 000

⁷⁵ Article 229.5 on foreign bribery refers to articles 229.1 to 229.4 on domestic bribery as concerns sanctions. These sanctions are comparable to those for fraud, theft, extortion, and embezzlement.

⁷⁶ A fine is imposed in daily rates. The court specifies the number of daily rates (between 10 and 360) and the amount of each day (between 10 and 2 000 Polish zloty-PLN) (article 33 of the Penal Code). Consequently, the amount of a fine can range from PLN 100 to 720 000 (approximately from EUR 25 to 181 872). On 11 April 2006, PLN 100 was valued at EUR 25.26 and USD 30.59.

⁷⁷ See article 33.2 of the Penal Code.

⁷⁸ See article 71 of the Penal Code.

⁷⁹ See , article 229.2 of the Penal Code.

(EUR 25 300) was imposed for having offered a company to influence the passing of a law favourable to the development of its business, in exchange for a bribe of USD 17.5 million. Statistics nevertheless show that imprisonment was suspended in 75% of these serious cases (which represented less than 1% of the active bribery cases in Poland).

(ii) *Sanctions against legal persons*

172. In the Phase 1 evaluation of Poland, the Working Group recommended a follow-up on its concern that the administrative sanctions then applicable to legal persons were based on the revenue of the legal person in the year preceding the decision of the court or tribunal. This matter is considered below. Also there has been a major new development since Phase 1 with the enactment of the new Law on Collective Entities (as amended in 2005) which has modified the calculation of fines and added additional sanctions (see below sub-section c on additional sanctions) which can be imposed on legal persons that contravene the Law.

173. Compared to the system in place at the time of Phase 1, the enactment of the Law on Collective Entities has introduced fixed thresholds to the range of fines applicable to legal persons. Since 2005, legal persons convicted for acts of bribery of a domestic or a foreign public official are liable to a fine between PLN 1 000 and PLN 20 000 000 [EUR 250 – EUR 5 million]. The maximum fine of PLN 20 000 000 was positively acknowledged by the lead examiners. However, the ultimate fine is limited under the provision to no more than up to 10% of the revenue generated in the tax year when the offence which is a ground for the collective entity's liability was committed.⁸⁰

174. The impact on applicable sanctions, by limiting fines to no more than 10% of revenue of the legal person, was an issue of considerable interest to the lead examiners. At the time of the Phase 1 review, the revenues to be taken into account by the courts when calculating fines were the revenues of the year preceding the judgement. The Working Group had difficulties with this approach, because it was concerned that a company showing no or little revenue in the preceding year would not be liable to a fine, or would be liable to a very low fine despite the amount of its assets. As noted above, the new Law on Collective Entities adopted a similar approach, but stipulated that the fine must be no more than up to 10% of the revenue generated “in the tax year” when the offence was committed.⁸¹ Article 7.2 of the Law on Collective Entities further specifies that “the revenue shall be assessed on the basis of the financial report written out by the collective entity or on the basis of the summation of entries in the financial books, as pointed out in the Article 3.4 of the Tax Ordinance”.⁸² A representative of the Ministry of Justice indicated that if a legal person does not properly declare its revenues, the court can look to all the surrounding facts and circumstances in calculating them, without relying solely on the declarations made in financial reports. It remains a concern of the lead examiners however, that a company showing little or no revenue in the tax year when the offence was committed, could be liable to a very low fine despite the amount of its assets. Polish authorities explained that the term ‘revenue’ (*‘przychód’*) indicated in article 7.2 refers to the sum of

⁸⁰ Article 7 of the Law on Liability of Collective Entities for Acts Prohibited under Penalty.

⁸¹ This development seeks to address two deficiencies of the previous system. First, the previous system did not allow the offender to predict the scope of punishment, since the basis of calculation of the fine were economic figures unknown at the time of the offence. Second, a collective entity, anticipating proceedings, might have voluntarily lowered its revenues to lower the expected fine. See the 2004 Constitutional Tribunal decision K 18/03, OTK-A 2004/10/103

⁸² “Whenever the Act refers to: [...] 4) financial books – it shall mean accountancy books, the taxation book of incomes and expenditures, records and registries, conducting of which for taxation purposes is obligatory, based on specific law provisions, for tax-bearers, tax-payers, and tax collectors.” (Journal of Laws of 2005, No 8, item 60 with further amendments)

means obtained in the course of economic activity. This amount is calculated before costs associated with obtaining the revenue become deducted and the subsequent taxation of the income.

175. The examining team recognises the important policy reasons for adjusting sanctions for legal persons in accordance with their economic performance. It is nevertheless concerned that the method adopted by Poland may create a loophole in the case where a legal person had no or little revenue. Indeed, a representative of the Ministry of Justice confirmed that it is not possible to fine a company showing no revenue. But several participants answered that in that case the most efficient sanction would be the exclusion from public procurements or applying other additional sanctions provided for in the Law (see section C.6.c of the report) which remains available, and the collateral negative publicity of a criminal investigation. The lead examiners recognised that the availability of additional sanctions, introduced since the Phase 1 Review, does provide the courts with the ability to impose other types of penalties on legal persons found liable, where a fine alone would otherwise prove to be inadequate.

176. There are no cases available to demonstrate the practice and considerations of the courts in imposing sanctions on legal persons. However, articles 10 and 12 of the Law stipulate the factors to be taken into account when determining the appropriate penalty (including a fine, imposition of a ban or pronouncing a ruling in public). Pursuant to article 10, “the court shall consider in particular the weight of irregularities in electing or supervising mentioned in article 5, the size of the advantages actually or potentially obtained by the collective entity, its financial situation, the social consequences of the penalty, and the impact of any punishment on the future functioning of the collective entity”. Article 12 further gives the court the possibility to abstain from imposing a fine if the offence has not brought any benefit to the entity, for example, in the case of an unsuccessful offer of a bribe. In these circumstances, however, article 12 provides that the court would impose additional sanctions such as forfeiture or bans. The Ministry of Justice considers that financial sanctions are more appropriate when the collective entity gains financial profits from the offence, and that in other situations bans could prove even more effective.

b. Forfeiture

177. At the time of the Phase 1 Review, the Working Group noted that the exercise of discretion in some cases regarding forfeiture or the application of monetary sanctions of comparable effect may undermine the effective implementation of the Convention in the absence of guidelines. The Working Group recommended a follow-up in Phase 2. In 2003, Poland amended articles 44 and 45 of the Penal Code on forfeiture against natural persons (see Annex 3) and courts applied them in practice. Article 8 of the Law on Liability of Collective Entities and article 52 of the Penal Code and article 8 of the Law on Collective Entities regulate forfeiture against legal persons.

(i) Article 44: Confiscation of the bribe (instrument of active bribery) against natural persons

178. Article 44.2 provides for the discretionary forfeiture of the items which served or were designed for committing an offence (i.e. the instrument).⁸³ Article 44.4 provides for the discretionary forfeiture of an amount equivalent to that of the instrument, when the forfeiture of the latter is impossible. The forfeiture of instruments is no longer restricted to movable assets, but is still discretionary.

179. The few case examples on domestic bribery presented by the Polish authorities show that courts do forfeit bribes still in the possession of the briber. When the bribe has been given to a public official, it is forfeited in the hands of the corrupted official, as proceeds of passive bribery (pursuant to article 45).⁸⁴ In cases of bribery of a foreign public official, Polish courts will rarely have jurisdiction over the corrupted

⁸³ Unless a statute states that forfeiture is obligatory, which is not the case with foreign bribery.

⁸⁴ General statistics indicate that the bribe was forfeited in 8% of the cases of active bribery in 2004.

official. In these cases, an efficient implementation of the Convention would imply that courts use the possibility offered by Article 44.4 to forfeit a value equivalent to the bribe.

(ii) *Article 45: Confiscation of the proceeds against natural persons*

180. The amended Article 45.1 provides for the mandatory forfeiture of any benefit (financial advantage) directly or indirectly received from an offence, or of an equivalent amount. This conforms to Article 3.3 of the Convention and addresses the concern expressed by the Working Group in Phase 1. But the practice seems more problematic: although a prosecutor indicated that this measure was frequently applied in economic crimes, statistics indicate that forfeiture of the proceeds of active bribery has been imposed only 15 times in 2005 (on an average of 700 cases of active bribery per year). All the examples presented before and after the visit relate to passive bribery.

181. In 2003, the Polish authorities recognised “the difficulties and sometimes even powerlessness experienced in practice by the authorities conducting criminal proceedings faced with the fulfilment of evidentiary obligations when ordering forfeiture of the proceeds of offences”. To counteract these difficulties, Poland introduced a system of “enhanced forfeiture” in Article 45.2 to 45.4, which is applicable to active bribery of a Polish or foreign public official. Pursuant to Article 45.2, if the offender received from the offence benefits of “considerable value” (*i.e.* EUR 42 200),⁸⁵ the property that the offender received or took possession of, or to which he/she received any legal title, is deemed to be the benefit derived from the offence. Article 45.3 further specifies that, when the circumstances of the case indicate that there is high probability that the offender transferred the property to a third party (natural or legal person), the property is still deemed to belong to the offender. In both cases, the presumption is dismissed if the offender or any other interested person proves otherwise.

182. Based on the available information, the lead examiners are not convinced that forfeiture of proceeds is routinely imposed in corruption cases, and hope that the introduction of enhanced forfeiture will reverse the situation. It may therefore be useful for Poland to encourage its prosecutors to seek these measures in corruption cases whenever appropriate. Indeed, Polish authorities informed the lead examiners that prosecutors are currently being trained in asset and proceeds tracing (also in corruption cases) and in practice this is one of the main activities of all agencies.

(iii) *The forfeiture of the bribe and the proceeds from legal persons*

183. In addition to a monetary penalty (and the additional sanctions described in part C.6.c of the report), a legal person held liable under the Law on Collective Entities is subject to the forfeiture of the items (or an equivalent amount) used in the perpetrating of the prohibited act by the natural person (for example, a bribe). In these circumstances, forfeiture is mandatory, pursuant to article 8 of the Law on Collective Entities. The forfeiture from legal persons of the financial gains originating from the prohibited act or of an equivalent amount is also mandatory (for example, the proceeds of active bribery). When sentencing the natural person who bribed a Polish or foreign public official, the court will request the legal person to return to the state the material benefit acquired as a result of an offence perpetrated by the natural person, pursuant to article 52 of the Penal Code. If article 52 has not been applied, the court will impose forfeiture of the proceeds of bribery or an amount equivalent to the proceeds on the occasion of the trial of

⁸⁵ A “considerable value” corresponds to 200 times the lowest salary (now PLN 850) for material advantages, *i.e.* PLN 170 000 or EUR 42 200, pursuant to Article 115 of the Penal Code.

the legal person itself, pursuant to article 8 of the Law on Collective Entities. The relationship between the two provisions is settled in article 11.2 of the Law on Collective Entities.⁸⁶

184. The Polish authorities have not indicated whether article 52 has already been applied to cases of active bribery, but the difficulties encountered by the law enforcement authorities to prove the proceeds of offences are probably identical for natural and legal persons. The Polish authorities indicated that the “enhanced forfeiture” of proceeds is not possible against legal persons for the moment, but that it could be envisaged, if article 45.2 proves effective against natural persons.

c. Additional Sanctions

185. In addition to criminal sanctions, the Convention contemplates additional sanctions for foreign bribery.⁸⁷ Poland provides for most of these additional sanctions, either as additional penal measures or as administrative sanctions.

186. Courts sometimes apply two penal measures against natural persons in cases of domestic bribery: forfeiture (of bribes) and the prohibition from occupying certain posts, performing certain professions or conducting certain economic activities from one to ten years. The other measures available in cases of domestic or foreign bribery are the deprivation of public rights, a supplementary payment to the injured or for a public purpose, and the publication of the sentence pursuant to article 39 of the Penal Code.

187. Article 9 of the Law on Collective Entities introduced a wide range of additional sanctions that the court can (discretionarily) impose against legal persons held liable under the Law: 1) a ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants; 2) a ban on using grants, subsidies, or other forms of financial support originating from public funds; 3) a ban on using aid provided by international organisations the Republic of Poland holds membership in; 4) a ban on applying for public procurement contracts; 5) a ban on pursuing the indicated prime or incidental business activities, except where it could lead to bankruptcy or liquidation of the collective entity, or layoffs; 6) public pronouncement of the ruling. The various bans may last from one to five years.

(i) Officially supported export credits

188. In Poland, if it is disclosed that an applicant for officially supported export credits has been convicted for foreign bribery, before the decision to provide support has been made, then the Polish export credit agency, KUKÉ, may withhold support for a transaction or deny access to official support, although this is not a mandatory requirement. Poland stated in its responses to the OECD/Export Credit Group’s 2004 Revised Survey that any step against bribery is to be taken only on the basis of “legal evidence”. In circumstances where support has already been provided, there are no administrative sanctions available where KUKÉ staff have manifested a “suspicion” of bribery or even “sufficient evidence” of bribery. If however, there is a conviction for bribery after support has been approved, then a range of administrative sanctions are potentially available against natural and legal persons, including invalidation of cover and denial of claim indemnification. In practice, there have been no instances to date where KUKÉ has denied or withdrawn official export credit support on the basis of foreign bribery in international business transactions.

⁸⁶ Articles 8 and 11.2 of the Law on Collective Entities, and article 52 of the Penal Code are extracted in Annex 3 to this report.

⁸⁷ Article 3(4) and Commentary 24 of Convention; Revised Recommendation VI.ii.

(ii) *Public procurement*

189. The exclusion from public procurement is expressly provided for in the list of additional sanctions available against legal persons under the Law on Collective Entities. In addition, article 24 of the Public Procurement Law of 29 January 2004 automatically excludes legal persons, in circumstances where a partner or manager of the entity has been convicted for bribery in connection with a contract award procedure, although the legal persons have not been themselves punished for bribery.⁸⁸ The law also excludes natural persons having been convicted for bribery. The representative of the Public Procurement Office clarified that the exclusion applies to active bribery of a Polish or foreign public official, and the exclusion applies primarily to persons convicted in Poland.⁸⁹ In practice, the applicant must provide a certificate indicating whether the company or its managers or partners have already been convicted for bribery. Military procurements are ruled separately. The Ministry of Defence developed a blacklist of companies with “bad records” (such as bribery convictions).

(iii) *Official development assistance*

190. No law or regulation provides for the exclusion of legal persons or individuals convicted of bribery from official development assistance programmes managed by the Ministry of Foreign Affairs (except where the aid is delivered through public procurement, which is not the case so far). This absence of sanction is part of the general lack of awareness of the fight against bribery in development programmes. Similarly, the Ministry of Finance does not contemplate the exclusion from the tied aid attached to its preferential credits, although it has developed a due diligence policy (see above Part B, Chapter 4 on official development assistance).

(iv) *Privatisation*

191. The privatisation of public assets is not organised through public procurement procedures in Poland,⁹⁰ but through separate public procedures. The law and regulations on privatisation do not encompass the exclusion of natural and legal persons convicted of bribery. Internal regulations to be implemented by the Ministry of Treasury, providing due diligence measures to be followed when selecting candidates, have not yet come into force.

d. *Conclusion on Sanctions for Bribery of Foreign Public Officials*

192. Poland has developed a broad menu of sanctions available against natural and legal persons, with potentially high penalties and a wide range of complementary sanctions. Concerning the issues raised in

⁸⁸ See the law at http://www.uzp.gov.pl/english/The_Law_on_PP.html. The exclusion does not apply to entities that are related to the briber, e.g. a briber’s subsidiaries and affiliates: the Polish authorities explain that the subsidiaries of an entrepreneur could not be captured by the definition of “economic operator” under article 2.11 of the Public Procurement Law.

⁸⁹ Poland implemented the 2004 EU directives on public procurement and therefore excludes from public procurements persons or companies sentenced for active bribery in their country. However, in the case of companies which have been convicted for active bribery but whose no partner or manager has been convicted, the representative of the Public Procurement Office specified that the exclusion would apply only if the foreign court expressly excluded the company from public procurement. A mere conviction to a fine would not be sufficient.

⁹⁰ Privatisation of public assets is conducted through public procedures. The aim of those procedures in the process of privatisation is to ensure equitable access to privatisation offer for all potential investors. The public procedures in privatisation processes, designed for buyers of shares, is different from public procurement procedures, which are designed for acquisition of goods and services financed from public resources.

the Phase 1 evaluation of Poland, the lead examiners acknowledge the improvements brought to the calculation of fines against legal persons, although doubts remain on the effectiveness of sanctions against legal persons showing no or little revenues. The lead examiners further commend the Polish authorities for the amendments to the provisions on forfeiture of the bribe and proceeds of active bribery. The lead examiners are concerned by the sanctions imposed in practice. Sanctions applied so far in domestic cases are generally low (suspended short-term imprisonment, with a fine in half of the cases). This could be explained by the fact that most cases are simple cases of petty corruption involving small amounts. The same reason could explain the rare application of bans and confiscation measures, which may prove very effective and dissuasive in cases of bribery in international business transactions.

Commentary

Poland has developed a broad menu of sanctions, including a wide range of complementary sanctions, applicable to the offence of foreign bribery. Because cases of active bribery of foreign public officials will rarely be comparable to the simple cases of petty domestic corruption usually dealt with, the lead examiners stress that the attention of the investigating, prosecutorial and judicial authorities will need to be drawn to the imposition of economic sanctions on the bribers, especially fines and forfeiture of proceeds. The investigating and judicial authorities should also be offered training in tracking down the proceeds of bribery and assessing the value of such proceeds.

In relation to legal persons, the lead examiners remain concerned that the requirement in the Law on Collective Entities that a fine must be no more than up to 10 per cent of the revenue generated in the tax year when the offence was committed could result, where a company shows no or little revenue, in the imposition of low monetary penalties for a prohibited act, despite the amount of its assets. It is recognised however, that Poland now provides alternative sanctions through a range of additional penalties which could be imposed by courts where a fine may otherwise prove inadequate.

Due to the lack of cases the lead examiners recommend that the Working Group monitor the level of sanctions for foreign bribery imposed against natural and legal persons (including the application of confiscation measures, additional sanctions and the use of suspended imprisonment terms by courts) when there has been sufficient case law, in order to ensure that the sanctions handed down by the courts are sufficiently effective, proportionate and dissuasive.

7. The Money Laundering Offence

a Scope of the Money Laundering Offence

193. Money laundering is an offence in Poland, pursuant to article 299 of the Penal Code. The principal offence, in article 299.1, states that “whoever receives transfers or transports abroad, assists in its transfer of title or possession of legal tenders, securities or other foreign currency values, property rights or real or movable property obtained from the proceeds of a forbidden act, or takes any other action which can prevent, or make significantly more difficult, determination of their criminal origin or place of deposition, detection, seizure or forfeiture” is liable to punishment. It is also a separate offence, in article 299.2, for employees or officers of reporting entities (financial institutions, etc) to assist or co-operate in laundering the illegal gains from crimes.

194. All offences can serve as a predicate offence to money laundering including domestic and foreign bribery offences. In relation to article 299.1, the offender is only required to know that the property is

derived from a criminal offence and not that it is derived from a specific offence. Poland has confirmed that article 299.1 applies to the perpetrator of the predicate offence (that is, self laundering) as well as a third person. Poland has re-affirmed that the money laundering provisions apply regardless of where the bribery occurred. An issue canvassed in Phase 1 was the question as to whether article 299.1 was capable of covering laundering related to the payment of a bribe by the perpetrator to a foreign public official in return for an advantage, such as a contract to provide services to the official's government. Polish authorities confirmed in Phase 1 that laundering of the gain that is obtained from the contract would be covered by article 299 of the Penal Code.⁹¹

b. Enforcement of the Money Laundering Offence

195. In 2004 the Polish Financial Intelligence Unit, GIFU, sent 148 notifications of suspicious transactions to prosecution authorities on the basis of potential money laundering. In the same year, 54 indictments were filed with the courts by the State Prosecution Authority for the offence of money laundering. The lead examiners were informed that there have not been any cases in Poland of money laundering with a corruption offence (including bribery of a foreign public official) as a predicate offence. Another strategy referred to by prosecutors for combating unlawful or unexplained income was to invoke article 30 of the Income Tax Act which enabled a 75% tax rate to be imposed on a person's income that was from undisclosed sources.

c. Sanctions for Money Laundering

196. The money laundering offences provide for significant terms of imprisonment, including a period of between 6 months and 8 years if convicted under articles 299.1 or 299.2. Conviction for these offences will also attract forfeiture of the objects and benefits derived from the offence, pursuant to article 299.7 of the Penal Code. Article 299.8 provides that where a person discloses voluntarily information about money laundering activities in which he/she was involved to the competent authorities, and the disclosure prevents the commission of the offence, there is no liability. If the commission of the offence was not prevented, the penalty imposed on the person is reduced.⁹²

197. In 2004 there were 17 persons convicted of money laundering offences. The sentences handed down by the courts were for periods of imprisonment of 2 years or less, although of these, 14 were given suspended sentences. On the whole, the imprisonment terms, combined with the large number of suspended sentences suggest, at the very least, that in practice the sanctions imposed by the Polish courts for money laundering offences are quite low. The complete picture however, requires an examination of confiscation orders imposed by the courts. The only statistics provided were confined to police statistics indicating the value of property seized and secured in money laundering cases. In 2004, for example, this figure amounted to over PLN 50 million. Whilst significant, there was no statistical information available in relation to the final confiscation orders.

Commentary

The lead examiners encourage Poland to compile statistical information on the level of confiscation in cases of money laundering.

⁹¹ Phase 1 Report, p. 23.

⁹² See 299.8 Penal Code; and Phase 1 Report, p. 23.

8. The Offence of False Accounting

a Scope of the False Accounting Offence

198. Bribe payments made to foreign public officials in the context of international business transactions can be detected by accountants and auditors through analysis of violations in the books and records of companies and other entities. According to the Polish authorities, the establishment of off-the-book accounts, the making of off-the-book or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents, prohibited under Article 8 of the Convention, would be contrary to various provisions of the Accountancy Act, the Fiscal Criminal Code, and the Penal Code. (See Part B, Chapter 7 on accounting and auditing)

199. Among the abovementioned obligations, the Accountancy Act provides for penalties for not keeping books of accounts or keeping them contrary to the provisions of the Act or presenting unreliable information in books of accounts (art. 77.1). Furthermore the Accountancy Act penalizes not preparing financial statements or preparing them contrary to the provisions of the Act or presenting unreliable data in financial statements (art. 77.2). Additionally the Fiscal Criminal Code creates various criminal offences where contrary to obligations a person: does not keep the books of accounts; dishonestly keeps the books; or does not issue an invoice or a bill for performing a service, or issues the invoice or bill in an improper manner, or refuses to deliver them.⁹³ In relation to the falsification of an account document, Polish authorities state that this could constitute an offence under article 270.1 (forgery) or article 303 of the Polish Penal Code.⁹⁴

200. The scope of application of the accounting offences is limited under the current law in Poland to natural persons only for violations of many of the principle offences. The list of prohibited acts in article 16 of the Law on Liability of Collective Entities, which could trigger liability of collective entities, does not include the relevant offences created in the Accountancy Act. The relevant articles of the Fiscal Criminal Code, including articles 60-62, are listed as prohibited acts in the Law on Liability of Collective Entities, but only to the extent that these provisions apply where the natural person committed an offence “against tax duties and the obligation to account for grants or subsidies” as defined in the Fiscal Criminal Code. Polish authorities pointed out however, that in the case of a falsification of an account document, this could constitute an offence under article 270.1 (forgery) or article 303 of the Penal Code, which are prohibited acts for which a collective entity could be held liable under the Law on Liability of Collective Entities.⁹⁵

b. Sanctions for False Accounting

201. If books of accounts are not kept or are kept contrary to the provisions of the Accountancy Act or include unreliable information, then article 77.1 of the Act provides that the person responsible shall be subject to a fine (fine imposed in accordance with the Penal Code, as such the amount would range from 100PLN/30 EUR to 720 000 PLN/210 000 EUR) or a deprivation of liberty for a period of 2 years or both. Furthermore, if financial statements are not created, or are created contrary to law, or include dishonest

⁹³ See articles 60-61 of the Fiscal Criminal Code.

⁹⁴ Article 303. § 1 states ‘Whoever causes material damage to a natural or legal person or an organisational unit which is not a legal person, by failing to document business activities or by documenting it in a dishonest or false manner, particularly by destroying, removing, concealing, altering or falsifying documents regarding such activities’.

⁹⁵ Article 16.1(5) of the Act of 28 October 2002 on Liability of Collective Entities for Acts prohibited under Penalty (Journal of Laws No 197, item 1661, as amended).

information, then article 77.2 of the Accountancy Act provides that the person responsible shall be subject to a fine or a deprivation of liberty for a period up to 2 years or both. Article 79, provides that whoever being responsible under the law does not submit a financial statement for auditing or publication is subject to the same fine or a restriction of liberty (from one month to one year).

202. Article 60 of the Fiscal Criminal Code states that, whoever against an obligation does not keep the books of accounts shall be subject to a fine in an amount up to 240 daily rates (the total fine imposed in the maximum amount of 240 rates would in such case range from around 7 200 PLN / 1800 EUR to 2900 000 PLN/ 720 000 EUR).⁹⁶ Similarly, Article 61 provides that whoever dishonestly keeps the books, shall be subject to a fine in an amount up to 240 daily rates. A person who, against an obligation to do so, does not issue an invoice or a bill for performing a service, or issues them in an improper manner, or refuses to deliver them, shall be subject to a fine of up to 180 daily rates (the total fine imposed in the maximum amount of 180 rates would in such case range from around 5400 PLN / 1350 EUR to 2160 000 / 540 000 EUR). Also a person who, in defiance of the provisions of the Act carries out an act of sale, omitting the fiscal cashier, or does not deliver a fiscal cashier document confirming the act of sale, shall also be subject to such penalty. However, a person who issues such an invoice or a bill in an dishonest manner, or who uses such document, shall be subject to a harsher penalty, namely of 240 daily rates pursuant to article 62 of the Fiscal Criminal Code.

203. The falsification of an account document, as noted above, could constitute the offence of forgery under article 270.1 or an offence under article 303 of the Penal Code, subject to a penalty of deprivation of liberty from 3 months to 5 years, or up to 3 years respectively. If such a falsification results in the reduction or the danger of reduction of public-law revenues, it could also constitute a separate criminal taxation offence under Article 76 of Fiscal Criminal Code, subject to a penalty of deprivation of liberty (for a term of between 5 days and 5 years) or to a fine imposed in conformity with the rules indicated above, or to both these penalties.

c. Enforcement

204. The Polish Treasury authorities (including treasury control inspectors and tax officials), together with the police, are authorised to perform investigations of offences, pursuant to the Act on Accounting, and to file and support a charge in the court of first instance in cases subject to hearing in abridged proceedings. Poland reports that there have been cases related to the falsification of tax books or their negligent keeping, but that these cases were unrelated to the crime of bribery. In the majority of these cases, the Court imposed fines. At the on-site visit, it was stated that in 2005 there were 158 proceedings under the criminal provisions of accounting law, resulting in 50 people being sentenced. Statistics on the level of fines imposed in each case were not available. In the absence of further information drawn from case law, it has not been possible for the lead examiners to conclude whether the criminal penalties in Poland for such omissions and falsifications in respect of the books, records, accounts and financial statements of companies are effective, proportionate and dissuasive.

Commentary

The lead examiners are concerned about the low number of prosecutions for false accounting offences in Poland and thus recommend follow-up by the Working Group with regard to the application in practice of Article 8 of the Convention, including the level of sanctions.

⁹⁶ Pursuant to Article 23.1 of the Fiscal Criminal Code the lowest daily rate of the fine would amount to around 29,97 PLN/ 7,5 EUR and the highest to 11988 PLN/ 3000 EUR

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Poland, the Working Group (1) makes the following recommendations to Poland, and (2) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the bribery of foreign public officials

1. With respect to awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Poland:

- a) provide training to police, prosecutors and the judiciary on the Convention and on Poland's foreign bribery legislation (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);
- b) take additional measures, including further training, to raise the level of awareness of the Convention and the foreign bribery offence within the public administration, particularly those institutions that interact with Polish companies active in foreign markets, including foreign diplomatic representations, and trade promotion, official export credit support and Official Development Assistance (ODA) institutions, (Revised Recommendation, Paragraph I);
- c) take necessary action to improve awareness of the Convention and of foreign bribery legislation among business associations and companies, including small and medium size enterprises, and among Non-Government Organisations and companies involved in the execution of ODA contracts funded by Poland (Revised Recommendation, Paragraph I);
- d) encourage the accounting and auditing professions to develop further initiatives to (i) provide training and raise awareness concerning the foreign bribery offence and the relevant accounting and auditing requirements under Polish law; and (ii) publicise within both professions the obligation to report suspicions of foreign bribery to the appropriate bodies. (Revised Recommendation, Paragraphs I and V);
- e) take further measures to raise awareness about the Law on Liability of Collective Entities to ensure that possible contraventions of the law by legal persons are actively investigated and prosecuted and, to that extent, consider (1) measures to assist police and prosecutors with the investigation and prosecution of legal persons pursuant to the Law; and (2) the provision of further training for police and prosecutors about the operation of the Law (Revised Recommendation, Paragraphs I).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Poland:

- a) adopt measures to ensure that Polish public officials who could play a role in the detection and prevention of the foreign bribery offence are aware of their duty to report foreign bribery to law enforcement authorities in Poland, and the procedures and channels for such reporting (Revised Recommendation, Paragraph I);
- b) with respect to personnel in charge of Official Development Assistance, and those in other institutions that have privileged contacts with Polish enterprises active abroad, provide training on how to detect foreign bribery and on specific measures to be taken if credible suspicions of foreign bribery should arise, including reporting channels and arrangements for co-operation and co-ordination between the relevant government ministries (Revised Recommendation, Paragraph I);
- c) provide training for tax officials as a matter of priority in order to maximise the possibility of detection of the bribery of foreign public officials, including information about the non-tax deductibility of bribes to foreign public officials under the Convention and the obligation of tax officials to report suspicions of such bribes to law enforcement authorities (Revised Recommendation, Paragraphs I, II; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);
- d) consider introducing stronger whistleblower protection measures for public and private sector employees who report suspicious facts that may indicate foreign bribery, in order to encourage them to report such facts without fear of reprisals (Convention, Article 5; Revised Recommendation, Paragraphs I and V.C(iv));
- e) consider strengthening the measures for deterring foreign bribery in respect of international business transactions benefiting from official export credit support, including through the assessment of applications for officially supported export credits and the scrutiny of agents' commissions (Revised Recommendation, Paragraph II (v));
- f) encourage the General Inspector of Financial Information to consider taking appropriate and practicable steps to improve the flow of information and feedback to obligated institutions on the use of suspicious transaction reports by the authorities, with the view to further strengthening the anti-money laundering reporting system (Revised Recommendation, Paragraph I);
- g) consider requiring auditors to report indications of a possible illegal act of foreign bribery to law enforcement authorities (Revised Recommendation, Paragraphs I and V.B(iv)).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Poland:

- a) take necessary measures to ensure that all credible foreign bribery allegations are proactively and conscientiously investigated, and remind police and prosecutors of the importance of actively looking into the range of possible sources of detection of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- b) ensure that greater use is made of specialised financial investigators within anti-corruption units of the police and State Prosecution Authority for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);

- c) in relation to the dual nature of the Office of the Prosecutor General (*i.e.*, the Office is held by the Minister of Justice) consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers (in particular for the foreign bribery offence) are not to be influenced by considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I);
 - d) consider, within Poland’s constitutional principles, measures that may be taken in order to ensure that the immunity from prosecution available to certain designated office holders does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences and, in this respect, consider clearly limiting the immunity applicable to them, to acts done in performance of the office holder’s duties (*i.e.* functional immunity) (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);
 - e) review the “impunity” provision within article 229.6 of the Penal Code and either exclude its application to the offence of foreign bribery, or significantly limit its scope by imposing further conditions for its application, or in some other appropriate way ensure that the law does not contravene the Convention and report to the Working Group on progress in 12 months (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);
 - f) amend the Law on Liability of Collective Entities to eliminate the requirement that a natural person be finally and validly convicted as a prerequisite to proceeding against a collective entity (Convention, Articles 2, 3.2).
4. With respect to sanctions for foreign bribery, the Working Group recommends that Poland:
- a) take measures to draw to the attention of investigating, prosecutorial and judicial authorities, the importance of applying sanctions that are sufficiently effective, proportionate and dissuasive for foreign bribery offences, in particular emphasising the importance of economic sanctions, including fines and the forfeiture of proceeds of bribery, and offer training in tracking down the proceeds of bribery and assessing the value of such proceeds (Convention, Article 3.1; Revised Recommendation, Paragraph I);
 - b) consider whether the cap on fines for legal persons under the Law on Liability of Collective Entities (*i.e.*, 10% of the “revenue” generated in the tax year when the offence was committed) is an obstacle to imposing effective, proportionate and dissuasive sanctions, and if so, amend the Law accordingly (Convention, Article 3.2).
5. With respect to the non-tax deductibility of bribes, the Working Group recommends that Poland amend its legislation to clearly confirm that bribes are not tax-deductible and in that regard, consider an express prohibition on the tax deductibility of bribes. (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).
- 2. Follow-up by the Working Group**
6. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) the application of the foreign bribery offence in the Penal Code, including its coverage of bribes made to third parties and to all aspects of the term “foreign public official”;

- b) the application, in article 3 of the Law on Liability of Collective Entities, of the requirement that the conduct of the natural person did or could have given the collective entity an advantage, to ascertain how this provision is applied in practice to foreign bribery cases;
- c) the level of sanctions for the foreign bribery offence and related offences (including false accounting offences) imposed against natural and legal persons (including the application of confiscation measures, additional sanctions and the use of suspended imprisonment terms by courts) and to ascertain whether the sanctions handed down by the courts are effective, proportionate and dissuasive;
- d) Poland's application of territorial and nationality jurisdiction, in particular, in cases of proceedings against legal persons or concerning offences committed in whole or in part abroad;
- e) whether the Central Anti-Corruption Bureau (CBA) established in 2006 has developed a role and capacity for combating foreign bribery in international business transactions and, if so, the effectiveness of any arrangements established to co-ordinate its work with the police and the State Prosecution Authority in investigating foreign bribery cases;
- f) whether the exception for "service type work" in the Penal Code definitions of "public official" and "a person performing public functions" does not, contrary to Article 1 of the Convention, result in an exception to the foreign bribery offence for acts or omissions of a foreign public official "in relation to the performance of official duties" (Convention, Articles 1, 5; Commentary 9).

APPENDIX 1 – LIST OF PARTICIPANTS IN THE ON-SITE VISIT

MINISTRIES AND STATE ORGANS

Ministry of Defence (Procurement Department)
Ministry of Economy
Ministry of Finance
Ministry of Foreign Affairs
Ministry of Interior and Administration
Ministry of Treasury
Office of the Civil Service
Office of the General Inspector of Financial Information (GIFI)
Office of Prime Minister's Plenipotentiary for the creation of the program for combating abuses in public institutions
Commission of Insurance Supervision and Pension Funds
Export Credit Insurance Corporation (KUKI S.A.)
Małopolski (Regional) Tax Office
Polish Information and Foreign Investments Agency
Public Procurement Office
Securities and Exchange Commission
Members of Parliament

LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

National Police
Internal Affairs Authority of the Border Guard
Regional Police Office in Katowice
Military Gendarmerie
State Prosecution Authority (including the Bureau for Organised Crime)
Appellate Prosecutors Office in Szczecin
Regional Prosecution Authority in Warsaw
Military Prosecution Authority
Regional Military Prosecution Authority in Warsaw
Judges from the Supreme Court and the Penal Chamber in the Department of Common Courts

ACCOUNTING AND AUDITING BODIES

Association of Accountants in Poland
National Chamber of Statutory Auditors

PRIVATE SECTOR AND CIVIL SOCIETY

Association of Polish Banks
Association of Polish Crafts
Business Centre Club
Chamber of Funds and Assets Managers

Council of Associations of Trade and Services
National Economic Chamber
Polish Chamber of IT and Telecommunications
Polish Directors' Institute
Polish Insurance Chamber
Polish Organization of Trade and Distribution
Bumar Ltd
PKN Orlen
Bank Pekao SA
BZ WBK
ING Bank Śląski
Kredyt Bank
PZU SA
Raiffeisen Bank
The Supreme Chambers of Advocates
The Supreme Chamber of Legal Advisors
The Faculty of Law and Administration, Warsaw University
The Institute of Legal Science of the Polish Academy of Science
Transparency International Poland
NSZZ (Solidarność);
Press representative from 'Rzeczpospolita' Daily

APPENDIX 2 – LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS

CBA	Central Anti-Corruption Bureau
EU	European Union
EUR	Euro
FDI	foreign direct investment
GIFI	General Inspector of Financial Information
KUKE	Export Credit Insurance Corporation Joint Stock Company
MLA	mutual legal assistance
NGO	non-governmental organisation
PLN	Polish zloty

ABBREVIATIONS

1996 Recommendation	OECD's Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials
2000 Action Statement	2000 OECD Action Statement of the Working Party on Export Credits and Credit Guarantees
Accountancy Act	Act of 29 September 1994 on Accountancy
Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
Handbook	OECD Bribery Awareness Handbook for Tax Examiners
Law on Liability of Collective Entities	Law of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty, which is now applicable for the liability of legal persons in Poland
OECD	Organisation for Economic Cooperation and Development
Working Group	OECD Working Group on Bribery in International Business Transactions

APPENDIX 3 – EXCERPTS FROM RELEVANT LEGISLATION

1. *Act of 6 June 1997 the Penal Code (extracts)*

Chapter V. Penal measures

Article 44

§ 1. The court shall impose the forfeiture of items directly derived from an offence.

§ 2. The court may decide, and where law so provides - decides, on the forfeiture of the items which served or were designed for committing the offence.

§ 3. The forfeiture described in § 2 shall not be applied if its imposition would not be commensurate with the severity of the offence committed, the court may impose a compensatory damages to the State Treasury instead.

§ 4. In the event that imposing the forfeiture of items specified in §§ 1 or 2 is not possible, the court may impose the obligation to pay a pecuniary equivalent of items directly derived from an offence or items which served or were designed for committing the offence.

§ 5 The forfeiture of items referred to in § 1 or 2 shall not be imposed if they are subject to return to the injured person or other legitimate entity.

§ 6. In the event that the conviction has pertained to an offence of violating a prohibition of production, possession or dealing in or transporting specific items, the court may decide or, if the law so provides, shall decide on the forfeiture thereof.

§ 7. If the items referred to in § 2 or 6 are not the property of the perpetrator, the forfeiture may be decided by the court only in the cases provided for in the law; in the case of co-ownership, the decision shall cover only the forfeiture of the share owned by the perpetrator, or the obligation to pay a pecuniary equivalent of its value.

§ 8. Property which is the subject of forfeiture shall be transferred to the ownership of the State Treasury at the time the sentence becomes final and valid.

Article 45.

§ 1 If a perpetrator received any benefit from an offence, even indirectly, which shall not be subject to forfeiture of items referred to in art. 44 § 1 or 6, a court shall impose forfeiture of such benefit or pecuniary equivalent of its value. Forfeiture shall not be applied to the benefit as a whole or its part if the benefit or its pecuniary equivalent is subject to return to the injured person or another entity.

§ 2 In the case of sentencing for the offence from which the perpetrator received, even indirectly any benefit of considerable value, the property that the perpetrator received or took possession of or to which the perpetrator received any legal title, during or after the commission of the offence, even before any final judgement, is deemed to be the benefit derived from the offence unless the perpetrator or any other interested person proves otherwise.

§ 3 When the circumstances of the case indicate that there is high probability that the perpetrator referred to in § 2- transferred, practically or under any other legal title, property derived from the offence to a natural person or legal person or other entity not having legal personality, items being in autonomous possession of that person or entity as well as their property rights are deemed to belong to the perpetrator unless any interested person or organizational unit proves that they were legally received.

§ 4. The provisions of § 2 and 3 shall be also applied while execution of the seizure pursuant to the provision of Article 292 § 2 of the Code of Criminal Procedure, while securing the benefits threatened with forfeiture and

enforcing this measure. A person or an entity to which the allegation provided for in § 3 refers may bring an action against the State Treasury concerning the reversal of this allegation; the enforcement proceedings shall be suspended until the case is legally concluded.

§ 5. In the case of co-ownership, the forfeiture of the perpetrator's share in co-property or the forfeiture of share's in co-property equivalent shall be exacted.

§ 6. The material benefit or its equivalence subject to forfeiture shall be passed to the State Treasury from the moment the judgement becomes valid and final, and in the case referred to in § 4, sentence 2, from the moment the judgement dismissing the claim against the State Treasury becomes valid and final.

Article 52.

In the event of sentencing for an offence which brought material benefits to a natural or legal person or an organisational unit not possessing the status of a legal person, and committed by a perpetrator who acted on its behalf or in its interest, the court shall obligate the entity which acquired the material benefit, to return it in whole or in part to the benefit of the State Treasury; this shall not affect the material benefit subject to return to another entity.

Chapter XIV. Explanation of terms of the law

Article 115.

[...] § 2. In assessing the level of social consequences of an act, the court shall take into account the type and nature of the infringed interest, the dimension of the damage caused or anticipated damage, the method and circumstances of perpetrating the act, the importance of the duties breached by the perpetrator, as well as the form of intent and motivation of the perpetrator, the type of precautionary rules breached and the degree of the transgression. [...]

§ 4 The material or personal benefit constitutes the benefit for the person himself or for somebody else;

§ 5 Property of considerable value means the property whose value at the time of the commission of a prohibited act, exceeds two hundred times the level of the lowest monthly salary.

§ 6 Property of great value means the property whose value at the time of the commission of a prohibited act, exceeds one thousand times the level of the lowest monthly salary.

§ 7 The provisions of § 5 and 6 shall be applied also to the expressions; "considerable damage" and "damage of great dimensions". [...]

§ 13. A public official is:

- 1) the President of the Republic of Poland;
- 2) a deputy to the Parliament, a councillor;
- 2a) a deputy to the European Parliament;
- 3) a judge, a lay-judge, a state prosecutor, an official of the financial investigation authority or superior authority over the financial investigation authority; a notary public, a bailiff, a professional court probation officer, a person adjudicating in disciplinary authorities operating under the law;
- 4) a person who is an employee in a state administration, other state authority or local government, except when he performs only service-type work, and also other persons to the extent in which they are authorised to render administrative decisions;
- 5) a person who is an employee of a state auditing and inspection authority or of a local government auditing and inspection authority, except when he performs only service-type work;
- 6) a person who occupies a managerial post in another state institution;
- 7) an official of an authority responsible for the protection of public security or an official of the State Prison Service;
- 8) a person performing active military service; [...]

§ 19 A person performing public functions is a public official, a member of the local government authority, a person employed in an organisational unit which has access to public funds, unless this person performs exclusively service type work, as well as another person whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding for the Republic of Poland.

Chapter XXIX. Offences against the Functioning of the State and Local Government Institutions

Article 229.

§ 1. Whoever gives a material or personal benefit or promises to provide it to a person performing public functions in connection with his official capacity ('in connection with performance of this function') shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

§ 2. In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years

§ 3. If the perpetrator of the act specified in § 1 strives to induce a person performing public functions to violate the law or provides such a person, or promises to provide, with a material or personal benefit for violation of the law, shall be subject to the penalty of deprivation of liberty for a term of between one year and 10 years.

§ 4. Whoever gives a material benefit of considerable value or promises to provide it to a person performing public functions in connection with his official capacity, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.

§ 5. Accordingly, subject to the penalties specified in § 1-4 shall be also anyone who gives a material or personal benefit or promises to provide it to a person performing public functions in another country or an international organisation in connection with these functions.

§ 6. The perpetrator of the act specified in § 1-5 shall not be liable to punishment if the material or personal benefit or a promise thereof were accepted by the person performing public functions and the perpetrator had reported this fact to the law-enforcement agency, revealing all essential circumstances of the offence before this authority was notified of the offence.

2. Act of 28th October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty (extracts)

Article 1.

The Act sets forth the principles defining the liability of collective entities for acts prohibited under penalty, i.e. offences or fiscal offences, and the principles to govern the procedure to be followed in matters of such liability.

Article 2.

1. A collective entity, as understood in the Act, denotes a legal person and/or organisational entity without personality at law for which specific legal provisions grant legal capacity, except for the State Treasury, local self-government units and their associations.

2. A collective entity, as understood in the Act, also denotes a commercial company with equity participation of the State Treasury, a local self-government unit or an association thereof, a commercial company in organisation, an entity in liquidation, and an entrepreneur other than a natural person, as well as a foreign organisational entity.

Article 3.

The collective entity shall be liable for a prohibited act consisting in conduct of a natural person who:

1) acts in the name or on behalf of the collective entity under the authority or duty to represent it, to make decisions in its name, or to exercise internal control, or whenever such person abuses the authority or neglects the duty,

2) is allowed to act as the result of abuse of the authority or neglecting of the duty by the person referred to in point 1 above,

3) acts in the name or on behalf of the collective entity on consent or at the knowledge of the person referred to in point 1,

- if such conduct did or could have given the collective entity an advantage, even of non-financial nature.

Article 4

The collective entity shall be held liable, if perpetration of a prohibited act listed in article 16, by the person referred to in Art. 3, has been acknowledged in a valid and final convicting judgement, judgement on conditional discontinuation of penal proceedings or proceedings with regard to a fiscal offence, decision to leave such person a voluntary submission to liability, or a decision to discontinue the proceedings for circumstances excluding prosecution of the perpetrator.

Article 5.

The collective entity shall be held liable if the offence has been committed in the effect of at least absence of due diligence in electing the natural person referred to in Art. 3.2 or 3.3, or of at least the absence of due supervision over this person, by an authority or a representative of the collective entity.

Article. 6.

Neither the existence nor non-existence of liability of the collective entity under the principles set forth in this Act shall exclude civil liability for the inflicted damage, administrative liability, or personal legal responsibility of the perpetrator of the prohibited act.

Article 7.

1. A collective entity shall be sentenced to a fine between 1000 and 20.000 000 PLN but no more than up to 10% of the revenue generated in the tax year when the offence which is a ground for the collective entity's liability was committed.

2. The revenue referred to in point 1 shall be assessed on the basis of the financial report written out by the collective entity or on the basis of the summation of entries in the financial books, as pointed out in the Art. 3.4 of the Law 1997, August 29 - tax ordinance (Journal of Laws of 2005, No 8, item 60 with further amendments).

Article. 8.

1. The collective entity is further decreed the forfeiture of:

- 1) the objects coming, even indirectly, from the prohibited act, or objects used or designated for use as the tools of perpetrating the prohibited act;
- 2) the financial gains originating, even indirectly, from the prohibited act;
- 3) the amount equivalent to the objects or financial benefit coming, even indirectly, from the prohibited act.

2. The forfeiture specified in paragraph 1 above shall not be decreed, if the object, financial benefit, or amount equivalent thereto are due for restitution to another entitled entity.

Article. 9.

1. The collective entity can be penalised with:

- 1) the ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants;
- 2) the ban on using grants, subsidies, or other forms of financial support originating from public funds;
- 3) the ban on using the aid provided by the international organisations the Republic of Poland holds membership in;
- 4) the ban on applying for public procurement contracts;

- 5) the ban on pursuing the indicated prime or incidental business activities;
- 6) public pronouncement of the ruling.

2. The bans listed in paragraph 1.1-5 are imposed for any period between 1 and 5 years, and are adjudicated in years.

3. The ban referred to in paragraph 1.5 shall not be imposed, if it could lead to bankruptcy or liquidation of the collective entity, or layoffs discussed in Art. 1 of the Act of 13th March 2003 on special principles of terminating employment for reasons relating to the employer

Article 10.

When adjudicating the fine, imposing the bans or pronouncing the ruling in public the court shall consider in particular weight of irregularities in electing or supervising mentioned in Art. 5, the size of the advantages obtained or possible to obtain by the collective entity, its financial situation and social consequences of the penalty and an influence of punishment on further functioning of the collective entity.

Article 11.

1. When adjudicating the fine or forfeiture the court shall recognise any valid judgement pronouncing the collective entity secondarily liable to bear the fine or the execution of forfeiture of financial equivalent of objects, ruled against the natural person referred to in Art.3 for the fiscal offence identified in the Fiscal Penal Code.

2. When ruling the forfeiture of the financial gains or an equivalent thereof the court shall recognise any valid judgement issued on the basis of Art. 52 of the Penal Code or Art. 24 § 5 of the Fiscal Penal Code that obliges the collective entity to refund the financial gains obtained through the offence of the natural person referred to in Art. 3.

Article 12.

In particularly justified cases, when the prohibited act that made the collective entity liable has not brought any benefit to the entity, the court may waive a fine and limit itself to ruling the forfeiture, ban, or public pronouncement of the judgement, though subject to the regulations of Art. 8.2 and Art. 11.

Article 13.

If prior to the expiration of a 5-year period following the adjudication of the fine the prohibited act that gave rise to the liability of the collective entity reoccurs, the entity may be fined in any amount up to the upper law-defined penalty limit increased by half; the regulation of Art. 9.3 shall not apply.

Article 14.

No fine, forfeiture, ban, or public pronouncement of the ruling shall be adjudicated against the collective entity 10 years after the issuance of the decision referred to in Art. 4.

Article 15.

No fine, forfeiture, ban, or public pronouncement of the ruling shall be carried out 10 years after the judgement pronouncing the collective entity liable for the prohibited act threatened with penalty became final.

Article 16.

1. The collective entity shall be held liable under this Act, if the person referred to in Art. 3 committed an offence:

- 1) against economic relations provided for in:
 - a) Art. 296, Art. 297-307 and Art. 308 of the Penal Code,
 - b) Art. 224-232 of the Act of 22 May 2003 on insurance activities ...,
 - c) Arts. 38-43a of the Act of 29th June 1995 on bonds ...,
 - d) Art. 171 of the Act of 29th August 1997 - the Banking Law ...,

- e) Arts. 303-305 of the Act of 30th June 2000 - the Industrial Property Law ...,
- f) Arts. 585-592 of the Act of 15th September 2000 - the Code of Commercial Companies ...,
- g) Art. 33 of the Act of 29th November 2000 on foreign trade in goods, technologies, and services of strategic significance for the security of the state and for keeping international peace and security, and on amendments to selected laws....,
- h) Arts. 36 and 37 of the Act of 22nd June 2001 on pursuing business activities in the area of manufacturing and trading in explosives, arms, ammunition, and products and technologies designated for military or police purposes
 - 2) against money and securities trading, as provided for in:
 - a) Arts. 310-314 of the Penal Code,
 - b) Arts. 178-180 of the Act of 29 July 2005 on trading in financial instruments (Journal of Laws No. 183, it. 1538),
 - c) Art. 37 of the Act of 29th August 1997 on mortgage bonds and mortgage banks...;
 - 3) of bribery and paid patronage, as provided for in Arts. 228-230a, Art. 250a, Art. 296a and Art. 296b of the Penal Code;
 - 4) against data protection, as provided for in Arts. 267-269 of the Penal Code;
 - 5) against reliability of documents, as provided for in Arts. 270-273 of the Penal Code;
 - 6) against property, as specified in Arts. 286 and 287, and in Arts. 291-293 of the Penal Code;
 - 7) against sexual freedom and good morals, as specified in Art. 200 § 2, Art. 202, and Art. 204 of Penal Code;
 - 8) against the environment, as specified in:
 - a) Arts. 181-184 and Arts. 186-188 of the Penal Code,
 - b) Art. 34 of the Act of 11th January 2001 on chemical substances and preparations ...,
 - c) Art. 69 of the Act of 27th April 2001 on wastes ...,
 - d) Arts. 58-64 of the Act of 22nd June 2001 on genetically modified organisms ...,
 - 9) against public law and order, as specified in Arts. 252 & 253, 256-258, 263 & 264 of Penal Code;
 - 10) consisting in an act of unfair competition, as defined in Arts. 23 & 24b of the Act of 16th April 1993 on combating unfair competition ...,
 - 11) against intellectual property, as specified in Arts. 115-118 of the Act of 4th February 1994 on copyright

2. The collective entity shall also be held liable under this Act if the person referred to in Art. 3 committed a fiscal offence:

- 1) against tax duties and the obligation to account for grants or subsidies, as defined in art. 54 § 1 i 2, art. 55 § 1 i 2, art. 56 § 1 i 2, art. 58 § 2 i 3, art. 59 § 1-3, art. 60 § 1-3, art. 61 § 1, art. 62 § 1-4, art. 63 § 1-4, art. 64 § 1, art. 65 § 1-3, art. 66 § 1, art. 67 § 1 i 2, art. 68 § 1, art. 69 § 1-3, art. 70 § 1-4, art. 71-72, art. 73 § 1, art. 73a § 1 i 2, art. 74 § 1-3, art. 75 § 1 i 2, art. 76 § 1 i 2, art. 77 § 1 i 2, art. 78 § 1 i 2, art. 80 § 1-3, art. 80a § 1, art. 82 § 1 and art. 83 § 1 of the Fiscal Penal Code;
- 2) against customs duties and the principles of foreign trade in goods and services, as provided for in ... the Fiscal Penal Code.
- 3) against trade in foreign exchange values as provided for in ... the Fiscal Penal Code.
- 4) against organization of games of chance and mutual betting as stipulated for in ... the Fiscal Penal Code.