Implementing the OECD Anti-Bribery Convention

FINLAND

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

– to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

– to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and

– to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

Publié en français sous le titre :

La mise en œuvre de la Convention anti-corruption de l'OCDE

© OECD 2004

Permission to reproduce a portion of this work for non-commercial purposes or classroom use should be obtained through the Centre français d'exploitation du droit de copie (CFC), 20, rue des Grands-Augustins, 75006 Paris, France, tel. (33-1) 44 07 47 70, fax (33-1) 46 34 67 19, for every country except the United States. In the United States permission should be obtained through the Copyright Clearance Center, Customer Service, (508)750-8400, 222 Rosewood Drive, Danvers, MA 01923 USA, or CCC Online: *www.copyright.com*. All other applications for permission to reproduce or translate all or part of this book should be made to OECD Publications, 2, rue André-Pascal, 75775 Paris Cedex 16, France.

Introduction

At OECD, the world's major exporting countries are fighting corruption in international business with legally binding rules, tough monitoring and public disclosure of shortcomings in national laws and enforcement efforts. Progress in the fight against corruption will enhance economic efficiency and level the playing field for conducting business internationally.

Under the OECD Anti-Bribery Convention, "The Convention against Bribery of Foreign Public Officials in International Business Transactions", each of the 30 OECD Members and 5 associate non-members commits to outlaw bribery of foreign public officials and submits to a rigorous review of its legal provisions and enforcement efforts. In 1999 the Convention entered into force and the country review procedure was started.

Country reviews are carried out by the OECD Working Group on Bribery in International Business Transactions (WGB) whereby all Parties to the Convention are represented. The resulting reports are published several months after examination by the WGB.

Each country report examines how national laws and rules implement the OECD Anti-Bribery Convention, how enforcement is assured and how related non-criminal law aspects are applied in practice. Each report identifies what works well in the country as well as shortcomings in the effective prevention, detection and prosecution of foreign bribery cases. Key national legal provisions are also included. The review of all 35 Parties to the OECD Anti-Bribery Convention is scheduled to be completed by 2007.

The order of examinations by the WGB is as follows: Finland, United States, Iceland, Germany, Bulgaria, Canada, France, Norway, Luxembourg, Mexico, Korea, Italy, Switzerland, Japan, United Kingdom, Hungary, Greece, Sweden, Belgium, Slovak Republic, Australia, Austria, Czech Republic, Spain, Netherlands, Denmark, Argentina, New Zealand, Poland, Portugal, Ireland, Slovenia, Chile, Turkey and Brazil.

Implementing the OECD Anti-Bribery Convention

REPORT ON FINLAND

Foreword

This report surveys the legal provisions in place in Finland to combat bribery of foreign public officials and evaluates their effectiveness. The assessment is made by international experts from 35 countries against the highest international standards set by the OECD Anti-Bribery Convention and related instruments. This report is published as part of a series of country reviews that will cover all 35 countries party to the Convention.

In an increasingly global economy where international trade and investment play a major role, it is essential that governments, business and industry, practitioners, civil society, academics and journalists, be aware of the new regulatory and institutional environment to:

- enhance the competitive playing field for companies operating world-wide;
- establish high standards for global governance; and,
- reduce the flow of corrupt payments in international business.

This regulatory and institutional environment is mainly based on two groundbreaking instruments adopted in 1997 by OECD Members and associated countries: the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("the Convention") and, the Revised *Recommendation on Combating Bribery in International Business in International Business Transactions (*the "Revised Recommendation"). The Convention was the first binding international instrument imposing criminal penalties on those bribing foreign public officials in order to obtain business deals and providing for surveillance through monitoring and evaluation by peers. The Revised Recommendation complements the Convention by its focus on deterrence and prevention of foreign bribery.

The OECD Working Group on Bribery in International Business Transactions (the "Working Group") is entrusted with the monitoring and follow-up of these instruments. The Working Group, chaired by Professor Mark Pieth, is composed of experts (government officials), from the 35 countries Parties to the Convention. These government experts developed a monitoring mechanism which requires all Parties to be examined according to a formal, systematic and detailed procedure including self-evaluation and mutual review. Its aim is to provide a tool for assessing the implementation and enforcement of the Convention and Recommendation.

In designing the monitoring mechanism, the Working Group was eager to respect the Convention's core principle of 'functional equivalence' under which the Parties seek to achieve a common goal while respecting the legal traditions and fundamental concepts of each country. Consequently, the Working Group examines each Party's anti-bribery provisions in light of its individual legal system.

© OECD 2003

Immediately after the Convention's entry into force in February 1999, the Working Group began conducting the first phase of monitoring to determine whether countries had adequately transposed the Convention in national law and what steps it has taken to implement the Revised Recommendation.

As the Working Group neared completion of this first phase, it moved progressively into a new and broadened monitoring phase. The second phase examines compliance and whether structures are in place to provide effective enforcement of the laws and rules necessary for implementing the Convention. The second phase also encompasses an extensive examination of the non-criminal law aspects of the 1997 Revised Recommendation.

The monitoring procedures developed for the Phase 1 and Phase 2 examinations are similar. For each country reviewed, a draft report is prepared which is submitted to a Working Group consultation. This report is based on information provided by the country under examination as well as information collected by the OECD Secretariat and two other countries who act as "lead examiners" either through independent research or, under Phase 2, through expert consultations during an on-site visit to the country examined. Consultations during on-site visits include discussions with representatives from various governmental departments as well as from regulatory authorities, the private sector, trade unions, civil society, academics, accounting and auditing bodies and law practitioners.

The outcome of the Working Group consultation is the adoption of the final country report, which contains an evaluation of the country's laws and practices to combat foreign bribery. Prior to issuing the final country report, the country under review has an opportunity to review the report and to comment on it. The country under review may express a dissenting opinion, which is then reflected in the final report, but cannot prevent adoption of the evaluation by the Working Group.

This Phase Two monitoring report of Finland describes the structures and the institutional mechanisms in place to enforce national legislation implementing the Convention and assesses the effectiveness of the measures to prevent, detect, investigate and criminalise the bribing of foreign public officials in international business transactions. Appendix 1 contains the evaluation made by the Working Group under the Phase 1. In Appendix 2, the reader will find extracts of the most relevant implementation laws and Appendix 3 contains suggestions for further reading. The *(i)* the Convention, *(ii)* the Revised Recommendation, the *(iii)* the Recommendation on the Tax Deductibility of Bribes and *(iv)* a list of Parties to the Convention are in Appendix 4.

© OECD 2003

Table of Contents

The Foreign Bribery Offence: Application and Practice by Finland... 7

Introduction.. 7

Measures for Preventing and Detecting the Bribery of Foreign Public Officials.................. 12

Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences.. 21

Summary and Recommendations.. 34

Appendix 1 Evaluation of Finland by the OECD Working Group Legal Framework 37

Appendix 2 Principal Legal Provisions 41

Appendix 3 Suggested Further Reading 47

Appendix 4 Note: Appendix 4 is identical in all of the 35 Country Reports comprising this binder edition. For that reason it is made available only once at the back of each binder. The reader may download and print additional copies of the Appendix which is found on the OECD Anti-corruption website www.oecd.org/daf/nocorruption/convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
Commentaries on the Convention

(*ii)* Revised Recommendation of The Council on Combating Bribery in International Business Transactions

(iii) Recommendation of The Council on the Tax Deductibility of Bribes to Foreign Public Officials

(iv) Parties to the Convention
Countries Having Ratified/Acceded to the Convention

© OECD 2003

The Foreign Bribery Offence: Application and Practice by Finland

Introduction[1]

Nature of the On-Site Visit

In September 2001, Finland was the first Party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to undergo the Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions. Finland volunteered to be the first country to be examined in Phase 2 of the monitoring of Parties' compliance with the Convention and the 1997 Recommendation.

The team from the OECD Working Group was composed of lead examiners from the Czech Republic and Korea as well as four representatives of the OECD Secretariat and a tax consultant The meetings took place over the course of four days, and brought together officials from the following Ministries and other government bodies: Ministry for Foreign Affairs, Ministry of Trade and Industry, Ministry of Justice, Ministry of Finance, Ministry of the Interior, Office of the Prosecutor General, National Board of Taxation, National Auditing Board, National Bureau of Investigation, Money Laundering Clearing House, Finnish Security Police, Financial Supervision Authority, National Board of Customs, Research Institute of Legal Policy (Optula), Office of the Parliamentary Ombudsman and Office of the Chancellor of Justice.

The OECD team also met with representatives of the Central Chamber of Commerce, Auditing Board of the Central Chamber of Commerce, Transparency International, BIAC, International Chamber of Commerce (Finland), Central Organisation of Finnish Trade Unions, Confederation of Finnish Industry and Employers, accounting firm of Ernst & Young, Helsinki Institute of Crime Prevention and Control (HEUNI), Nordea Bank, Kesko Group, Wartsila Oyj Abp, Stora Enso Oyj, law firm of Asianajotoimisto Hannes Snellman and the Task Force on Organised Crime in the Baltic Region.

Pursuant to the procedure agreed to by the Working Group for the Phase 2 self and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in Finland to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Finland's compliance in practice with the 1997 Recommendation.

In preparation for the on-site visit, Finland provided the Working Group with answers to the Phase 2 questionnaire and translations of the full texts of all the relevant legislation, which were reviewed and analysed by the visiting team in advance. The on-site visit involved consultations in Helsinki with the various officials and civil society representatives as well as a visit to Turku to meet with prosecutors and gain a regional perspective of the issues. Following the on-site visit the Finnish authorities continued to provide the visiting team with follow-up information.

1. This report has been examined by the Working Group on Bribery in November 2001.

© OECD 2003

Methodology

The Phase 2 Review reflects an assessment of information obtained from Finland's responses to the Phase 2 questionnaire, the consultations with the Finnish government and civil society during the on-site visit, a review of all the relevant legislation and known case law, and independent research undertaken by the Secretariat.

This review has not been prepared according to the format used in the Phase 1 reviews, which mainly described the relevant laws and followed the sequence of questions in the Phase 1 questionnaire. Since the purpose of Phase 2 of the monitoring process is to assess the implementation of the Convention and Revised Recommendation in practice, and most of the assessment is derived from the on-site visit, it was felt that the Phase 2 review needed to be fact based and evaluative, identifying potential problems in the effective prevention, detection and prosecution of foreign bribery cases. It is therefore organised according to the issues rather than the sequence of questions in the Phase 2 questionnaire.

The review contains recommendations (summarised at the end) with respect to each issue identified. Those recommendations that relate to the Convention have different legal weight than those that relate to the Revised Recommendation, due to the difference in the legal nature of the two instruments. However, some of the recommendations, which may appear to relate to the Revised Recommendation, might have a direct impact on the effectiveness of the implementation of certain requirements under the Convention—in these cases it will be up to the Working Group to determine whether a particular recommendation needs to be addressed as a matter of Phase 2 compliance.

General Observations during On-Site Visit

The on-site visit was characterised by the highest level of transparency and co-operation on the part of the Finnish government. The lead examiners are confident that the Finnish government fully disclosed all available relevant information in its possession regarding the implementation of the Convention and the Revised Recommendation, and that any deficiencies in the information obtained were due to internal shortcomings in data collection.

Finland has been named by Transparency International (TI) as the least corrupt country (out of approximately 90 countries studied) for two years in a row (2000 and 2001) according to the TI "Corruption Perceptions Index". This Index measures the level of perceived corruption in the public service of each particular country. TI has also published a "Bribe Payers Survey", but Finnish businesses were not among those that the countries surveyed were asked to rate in terms of their propensity to bribe.

The Finnish government is understandably proud of its excellent record of a low level of corruption in government. However it appeared to the lead examiners that Finland's policy on implementing the Convention and Revised Recommendation is largely based on this record rather than a realistic assessment of the opportunities and pressures on companies to bribe in order to do business in certain foreign countries. The shared view of many of the officials interviewed was that bribery is not a significant problem in Finland and that therefore there is not a pressing need to ensure that adequate systems are in place for detecting and prosecuting the offence of bribing a foreign public official.

Since the coming into force of the implementing legislation, Finland's criminal justice system has not handled any cases concerning the bribery of foreign public officials. For this reason comprehensive information concerning domestic cases would

© OECD 2003

have provided the lead examiners with valuable information in understanding how in practice the foreign bribery offences would likely be implemented. The foreign bribery offences are incorporated by the original domestic bribery offences, and thus all the elements of the offence are identical. However, the criminal justice system has not dealt with many cases of domestic bribery, and, moreover, the data that has been collected on the cases that have been processed does not lend itself to a meaningful interpretation.

The main thrust of this Review is that regardless of Finland's low level of corruption in government institutions, it needs to address the opportunities and pressures faced by Finnish businesses as well as foreign business headquartered in Finland with regard to foreign bribery. For this reason, many of the measures for preventing, detecting and prosecuting foreign bribery need to be fine-tuned in order for Finland to be prepared to detect and address foreign bribery cases when they arise.

Exposure of Finland's Businesses to Sensitive Business Environments

Finland is located in the Baltic Sea region and borders on Sweden, Norway and Russia. It is the only member of the European Union that has a common border with Russia.

In 2000, 4.5 per cent of Finland's exports (7 billion FIM[2]) went to Russia and 11.5 per cent of its imports (20.5 billion FIM) came from Russia. The major sectors represented in Finland's exports to Russia between January and June 2001 can be broken down as follows: metal and engineering (28%); chemical industry (18%); forest industry (13%); and telecom equipment (12%). The major sectors represented in Finland's imports from Russia during the same period can be broken down as follows: oil, gas, coal products and electricity (65%); wood and forestry products (12%); basic metals (9%); and chemical products (8%).[3] Russia is one of Finland's major trading partners along with Germany, Sweden, USA and UK.[4]

Finland is considered an excellent gateway to trading with Russia and the newly independent Baltic States due to its location and history of trade relations with these markets. In fact, Helsinki promotes itself to prospective foreign investors as the centre of the expanding markets in the Baltic region and Russia and an ideal situation for their Scandinavian operations.[5] It also offers attractive features such as an excellent infrastructure, competitive living and labour costs, and the lowest corporate and capital taxation in the EU.[6]

Domestic companies have also benefited from these expanding markets. For instance, it is reported that Kesko, Finland's leading retailer, intends to capture a market share in Baltic retailing of between 20 and 25 per cent, and owns one of the largest retail chains in Estonia.[7]

---

2. On 30 October 2001, 10 FIM were valued at 1.68 EUR.
3. Statistics were obtained from the Finnish government and the Confederation of Finnish Industry and Employers.
4. Finland: Country Profile [Trade Partners UK (www.tradepartners.gov.uk)].
5. Helsinki: Centre of the New Northern Europe (Helsinki City Hall).
6. Ibid.
7. *Finland's Kesko Aims for 25 per cent of the Baltic Retail Markets* (Uni Commerce: www.union-network.org/unisite/sectors/commerce/Multin…/Kesko_to_Baltics.ht).

© OECD 2003

During the on-site visit, several Finnish officials described ongoing forms of corruption known to involve Finnish companies and Russian officials. For instance, it was reported that Finnish transport drivers delivering goods to Russia are commonly expected to pay bribes or similar fees to Russian officials at various checkpoints along their route in order to reach their final destination. The Ministry of Trade and Industry has issued a study on transportation between Finland and Russia that identifies the harassment of Finnish truck drivers by Russian officials as a significant problem. The Finnish authorities advised the lead examiners that Finnish truck companies are not comfortable or accustomed to this practice and have therefore lost some of their markets to Russian truck companies.

The representative from the Task force on Organised Crime in the Baltic Region raised the issue of the percentage of bribes in business transactions with Russian officials. In his view, this phenomenon is particularly prevalent in respect of large construction programs. It was explained that larger companies have more resources to hide bribery transactions, and may hide the costs in their bookkeeping.

Other forms of corruption were also described that do not appear to involve bribery but provide an understanding of the corruption landscape in which Finnish businesses find themselves in certain countries. For instance, officials from the Ministry of the Interior identified double invoicing as the most significant corruption problem involving Finnish companies and Russian officials. They stated that in these schemes two sets of documents are prepared--false ones, which are provided to the Russian officials, and genuine ones, which the company keeps. In most of these cases an intermediary is involved. The Ministry of Foreign Affairs informed the lead examiners of a recent study of the customs authorities from ten EU countries as well as Russia, which was conducted as part of the ongoing EU-Russia "RAID" operation. The study focused on goods transported through Finland from those countries, and indicated that double invoicing was used in 40 per cent of the cases studied.[8]

A representative of civil society provided information about the use of protection agreements in Russia by Finnish companies. These agreements are offered by officially registered security companies, which may be owned by organised crime groups, and members of the Russian police. The purpose thereof is to compensate for the inability of the Russian government to provide a sufficient level of security in respect of, for instance, the activities of organised crime groups engaging in forms of pressure such as extortion. In one publication describing the findings of a research project on this subject, it is stated that in St. Petersburg the majority of Finnish companies studied had been involved with the protection network covering the city.[9] However, the Finnish government informed the lead examiners that Finnish companies operating in certain markets, including St. Petersburg, find recommendations of the Finnish Security Police and the National Bureau of Investigation on selecting security companies very useful.

---

8. The Finnish authorities explain that the goals of the "RAID" operation, which was launched in 2000 as a Finnish initiative, are to 1) eliminate double invoicing, 2) expose criminal organisations behind such activities, 3) investigate related gains obtained through criminal activities, 4) deter and expose money laundering and commerce related crime, and 5) improve the flow of information and create contacts between officials in Russia and EU member states. The overall objective is to provide Russian officials with legal assistance pursuant to the European Convention on Mutual Legal Assistance.

9. The Baltic Region: Insights in Crime and Crime Control [Scandinavian Research Council for Criminology: 1998 (Aromaa, Kauko ed.)]

© OECD 2003

The general impression of the lead examiners was that Finland views these forms of transborder corruption as a problem originating in Russia and beyond the control of Finnish companies. The Finnish business community and officials seemed to regard Russian officials as the perpetrators of any illegalities and the Finnish companies as having no choice but to bow to unwanted pressures.

The on-site visit addressed the opportunities and pressures to engage in corrupt activities in Russia and the expanding market in the Baltic Region due to the proximity of these markets to Finland. However, Finnish companies are also involved in business transactions in other countries where the incentive to bribe may be just as compelling.

The Finnish companies represented at the on-site visit were of the opinion that bribery of foreign public officials, including Russian officials, is not a significant issue for their companies. They stated that if faced with a request for a bribe their representatives would withdraw from any involvement in the transaction that gave rise to the request.

The Finnish authorities underline that the situation faced by Finnish companies operating in Russia and the newly independent Baltic states is also faced by all European countries involved in those markets. In addition, they believe that it is very difficult for Finnish businesses to operate in certain countries due to the prevalence of corruption.

Commentary

Although in certain instances Finnish businesses may operate in corruption prone environments, the companies represented at the on-site visit do not consider bribery a problem. If this perspective is due to a lack of awareness of the Convention, then Finland should make every effort to ensure that it has (1) effective measures for preventing and detecting the bribery of foreign public officials, and (2) adequate mechanisms for the effective prosecution of foreign bribery offences and the related accounting and money laundering offences.

© OECD 2003

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

Need for Increased Awareness of the Offence of Bribing a Foreign Public Official

The Finnish government stated that extensive public awareness activities regarding the Convention have not been undertaken with business, labour and non-governmental organisations because bribery does not pose a significant threat in Finnish society. A representative of the trade unions was of the opinion that the government has not made a sufficient effort to inform companies about the Convention and the OECD Guidelines. However, the Ministry of Trade and Industry has widely published the OECD Guidelines for Multinational Enterprises, which refer to the Convention, and they have also been published in a recent document as well as on the Ministry's web site. In addition, the Guidelines were presented at a large seminar in Helsinki organised for business and government representatives in April 2001.

The lead examiners examined the codes of conduct of two of Finland's leading companies and concluded therefrom that companies may not have sufficient awareness of the offence of bribing a foreign public official. One code requires employees to work honestly and aim to behave in accordance with good ethical principles, and observe laws and the regulations and instructions of the authorities. It does not make any specific reference to bribery. The other code refers to bribery of government officials and candidates in order to obtain or retain business. It does not expressly prohibit bribes to foreign public officials, bribes through intermediaries, bribes for the purpose of obtaining omissions of government officials, or bribes for the purpose of obtaining or retaining other improper advantage in the conduct of international business**,** although there is no reason to doubt that the intent is to cover all prohibited behaviour.

It does not appear that compliance programs are commonly used by Finnish companies to ensure that employees are adhering to codes of conduct and business principles. Consultations with the private sector did not elicit information about the methods to be used for internal controls such as staff performance assessments including adherence to the rules, disciplinary procedures for non-compliance or the availability of channels for staff to report suspected bribery activities.

The English version of a publication of the Confederation of Finnish Industry and Employers entitled *Corporate Responsibility: What does it Concern* states that it is especially necessary for large and international companies to familiarise themselves with the UN's declarations and agreements, EU initiatives and the OECD recommendations etc. There is no specific reference therein to the Convention or the offence of bribing a foreign public official. However, the Finnish authorities state that the Finnish version does contain a reference to bribery. The Finnish branch of the International Chamber of Commerce commented that it is particularly difficult for small and medium-sized companies to be kept abreast of developments concerning international instruments such as the Convention and to cope with solicitation in foreign countries.

A representative of the Finnish Bar Association informed the lead examiners that the Bar Association has organised training on the Convention for interested members.

The Ministry for Foreign Affairs has provided all Finnish embassies with a copy of the Convention. Additionally the Ministry has drafted a booklet on the anti-corruption measures within the Finnish Development Co-operation including a description of the

© OECD 2003

main contents of the Convention. The target group of the booklet will be all those acting in the area of the Finnish Development Co-operation, authorities in Finland and in Partner Countries as well as private companies.

Neither the Office of the Parliamentary Ombudsman nor the Office of the Chancellor of Justice[1] have had training programs regarding the Convention, although they have the authority to receive complaints about the conduct of the Finnish police in investigating the foreign bribery offence as well as the various Finnish government officials involved in the implementation of the Convention in practice (e.g. the handling of requests for mutual legal assistance and extradition).

Commentary

The lead examiners were conscious of a high degree of openness and transparency between the Finnish government and the private sector, and vice versa. These aspects of the relationship between the public and private sectors are very tangible in discussions with representatives therefrom and are highly valued by Finnish society. It is therefore evident that a culture and framework is already well established for the dissemination of information by the Finnish government about the Convention. The lead examiners believe that due to these factors it would be a relatively simple matter for the Finnish government to deliver effective public awareness activities for the purpose of educating the private sector about the Convention. The business associations represented at the on-site visit expressed interest in helping companies with the issues related to the Convention, and thus would provide valuable partners in any public awareness initiatives.

Need for Awareness of Non tax-deductibility of Bribe Payments

Closely connected to the need for increased awareness of the foreign bribery offence is the need for awareness of the non tax-deductibility of bribe payments. The tax authorities are not likely to detect bribe payments in the absence of a clear understanding that bribes are not tax deductible.

Currently, Finnish tax legislation does not expressly prohibit the deductibility of bribe payments**,** and according to an information booklet prepared by the Ministry of Finance[2], neither bribes nor payments made in the course of committing a criminal offence are included in the all-inclusive list of non-deductible expenses. Moreover, the non-inclusive list of allowable expenses includes advertising expenses and 50% of entertainment expenses, both of which are categories of expenses under which bribes to foreign public officials could potentially be disguised. Officials from the Ministry of Finance explain that the prohibition against permitting deductions for bribe payments is contained in a decision of the Supreme Administrative Court (KHO: 1985/5265). They also state that the administration has a good level of awareness of the non-tax deductibility of bribes.

In the Spring 2002, the Finnish government is planning to present to Parliament a proposal of amendments to the Act on the Taxation of Business Profits and Income from Professional Activities, which will include a provision expressly denying the tax deductibility of bribes. In addition, the next version of the booklet *Taxation in Finland* published by the Ministry of Finance will expressly state that bribe payments are non-

1. The Office of the Parliamentary Ombudsman and the Office of the Chancellor of Justice are independent bodies that monitor the legality of the civil service and the actions of civil servants.

2. *Taxation in Finland* (2001)

© OECD 2003

deductible. As it is not certain when the next version will be released, the Ministry of Finance has, in the meantime, updated the version of the booklet available on its web site to state that the expenses that are not deductible include "bribes paid to domestic or foreign officials".[3]

Commentary

The lead examiners welcome the intention of the Finnish government to clarify the non-tax deductibility of bribes through an amendment to the tax legislation. They also welcome the statement in the information booklet of the Ministry of Finance to the effect that bribes to foreign public officials are not tax deductible. The lead examiners believe that these initiatives will clarify the issue for tax inspectors and businesses and raise their awareness of bribery transactions.

Need for Centralised Anti-corruption Authority and Specialisation in the Bribery Field

During the on-site visit the lead examiners attempted to clarify the allocation of responsibility for the implementation of the Convention among the various ministries. Although there was a clear understanding that the Ministry of Justice had formal responsibility for the implementation of the Convention through the amendment to the Penal Code, there was no clear consensus on where the current responsibility lies. Some government representatives thought it might lie with the Ministry of the Interior since it contains a special inter-ministerial committee regarding economic crimes. However, a co-ordinating body for the purpose of implementing the Convention has not been established because the government does not perceive any need therefor.

The Ministry of the Interior is the Supreme Police Command and has direct authority over the Helsinki Police Department, three national units [including the National Bureau of Investigation (NBI)], 5 provincial police forces and 90 local district forces. The NBI contains the Criminal Intelligence Unit, which is the focal point for all law enforcement agencies involved in international contact and co-operation, which in turn contains a Customs Unit (CID), Financial Intelligence Unit and an Intelligence Unit. The Money Laundering Clearing House (MLCH) is part of the Financial Intelligence Unit. Neither the Ministry of the Interior nor any of its constituent bodies contains a special anti-corruption unit.

The allocation of responsibility for investigating an offence depends upon where in Finland the crime was allegedly committed. It is the responsibility of the local police authority to consider whether it has the resources and expertise to investigate a particular case. Where a case is deemed too demanding to be handled locally, the local authorities are expected to contact the NBI and negotiate whether responsibility will be transferred to the NBI or whether they will work together. Officials from the Ministry of the Interior stated that in practice responsibility for a case is almost automatically transferred to the NBI where it has international connections or has taken place abroad because the NBI is formally considered the central authority for investigating alleged offences with wide national significance or with links abroad[4]. It is the opinion of the representatives of the

3. See: http://www.vn.fi/vm/english/other/taxation2001.pdf

4. This allocation of authority is not made through legislation, but is the result of a co-operative agreement between the provincial police departments and the NBI.

© OECD 2003

Ministry of the Interior that responsibility in practice for cases involving foreign bribery would almost automatically be transferred to the NBI.

The police have customarily initiated investigations of domestic bribery based upon reports of the media, injured parties, the Office of the Parliamentary Ombudsman and the Office of the Chancellor of Justice.

The Office of the Prosecutor General in Helsinki (PG), which is under the authority of the Ministry of Justice, is the central administration authority of the prosecution service. It contains 4 units, including the Prosecution Unit, which consists of key prosecutors specialised in different fields. In addition local prosecution units consist of key prosecutors specialised in various fields, including environmental crime, drug-related offences, cyber-crime, financial crime and offences with an international connection. Pursuant to an order of the PG, these prosecutors can operate nation-wide. An area of specialisation concerning bribery or corruption has not been established. However, the Finnish authorities state that state prosecutors and key prosecutors specialised in financial crime and offences in public office deal with issues concerning bribery and corruption.

The Ministry of the Interior and the Ministry of Justice also consist of bodies and departments with responsibilities related to the implementation of the Convention other than the investigation and prosecution of the foreign bribery offence. For instance, pursuant to the Act on Preventing and Clearing Money Laundering, the Money Laundering Clearing House (MLCH) investigates suspected money laundering cases reported to it by financial institutions. Pursuant to the International Legal Assistance in Criminal Matters Act, the Minister of Justice makes decisions regarding requests for the provision of mutual legal assistance. These requests are filtered down to the NBI where they do not involve requests from judicial authorities. The Finnish authorities explained that in cases involving extradition where there is no applicable treaty, the NBI is charged with conducting an investigation into the matter.[5]

The Financial Supervision Authority (FSA), which operates in connection with the Bank of Finland, makes inspections and supervisory visits about once very two years to supervised entities. Pursuant to the Act on the Financial Supervision Authority, it is obliged to inform the MLCH of anything in the operations of a supervised entity that gives reason to suspect the origin of funds connected with the operation in question.

Commentary

The lead examiners are of the view that there is not a clear consensus of where the responsibility lies for the implementation of the Convention, and believe that the effectiveness of the implementation of the Convention could be enhanced by clarifying internally the responsibilities of state authorities in this regard. In Finland, one way in which this could be accomplished is by centralising the authority for the supervision of the investigation of foreign bribery cases including the gathering and sharing of information. In addition, the lead examiners believe that in order to ensure the effective investigation of foreign bribery cases and consistency in approach, consideration could be given to requiring the local police authorities to automatically notify the NBI when they become aware of a case involving the bribery of a foreign public official.

5. Although section 15 of the Extradition Act states that "where the request is not immediately rejected…the (NBI) shall conduct an urgent investigation in the matter", the Finnish authorities explained that in practice such an investigation is only conducted where there is no applicable treaty.

© OECD 2003

The lead examiners believe that the prosecution of foreign bribery cases in Finland would be significantly enhanced were the state prosecutors and key prosecutors in local prosecution units specialised in financial crimes and offences with an international connection further specialised in foreign bribery for the purpose of supervising and advising on such cases at the central or local level.

Need for Improved Reporting Obligations

Tax Authorities

Authorities from the Ministry of Finance and the National Board of Taxation stated that tax authorities are entitled to provide information regarding suspected bribery transactions to the police, prosecutorial authorities and courts of law. They are also permitted to report transactions that they suspect to involve money laundering to the MLCH.

During the on-site visit the prosecutors explained that two cases involving foreign bribery[6] (one in the early 1990's and the other in 1998) were handled as tax frauds, and had been revealed by reports of tax inspectors. It is the position of the Finnish government that pursuant to section 86 of the Tax Proceedings Act, there is an obligation on tax inspectors to report aggravated tax fraud to the competent authorities. However, section 86 does not provide a clear obligation to this effect—instead it "entitles" tax authorities to "omit to report" a case of tax fraud to the competent authorities if it is deemed to be "petty" having "due consideration to the amount of financial benefit sought and other circumstances connected with the offence". Moreover, a representative from the MLCH explained that the lack of a statutory obligation on tax inspectors to report suspicions concerning foreign bribery is an obstacle to detecting cases.

Commentary

The entitlement to report suspected foreign bribery to the competent authorities is not contained in legislation and the entitlement to not report cases of petty tax fraud is not a clear direction to report tax fraud that is not petty—it could be interpreted to provide further discretion. The lead examiners believe that tax inspectors are key persons for detecting foreign bribery, and cite the cases presented by the Finnish prosecutors as evidence thereof. In addition, Finnish law does not impose a secrecy obligation on tax inspectors for the purpose of precluding reporting in this respect. The lead examiners therefore encourage the Finnish authorities to establish clear guidelines to the effect that tax inspectors are obligated to report cases of suspected foreign bribery and tax fraud to the competent authorities.

Accounting Professionals

The Accounting Act does not impose a duty on persons responsible for keeping accounting records for companies to report suspicious transactions to the competent authorities. Instead it states that confidential information may be submitted to the pre-trial investigation authorities and the public prosecutor. The Finnish government indicates that this issue will be considered in the context of a possible future harmonisation process within the EU.

6. One case involved the bribery of an Estonian official and the other involved the bribery of a Russian official.

© OECD 2003

Commentary

The lead examiners recommend that Finland consider establishing a clear obligation on persons responsible for keeping accounts to report suspected bribery transactions to either the competent authorities or the relevant management body, which in turn would have a duty to report to the competent authorities. This would improve the possibility of detecting cases of foreign bribery.

Auditors

The Auditing Act contains obligations regarding the reporting of information. In one instance auditors are required to make a critical comment in the auditor's report to the Board of Directors where a partner or Chairman of the Board of Directors, etc is guilty of an act or negligence that may result in liability for damages or of any violation against a law. However, this is a very limited duty to report as it only applies where the partner, etc is guilty of a violation of the law, not where a suspicion exists. Representatives from the Ministry of Finance highlighted article 20 of the Auditing Act, which provides auditors with an entitlement to make remarks to the Board of Directors, etc about matters not covered by the auditor's report, and stated that where an auditor does not report suspicions about foreign bribery he/she could be liable for damages caused to the company as a result of the failure to report. However, article 44 of the Act provides that auditors are liable for damages where they have been deliberately or negligently caused by a violation of the Act. Since there is not any obligation to report suspicious transactions, the failure to report would not appear to constitute a violation of the Act.

Moreover, the lead examiners believe that Chapter 5, section 25 of the Auditing Act may create an obstacle to the reporting of suspicious transactions. Pursuant thereto an auditor is forbidden from revealing information about an audited company to an "outsider", etc where this could cause harm to the entity unless the auditor has a statutory obligation to reveal the information. Since there is no statutory obligation to reveal information about suspicions respecting foreign bribery, the lead examiners believe that an auditor would always be prohibited from reporting his/her suspicions to the competent authorities. The penalty for violating the obligation of secrecy is a punishment under the Penal Code of a fine or imprisonment for up to one year.

The Finnish authorities state that the issue of the duty of auditors to report has been publicly debated in Finland, and recently a committee established by the Ministry of Trade and Industry thoroughly examined the subject, issuing a report in July 1998[7], which included an international comparison survey. The Finnish authorities emphasise the current duty of the statutory auditor to examine and report material fraud and error in his/her reports, which they state is required by the obligation to observe good auditing practice under section 16 of the Auditing Act.[8] They explain that the manner of reporting (i.e. directly to the competent authorities, or to the Board of Directors or shareholders) depends upon the situation. The Finnish authorities state further that Finland imposes a duty to report directly to the competent authorities in specific situations prescribed by law, and that these obligations are in accordance with international regulations and the BCCI directive.

7. Report 6/1998 of the Ministry of Trade and Industry.

8. The Finnish authorities explain that the obligation to observe good auditing practice incorporates ISA 240, which contains the duty of auditors to report material fraud and error in their reports.

© OECD 2003

The Finnish authorities explain that the reporting duties of statutory auditors have been under review and it is likely that this issue will remain on the agenda when the auditing legislation is reviewed during the next months. They advise that due to the principle of confidentiality, they do not support an obligation on auditors to report suspected bribery directly to the competent authorities.

A further impediment to the effective reporting by auditors of suspicious transactions may be present in the rules under the Auditing Act regarding the independence of auditors. Pursuant to these rules an auditor cannot be, for instance, a partner, a member of the Board of Directors or the Supervisory Board, the Managing Director, a spouse of one of the aforementioned or an employee of the company in question. However, the rules do not prohibit former partners, spouses of employees and shareholders of the parent or affiliates (including foreign subsidiaries) from participating. The Finnish authorities indicated that the Auditing Act shall be amended in the near future in order extend the prohibitions for participating in audits and harmonise it with the recommendation of the EU Commission concerning the independence of auditors.[9]

Commentary

The lead examiners recommend that, consistent with Sections V B (iii) and (iv) of the 1997 Recommendation, Finland consider requiring the auditor to report indications of a possible foreign bribery offence to management and, where appropriate, corporate monitoring bodies, and that such body in turn has a duty to report suspicions of bribery to the competent authorities. They feel that such an obligation would not violate the auditors' duty of confidentiality. They further consider that Finland would improve its compliance with section V B (ii) of the 1997 Recommendation regarding the independence of external auditors by broadening the prohibitions under the Auditing Act for participating in audits, and encourage Finland to make the amendments that are currently under consideration as soon as possible.

Financial Institutions

According to statistics provided by the MLCH, in 2000 and so far in 2001, money exchange bureaux have provided the majority of reports of suspected money laundering to the MLCH. However, neither the Act on Preventing and Clearing Money Laundering nor the Act on the Financial Supervision Authority establishes money exchange bureaux as reporting entities. Nevertheless, the Ministry of the Interior and the MLCH concluded that they are covered by the Act on Preventing and Clearing Money Laundering.

According to statistics provided by the MLCH, real estate agencies have made 5 reports of suspected money laundering to the MLCH since the beginning of 2000. The reporting obligations under the Act on Preventing and Clearing Money Laundering apply to real estate agents referred to in the Real Estate Agents Decree. On the other hand, pursuant to the Act on the Financial Supervision Authority, real estate agents are not supervised by the FSA. The MLCH confirms that real estate agents are under the supervision of provincial governmental agencies, and that this supervision has been very haphazard and not functional, with the result that there has been no verification of the implementation of money laundering laws in respect of real estate agencies.

9. At the time that this review was prepared, the Finnish authorities indicated that the EU recommendation would be published soon.

© OECD 2003

Commentary

The lead examiners recommend that Finland ensures that in practice the absence of an express obligation in the law on money exchange bureaux to report suspicious transactions does not decrease the effectiveness of money laundering legislation. Additionally, given the potential for money to be laundered through real estate transactions, Finland should consider adopting a consistent and effective approach to monitoring the compliance of real estate agencies with their reporting obligations.

Need for Witness Protection

The Finnish legislation does not include an act regarding the protection of witnesses and informants. A project to develop such an act is currently pending in the Ministry of Justice. Representatives from the Ministry of Justice advised that at this stage the content of the draft legislation is not certain and that the measures to be included have been debated for some time. They caution that Finland is too small a society to provide the comprehensive type of witness protection that is available in larger nations (e.g. change of identity, change of residency and anonymous witness statements), but that it might provide for the possibility of, for instance, video taping witnesses' testimony.

Officials from the Ministry of the Interior had different views on the significance of the absence of legislation on witness protection. Some felt that in practice it has not created any problems, but others felt that its absence has created real obstacles to investigating and prosecuting cases. The Ministry of the Interior explained that regardless of the lack of a specific Act on witness protection, the legislation provides many specific measures for protecting witnesses, including the following:

- Hiding the witness during the trial.
- Taking contact information from the court.
- Following the witness.
- Obtaining a restraining order.
- Hearing the witness in court without the presence of the public.
- Prohibiting the publication of the name and address of the witness in the citizen register.
- Charging a person who threatens a witness pursuant to the Penal Code with the offence of threatening a person to be heard in the administration of justice, for which the penalty is a fine or imprisonment for up to 3 years.
- Permitting the changing of a person's name and domicile (although identity numbers cannot be changed).
- Prohibiting police staff from disclosing the identity of informers, pursuant to section 44 of the Police Act.

Commentary

The lead examiners encourage the Ministry of Justice in its endeavour to develop witness protection legislation.

© OECD 2003

Protection of Whistle Blowers

A trade union representative explained that one of the main reasons that employees of companies are reluctant to report is the absence of protection of whistle blowers in labour legislation and companies' codes of conduct. The representative was not aware of any initiatives on the part of the Finnish government to address the situation. In addition, the offence under Chapter 30, section 5 of the Penal Code in respect of a violation of a business secret could provide further disincentive to the reporting of bribery by employees.

Commentary

The lead examiners recognise that the issue of whistle blower protection is inextricably connected to the broader issue of witness protection, and believe that it would be reasonable for the Ministry of Justice to include consideration of this issue in its project to develop witness protection legislation.

Need for Broadened Investigative Powers

Some of the prosecutors stated that the low rate of conviction for domestic bribery offences is due to evidentiary problems. The lead examiners believe that this may be in part due to the lack of legislative authority to intercept communications and undertake undercover operations where there is reason to believe that the offence of bribing a foreign public official has occurred[10].

Representatives from the Ministry of the Interior explained that it is highly probable that draft legislation providing a legal basis for the interception of telecommunications and undercover operations in respect of aggravated bribery, including foreign bribery, will be submitted to Parliament in the near future. The prosecutors confirmed that evidence obtained from communications interceptions and undercover operations would be admissible in court.

The lead examiners feel that due to the nature of the offence of bribing a foreign public official, these types of investigative techniques are important tools for obtaining evidence. The planning and executing of the foreign bribery offence would routinely involve use of telecommunications networks. However, due to technological impediments to the effective interception of communications[11] and problems that will surely arise as a result of emerging technologies, this measure should be complemented by investigative techniques that are not heavily reliant on technology, such as undercover operations.

Commentary

The lead examiners welcome the Finnish government's intention to submit in the near future draft legislation to Parliament for the purpose of providing a legal basis for the interception of communications and undercover operations in foreign bribery investigations, and believe that such powers will significantly enhance the ability of the investigative authorities to gather evidence.

---

10. Pursuant to the Coercive Measures Act, bribery of a foreign public official is not one of the offences for which an order for the interception of communications or undercover operations may be obtained.

11. These impediments include cellular phone features such as call forwarding, problems encountered in intercepting digital voice communications and high-speed data, and fibre optic lines.

© OECD 2003

Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences

What is Finland's Record concerning Prosecutions of Bribery and the Related Money Laundering and Accounting Offences?

Statistics compiled by the Task Force on Organised Crime in the Baltic Sea Region for the years 1998, 1999 and 2000[1] disclose that 6 cases of active domestic bribery were reported to the police in 1998, 7 cases in 1999 and 9 cases were reported in 2000. Statistics provided by the Office of the PG disclose that 2 convictions were obtained in 1998 for active domestic bribery (both for non-aggravated offences), 2 convictions were obtained in 1999 (one for non-aggravated bribery and one for aggravated bribery) and 1 conviction was obtained in 2000 (for non-aggravated bribery). The Office of the PG reported that since 1995 legal persons have been subject to fines only five times, and none of these cases involved bribery.

Statistics compiled by the MLCH for the years 1997 to 2001 disclose that financial institutions reported 206 suspicious (money laundering) transactions in 1997, 186 in 1998, 348 in 1999, 1109 in 2000 and 587 so far in 2001. For the years 1997 to 2000, 2 convictions were obtained in 1997, 7 convictions in 1998, 12 convictions in 1999 and 6 convictions in 2000.

Statistics compiled by the Office of the PG disclose that in 1999, 226 convictions for "single crime" accounting offences were obtained and 403 convictions for "several crimes in sentence", and in 2000, 238 convictions for "single crime" offences and 424 for "several crimes in sentence". Information is not available about how many crimes were reported in those years.

It would be misleading to directly compare the number of reported crimes to the number of convictions for a particular year because the offences reported in a particular year were not necessarily prosecuted in the same year. It is fair to say that a comparison of the two statistics provides an indication of the average rate of conviction. The lead examiners are concerned that the rate might be relatively low for bribery and money laundering offences, but are unable to make any conclusive comments in this respect because of the lack of international comparative data. The rate is not known for accounting offences, but it would appear by the number of convictions that Finland has a fairly successful record in this regard.

Commentary

The lead examiners believe that the rate of conviction for bribery and money laundering offences could be improved by removing impediments to obtaining evidence and/or impediments to effectively prosecuting the offences. This Part of the review will examine whether the mechanisms for prosecuting the offences are adequate.

1. *Situation Report on Corruption in the Baltic Sea Region* [March 2000 and May 2001 (update)].

© OECD 2003

General Impediments to Prosecuting the Offence of Bribing a Foreign Public Official

Interpretation of certain Concepts in the Offence

Pursuant to section 14 of the Penal Code, bribery is only considered aggravated where the briber intends to induce a public official to "act in service contrary to his/her duties with the result of considerable benefit to (himself/herself) or to another person", or "the value of the gift or benefit is considerable". Additionally, the bribery must be considered aggravated "when assessed as a whole". The Finnish authorities did not provide any judicial authority on the interpretation of these concepts. They state, however, that it is customary for the Finnish legislation to make the distinction between aggravated and non-aggravated offences, and that the Penal Code also does this with respect to theft, embezzlement, fraud, tax fraud, bankruptcy offences, forgery and assault. They further state that, despite the lack of experience concerning bribery offences, taking into account the criteria applied to similar offences in this respect, it should not be difficult for the relevant authorities to differentiate between aggravated and non-aggravated bribery in the absence of guidelines.

During the on-site visit, it was evident that these concepts are not interpreted uniformly by the police and the prosecutors. For instance, the police suggested that 10,000 FIM would normally be considered "considerable", whereas the prosecutors were of the opinion that 50,000 FIM would be the threshold. One official stated that the courts would not concentrate on the monetary value of the bribe and the benefit. The preparatory documents to the implementing legislation state that the damage or loss need not be financial.

The lead examiners are of the view that the differentiation between non-aggravated and aggravated bribery is particularly important in the Finnish system because the penalties for the aggravated offence are significantly more severe and are linked to a much longer statute of limitations.[2] The penalty for the non-aggravated offence is a fine or imprisonment for up to two years, and the penalty for the aggravated offence is imprisonment for at least 4 months and at the most four years. Moreover, the non-aggravated offence contemplates a bribe for the purpose of obtaining a breach of duty of a foreign public official, whereas countries that differentiate between aggravated and non-aggravated bribery normally distinguish the two offences on this ground.

Commentary

The lead examiners believe that Finland should consider providing guidance to law enforcement agencies and prosecutors concerning the differentiation between aggravated and non-aggravated bribery, due, in particular, to the uncertainty about the interpretation of the meaning of a "considerable benefit", as well as the low number of domestic bribery cases from which to make an analysis of this issue. In addition, it would be advisable for the Working Group to follow-up decisions of the court in this regard as litigation of the foreign bribery offence evolves.

Requirement of Precision in the Elements of the Offence

The Finnish authorities explained that the "principle of legality protected by the Constitution" prohibits the interpretation of a Penal Code provision in a way that is

2. See paragraph 89 for the lengths of the respective statute of limitations.

© OECD 2003

detrimental to a suspect. One of the relevant provisions from which this principle is derived provides that “the exercise of public powers shall be based on an Act” and “in all public activity, the law shall be strictly observed”. Another relevant provision provides that no one shall be “deprived of liberty arbitrarily or without a reason prescribed by an Act”. Due to this principle, the lead examiners feel that it is likely that Finnish courts would interpret Penal Code offences strictly, only applying the elements of an offence stated expressly therein. A narrow interpretation by the courts of Finnish bribery offences could result in a failure to address all the elements of Article 1 of the Convention (i.e. application of the offence where the bribe is made through an intermediary and the possible lack of coverage with respect to bribes to certain foreign public officials).

Bribes through Intermediaries

The bribery offences do not expressly apply to bribes through intermediaries. In addition, no information is available regarding the prevalence of the use of intermediaries in Finland for this purpose, and there have not been any domestic cases prosecuted involving intermediaries. The prosecutors stated that they do not imagine that the absence of specificity in the offence in this regard would be an impediment to prosecuting cases involving bribes through intermediaries, but they did concede that their job would be made easier by an explicit reference to this element in the offence.

Commentary

The lead examiners recommend that the Working Group follow-up the application of the offence in respect of bribes through intermediaries as litigation develops in this field.

Overlapping Definitions of Foreign Public Official

There is an overlap between the definition of “an official of another Member State of the European Union” and the definition of a “foreign public official”, both of which apply to the bribery offences. The former definition is much narrower in application in that pursuant thereto it is necessary to refer to the legislation of the foreign country for which the official performs public functions in order to determine if the person in question is “subject to criminal liability as a public official or civil servant”. The lead examiners have some doubt as to how these overlapping definitions would be applied where the public official in question were an official of another Member State of the EU to whom the broader definition applied but not the narrower one. Would the alleged briber be able to argue that, pursuant to the principle of legality in the Constitution, the overlap should not be interpreted to the detriment of him/her?

The Finnish authorities state that it is the intent that in such a situation the broader definition would apply. However, to avoid any uncertainty a draft amendment of the definition has been prepared that removes the overlap.

Commentary

The lead examiners have reviewed this proposal, and are satisfied that it removes the overlap. In addition, they encourage the Finnish government to submit the amendment to Parliament as soon as possible.

© OECD 2003

Necessity of Proving the Foreign Public Official had the Requisite Authority

According to the Office of the PG, proving the foreign bribery offence necessitates proving an element that is not prescribed by the offence itself--that the bribe was intended for a foreign public official who has the "exact powers" to provide the act or omission that the briber intends to obtain. The Office of the PG acknowledges that it might be difficult to obtain the co-operation of the foreign government in providing the information needed to prove whether the official had the requisite power, especially in countries where the local police may not be eager to pursue the case.

Commentary

The lead examiners recognise that this practice would not necessarily create an obstacle to proving domestic cases because the relevant information would be readily available, but are concerned that it places too heavy a burden on the prosecution in foreign bribery cases. They also draw attention to Commentary 3 on the Convention, which requires that it is understood that every public official has a duty to exercise judgement or discretion impartially and that this aspect of the offence is defined autonomously, not requiring proof of the law of the particular official's country. The lead examiners therefore recommend that the Working Group follow-up the application of the offence in this respect to assess compliance with Commentary 3 and to ensure that the practice does not impede the effective prosecution of foreign bribery cases.

Impediments to Successfully Prosecuting Bribery Offences Involving Legal Persons

Since the liability of legal persons was created under Chapter 9 of the Penal Code in 1995, legal persons have been subject to criminal liability only five times and never in relation to bribery. The Office of the PG explained that the criminal liability of legal persons has mainly been applied to environmental crimes, and that the average fine has been 20,000 FIM[3]. The lead examiners are concerned that the scant use of the relevant Penal Code provisions could be due to a lack of clarity in respect of certain key elements of liability, in particular prosecutorial discretion, the statute of limitations, and applicability of criminal liability to state-owned and state-controlled companies.

Standard of Criminal Liability

The lead examiners recognise that the standard of criminal liability in respect of legal persons was clarified through an amendment to the Penal Code in 2001 regarding the involvement of management required for liability, and believe that as a result the prosecuting of offences involving legal persons should be less burdensome. Previously, Chapter 9 stated that a person belonging to the management must have been an accomplice or allowed, etc the offence. Liability is now expressly extended to the case where a person is exercising a de facto management function regardless if he/she is formally a part of management.

Prosecutorial Discretion

Chapter 9 of the Penal Code appears to provide wide prosecutorial discretion in respect of legal persons, and the Office of the PG acknowledges that prosecutorial

3. Pursuant to Chapter 9 of the Penal Code, a corporate fine shall be at least 5,000 FIM and at most 5,000,000 FIM.

© OECD 2003

discretion is more clearly limited in law in respect of natural persons. Additionally, the Office of the PG confirmed that an injured person would be competent to force the prosecution to take place, but concede that there have not been any cases where this has occurred.

Statute of Limitations

The Penal Code provides a limitations period of ten years for aggravated bribery and five years for non-aggravated bribery (i.e. the period after the commission of the offence within which a criminal action can be brought). Moreover, Chapter 9 of the Penal Code states that a legal person cannot be sentenced to a punishment where the offender cannot to be sentenced due to the expiration of the statute of limitations, but that in any case the minimum period shall be five years. However, representatives from the Office of the PG stated that the limitations period in respect of legal persons is five years for bribery cases. It would therefore appear that the limitations period that has been applied in practice to legal persons is the minimum period.

State-owned and State-controlled Companies

The lead examiners are of the view that state-owned/controlled companies play a significant role in the Finnish economy. Finland owns shares in more than 40 companies, twenty-two of which fall under the administrative domain of the Ministry of Trade and Industry. According to the Ministry, during the expansion of the ownership base in many state-owned companies, during a period of about ten years, Finland has become a major owner of publicly listed companies. As of 2000, Finland owned shares in eleven listed companies, seven of which are industrial and energy companies.[4]

The Finnish authorities explained that they have no experience regarding the application of the criminal liability of legal persons to state-owned and state-controlled companies, but believe that for liability to apply thereto the company would probably have to be majority state-owned.

Commentary

The lead examiners are of the opinion that Finland should consider providing guidance to law enforcement agencies and prosecutors clarifying the application of the relevant Penal Code provisions to legal persons in respect of prosecutorial discretion, the statute of limitations and coverage of the law regarding state-owned/controlled companies, in order that the authorities would be able to more efficiently pursue legal persons for the foreign bribery offence.

Are the Relevant Sanctions Sufficiently Effective, Proportionate and Dissuasive in Practice

Foreign Bribery Offence

Statistics provided by the Office of the PG indicate that since 1998 the following sanctions have been applied for the active domestic bribery offences: one term of conditional imprisonment for 7 months (aggravated offence), 25 day-fines (once), 50 day-fines (once) and 80 day-fines (twice). Pursuant to Chapter 2a of the Penal Code, day-

4. Annual Report 2000, Ministry of Trade and Industry Finland (http://ws39.ambientfactor.fi/ktm/english/valtioharjoitti.php).

© OECD 2003

fines for natural persons are calculated on the basis of 1/60 of the average monthly income of the person fined, the minimum number of which shall be one and the maximum number 120. Information is not available on the actual amount of the day-fines that have been ordered. In addition, information about the relevant sanctions is not currently available in a manner that links penalties to essential information about the cases (e.g. amount and purpose of the bribe, whether the bribe was successful). The Finnish authorities state, however, that statistical information can be compiled in such a manner.

The lead examiners have been informed that a fine penalty is not available for aggravated bribery, and that for non-aggravated bribery a fine is available by itself or in conjunction with conditional imprisonment. They were also informed that conditional imprisonment is converted to actual imprisonment where the offender commits another offence.

In Finland first-time prisoners are normally released on parole after having served one-half of their sentence. According to officials from the Ministry of Justice, a person on parole is required to serve the rest of the sentence in prison if he/she commits another offence, but parole rarely entails the imposition of other conditions such as regular reporting to the authorities.

Commentary

The lead examiners recognise that criminal sanctions in Finland are traditionally less severe than in some other jurisdictions, and realise that the penalties prescribed in the Penal Code for non-aggravated and aggravated bribery are consistent with similar economic crimes such as theft and embezzlement. However, due to the absence of information for the purpose of interpreting sentencing statistics, they cannot determine whether the Finnish authorities have sought severe enough penalties for bribery within the parameters of the Penal Code. The lead examiners therefore recommend that in order to be able to evaluate whether future penalties for bribery are proportionate, dissuasive and effective, statistical information be compiled along with essential information about the offences to which they apply, and that the sanctions for domestic and foreign bribery be revisited by the Working Group following the development of some case-law in this regard.

Money Laundering Offence

Information about the level of sanctions for the receiving offences does not appear to be available, although the MLCH informed the lead examiners that the average value of property laundered where there has been a conviction is 200,000 FIM. In addition, the Finnish authorities stated that the courts consider property valued at 170,000 FIM to be "very valuable property" for the purpose of triggering the application of the aggravated receiving offence.

Commentary

Again, due to the lack of information about sanctions, the lead examiners are not in a position to comment on the effectiveness, etc of the sanctions imposed in practice to money laundering offences. They therefore encourage the Finnish authorities to compile the relevant statistical information for the purpose of a future assessment.

© OECD 2003

Accounting Offences

Incomplete Statistical Information about Sanctions

According to statistics provided by the Office of the PG, imprisonment has rarely been ordered for accounting offences. In the years 1999 and 2000, the most common penalties were an average fine of 47 day-fines[5] for a “single crime” and 50.5 day-fines for “several crimes in sentence”. Conditional imprisonment, which was the second most common penalty, was ordered for just over 3 months on the average for a “single crime” and 3.7 months for “several crimes in sentence”. Community service was also ordered on a few occasions, ranging from 82 hours for a “single crime” to 113 hours for “several crimes in sentence”. The lead examiners have difficulty interpreting these statistics in the absence of essential information about the offences in question, including the actual amount of the fines.

Insufficient Knowledge of where the Responsibility for Bookkeeping lies

During the on-site visit, the lead examiners were provided with different explanations about who is the person responsible for keeping a company’s accounts. Some officials were of the opinion that the responsibility lies with the managing director and the board of directors. A representative of the accounting profession believed that management has the responsibility and that each person in management would be charged with the accounting offence in question. Representatives from the business sector stated that the Chief Financial Officer of a company has the responsibility for ensuring that bookkeeping is according to the law. However, the Finnish government states that the responsibility is clearly defined in legislation, including Chapter 8, section 6 of the Finnish Company Act, which states that the Board of Directors is responsible for supervising the book-keeping and the control of financial matters, and the Manager Director is responsible for ensuring that the bookkeeping complies with the law and the financial matters are handled in a reliable manner.

The Office of the Prosecutor informed the lead examiners of a recent Supreme Court judgement (KKO: 2001:86) in which it was decided that anyone who exercises actual authority in respect of bookkeeping can be prosecuted for an accounting offence. In addition, in a 1993 judgement of the Court of Appeal of Turku, Board members were sentenced for negligent accounting offences even though they did not participate in management and did not know anything about the offences, because they were obliged to make themselves familiar with the status of the company’s accounts.

Non-applicability of Accounting Offences to Legal Persons

The accounting offences under the Penal Code and the Accounting Act do not apply to legal persons. Representatives of the Office of the PG indicated that the absence of the liability of legal persons in this respect has not impeded the prosecution of accounting offences because it has not been difficult to identify the person “behind the offence”. It was acknowledged, however, that the absence of an accounting offence in respect of legal persons means that a legal person could not be considered to have laundered the proceeds of an accounting offence since no offence would have been committed in such a case.

5. According to legislation, the amount of one day-fine is 1/60 of the net monthly income [at least 40 FIM (6.8 Euro)].

© OECD 2003

Exemptions from Obligation to keep Consolidated Accounts

Pursuant to Chapter 6, section 1 of the Accounting Act, most companies above a certain size limit are required to prepare consolidated accounts (i.e. the requirement for a parent company to include in its bookkeeping the accounts of both the parent company and controlled subsidiaries). The Finnish authorities state that the exemptions thereunder are consistent with those under the 7th EU Directive. In addition, pursuant to the Company Act (Chapter 11, article 10 and Chapter 12, article 1) consolidated accounts are compulsory for a parent company if it intends to distribute assets (dividends). The Finnish authorities state that there is no inconsistency between the two requirements because in practice they are applied so that a company that distributes assets is required, despite its size, to prepare consolidated accounts. They state further that this requirement makes the preparation of consolidated accounts almost mandatory for most limited companies in Finland.

However, the lead examiners noted that chapter 6, article 17 of the Accounting Act, which is based on the 7th EU directive, permits the non-consolidation of the accounts of subsidiaries with dissimilar activities in certain cases, and that in the GAAP 2000 Survey this was viewed as an issue that could lead to differences from the International Accounting Standard 27.[6] In addition, the relevant legislative provisions appear to only apply to the preparation of consolidated accounts for domestic subsidiaries.

The Finnish authorities informed the lead examiners that the EU is planning to amend the 7th directive in order to remove the possibility of not consolidating the accounts of subsidiaries with dissimilar activities, following which the Finnish Accounting Act would also be amended.

Commentary

With respect to the apparent non-availability of essential statistical information about sanctions for accounting offences, the lead examiners reiterate their comments regarding the foreign bribery and money laundering offences to the effect that the Finnish authorities consider compiling the relevant information for the purpose of a future assessment.

The lead examiners also advise that the accounting profession and companies themselves need to have a more precise understanding of the legal responsibility for bookkeeping. They feel that, in light of the absence of liability of legal persons for the accounting offences, it is particularly important that there is more widespread knowledge about the broad responsibility for bookkeeping. It is therefore recommended that, in light of the Supreme Court judgement in which it was decided that anyone who exercises actual authority in respect of bookkeeping could be prosecuted for an accounting offence, the Finnish government should consider informing accounting professionals about the practical consequences thereof to clarify responsibility and raise public awareness in this regard.

The lead examiners are concerned that in the absence of the liability of legal persons for the accounting offences, it may not be possible to effectively address accounting offences connected with the concealment of foreign bribery, and recommend that the Working Group follow-up this issue to determine whether Finland

---

6. The Generally Accepted Accounting Principles (GAAP) Survey is a survey by the large accounting firms of national accounting in fifty-three countries.

© OECD 2003

is able to effectively address accounting offences connected with the concealment of foreign bribery.

The lead examiners believe that the removal of the possibility of not consolidating accounts of subsidiaries with dissimilar activities would improve a parent corporation's ability to detect bribe payments made by subsidiaries, and therefore would welcome the amendments to the Accounting Act expected by the Finnish government. In addition, they recommend that Finland consider whether the relevant laws need to be amended to expressly extend the requirement to keep consolidated accounts to companies with controlled foreign subsidiaries.

Confiscation

The Office of the PG informed the lead examiners that although pursuant to the Penal Code there is discretionary authority to order confiscation of both the bribe and the proceeds of bribery in respect of the active bribery offence, in practice confiscation of the bribe has not been ordered because there have not been any actual bribes to confiscate, and the proceeds have not been confiscated because it is "too difficult to assess the surplus"[7].

The Office of the PG explained that where the property in question is in the possession of a third party (i.e. a person other than the offender) it could not be confiscated from him/her unless it was proven that he/she is not the bona fide owner. Additionally, the Finnish authorities explain that despite the lack of experience with confiscation in respect of bribery, they believe that it is possible to confiscate the bribe when it is still in the hands of the briber if there is something concrete involved, such as banknotes in an envelope or perhaps the amount of money promised in an e-mail message.

It was also explained by the Office of the PG that confiscation is not considered a punishment under the Finnish criminal legal system, and pursuant to a Supreme Court judgement (KKO: 1996-11-127) it is not possible to order confiscation (i.e. forfeiture to the state) where a victim with a right to compensation is in existence. It appears that confiscation would not be available even where the victim has not requested compensation. However, the Finnish authorities indicate that an amendment to Chapter 10 of the Penal Code will come into force in the beginning of 2002, according to which the financial benefit of an offence shall be ordered forfeited if a victim does not avail himself/herself of the right to compensation.

The Finnish authorities also stated that although it is normally the case that there is a victim with a right to compensation in respect of financial crimes, there is normally not a victim in respect of bribery and thus the proceeds of the offence can be confiscated.

Contrary to Article 3.3 of the Convention, monetary sanctions of a comparable effect are not available where confiscation is not possible for any reason.

Commentary

The lead examiners recognise that identifying the proceeds of bribery can be difficult, but feel that the high burden of proof where a third person is in possession of the property in question could be a further obstacle to confiscation. They are also of the opinion that, in light of the absence of the authority of the court to order

7. The Finnish authorities explained that the surplus is normally assessed by obtaining an expert opinion.

© OECD 2003

monetary sanctions of a comparable effect and the seemingly low sanctions that have been applied to domestic bribery offences, a future assessment by the Working Group of the sanctions for foreign bribery should include an assessment of the application of confiscation.

The lead examiners welcome the amendment to the Penal Code, which will come into force early in 2002, for the purpose of requiring forfeiture of the proceeds of an offence where the victim does not avail himself/herself of the right to compensation, and feel that it removes a significant obstacle to effective confiscation.

Lapse of Sanctions

Pursuant to Chapter 8 of the Penal Code a sentence of imprisonment shall lapse within five years if it is for at most one year, and within 10 years if it is for over one year and at most four years. The enforcement of a fine (for natural as well as legal persons[8]) shall lapse five years after the day the final judgement was given, and the enforcement of a sanction of confiscation shall lapse ten years after that day. It is the position of the Finnish government that it is not probable that these provisions could provide an obstacle to the effective application of sanctions to the foreign bribery offence, as this has not been the situation with other offences. In addition, the Finnish authorities state that the executive authorities are active in the enforcement of punishments.

The Finnish authorities informed the lead examiners that a convicted person who is sentenced to a term of imprisonment is not necessarily taken into custody at the time the sentence is pronounced. And once the period of imprisonment lapses, Finland does not have the authority to impose the sentence even if the person evaded capture. The Office of the PG and a representative of the MLCH explained that there have been cases where convicted persons avoided imprisonment by hiding in the US.

With respect to fines, the Finnish authorities indicated that pursuant to Chapter 2, section 4 of the Penal Code, a court order could be obtained to convert a fine to imprisonment. However, the lead examiners have discovered that this provision appears to have been repealed in 1999. Additionally, the authority to convert fines in this way would not provide a workable alternative in respect of legal persons. The Office of the PG explained that since so far legal persons have been subject to fines of such a "trifling amount", the provision on the lapsing of fines would not influence their behaviour in this respect.

A representative of the MLCH explained that the sanction of confiscation could not be converted to imprisonment.

Commentary

The lead examiners believe that the provisions on the lapsing of sanctions could provide another obstacle to the application of effective, persuasive and dissuasive sanctions and could seriously undermine deterrence. They therefore recommend that the Working Group assess the impact of these provisions in any follow-up on the imposition of sanctions in practice to the foreign bribery offence.

8. The corresponding provision for legal persons is in Chapter 9 of the Penal Code.

© OECD 2003

How effective is the Application in Practice of Nationality Jurisdiction

Pursuant to Chapter 1, subsection 11(1) of the Penal Code, in order to establish nationality jurisdiction (i.e. jurisdiction over an offence committed abroad by a Finnish national) an offence must be punishable under the law of the place of commission and a sentence could have been passed for it also by a court in that state (dual criminality). The language of this requirement appears to impose quite a strict form of dual criminality, which would appear to prevent establishing nationality jurisdiction in certain cases.[9]

Officials from the Ministry of Justice reported to the lead examiners that an amendment to the Penal Code that would remove the requirement of dual criminality in respect of nationality jurisdiction is before Parliament, and is expected to be passed sometime in 2002.

Commentary

The lead examiners welcome the legislative initiative before Parliament and are confident that the removal of the requirement of dual criminality for the establishment of nationality jurisdiction will correct the impediments to effective nationality jurisdiction identified above.

How effective is the Application in Practice of the Money Laundering Offences

Chapter 32 of the Penal Code contains "receiving offences" that include subsections that refer expressly to money laundering. Pursuant to these provisions, any offence can constitute an offence for which it is a crime to launder the proceeds therefrom (i.e. the "predicate offence"). Representatives of the MLCH informed the lead examiners that so far there have not been any money laundering cases connected to domestic or foreign bribery.

The lead examiners have identified the following impediments in the law, which they believe may be obstacles to the effective prosecution of money laundering and thus a reason for the absence of cases connected to bribery:

(i) Contrary to Article 7 of the Convention, the money laundering offences do not apply "without regard to the place where the bribery occurred". The Ministry of Justice and the Office of the Prosecutor explained to the lead examiners that the money laundering offences only apply to foreign bribery that takes place abroad where the country in which the bribery occurred has a foreign bribery offence.

9. The requirement of dual criminality would appear to exclude establishing nationality jurisdiction in the following cases:
(i) The statute of limitations has expired in the foreign state but not in Finland.
(ii) A defence that does not exist in Finland is applicable in the foreign state.
(iii) A Finnish national bribes a foreign public official from country "B" abroad in country "A", and country "A" has not established the offence of bribing a foreign public official. Officials from the Ministry of Justice provided that in practice nationality jurisdiction would be extended where country "A" has a domestic bribery offence and one of country "A's" own officials was bribed (but not an official from country "B")
(iv) A Finnish company bribes abroad in a state that has not established the criminal liability of legal persons.

© OECD 2003

(ii) *The offences only apply to third persons, not the person who committed the predicate offence.

(iii) To prove a money laundering offence, it is necessary to prove beyond a reasonable doubt that the "predicate offence" took place, even where the money laundering offence in question involves "a reason to believe" ("negligent receiving offence") that the property was acquired through an offence.

(iv) Corporate criminal liability does not appear to apply to the "negligent receiving offence" even though it would typically be the case that a legal person involved in money laundering (e.g. a car dealership) would have "reason to believe" that the property was acquired through an offence. Moreover, representatives of the Office of the PG acknowledge that where corporate criminal liability applies, in practice it is impossible to convict a legal person without having convicted the person behind the offence of money laundering.

(v) *Attempted money laundering has not been criminalised.

The Ministry of Justice informed the lead examiners that draft amendments to the Penal Code provisions on money laundering have been prepared for the purpose of consultations. According to the MLCH, these proposals would change the law as follows:

(i) Money laundering would be made an independent crime and not part of the receiving offences.

(ii) Negligent money laundering would be criminalised. Since the current offences cover the "reason to believe" standard, it would appear that the new standard would cover cases where the person concerned "should have known" that the property in question was obtained through an offence.

(iii) Attempted money laundering would be criminalised.

(iv) The burden of proof would shift to the alleged offender where he/she has unexplained property.

Commentary

The lead examiners welcome the recommendations for changes to the law on money laundering. However, they remain concerned that by not addressing all of the impediments in the law identified by the lead examiners, Finland will not be able to effectively prosecute money-laundering offences connected to the bribery of foreign public officials.

Impediments to the Effective Provision of Extradition

Pursuant to section 9 of the Extradition Act, in the absence of an applicable treaty on extradition a request for extradition must be based on "an enforceable sentence" "on the basis of adequate evidence" or on a warrant for detention based on evidence indicating the "probable guilt" for the offence. In addition, the extradition process involves, where

* Points (ii) and (v) were also identified by the MLCH as "problem areas in the present law".

© OECD 2003

the request is not immediately rejected by the Minister of Justice, the transmission of the relevant documents to the NBI, which shall conduct an urgent investigation into the matter.

In Finland, the process for extradition in the absence of a treaty is significantly different than the practice where a treaty applies. Where there is no applicable treaty and extradition is requested for the purpose of enforcing a sentence, it is necessary to consider the adequacy of the evidence. Similarly, where there is no applicable treaty and extradition is requested for the purpose of trying the person concerned, the Finnish authorities are required to undertake an investigation and become involved in the actual weighing of evidence. The lead examiners consider that this is a very high standard to meet, in particular where the offence was committed abroad and all or most of the evidence is available in a foreign jurisdiction. In addition, since Finland does not consider the Convention to be a legal basis for extradition in respect of the offence of bribing a foreign public official, the non-treaty practice will apply in respect of requests for extradition from Parties to the Convention where there is no applicable treaty.

The Finnish authorities indicate that the Convention cannot be regarded as the legal basis for extradition in respect of the offence of bribing a foreign public official where there is no applicable treaty because it does not address the requirement for an enforceable sentence based on adequate evidence, etc.

Commentary

The lead examiners consider that the standard for providing extradition in Finland is high where there is no applicable treaty and are concerned that effective extradition may be impeded. They therefore recommend that the Working Group follow-up this issue to determine whether Finland is able to provide effective extradition to Parties to the Convention in respect of the foreign bribery offence in the absence of an applicable treaty.

© OECD 2003

Summary and Recommendations

Summary

A high level of transparency and accessibility are well-entrenched characteristics of the Finnish government. This was particularly evident during the consultations with the private sector and civil society, which praised the Finnish government for its openness and custom of consulting with them about legislative and policy initiatives.

Pursuant to the Finnish Constitution, the legality of the civil service and the actions of civil servants are monitored by two independent bodies: the Office of the Parliamentary Ombudsman and the Office of the Chancellor of Justice. These bodies have the authority to receive complaints from anyone, regardless of nationality and regardless of the country where the complaint originates, concerning the conduct of all the various Finnish government officials involved in the implementation of the Convention in practice (e.g. police investigations, the handling of requests for mutual legal assistance and extradition).

For two years in a row (2000 and 2001), TI has rated the level of perceived corruption in Finland's public service as the lowest out of approximately 90 countries studied. The Working Group recognises the commendable record of the Finnish government in this regard.

During the on-site visit, it was evident that up to now the Finnish government has based its policy on implementing the Convention and Revised Recommendation on the low level of corruption in the Finnish government. However, more attention should be given to the opportunities of and pressures on Finnish companies and foreign companies located in Finland to bribe in order to compete in sensitive national markets.

In conclusion, based on the findings of the Working Group with respect to Finland's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Finland. In addition, the Working Group recommends that certain issues be revisited following the development of litigation of the foreign bribery offences.

Recommendations

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

The Working Group recommends that Finland:

a. Undertake effective public awareness activities for the purpose of educating and advising the public and private sectors about the Convention and consider involving interested business associations and other non-governmental bodies in the delivery of these initiatives. (Revised Recommendation, Article I)

b. Clarify internally the responsibilities of state authorities for the implementation of the Convention. (Convention, Article 5)

With respect to the reporting of suspected bribery to the appropriate authorities, the Working Group recommends that Finland:

a. Establish clear guidelines to the effect that tax inspectors are obligated to report cases of suspected foreign bribery and tax fraud to the investigative authorities. [Revised Recommendation, Articles II (ii) and IV]

© OECD 2003

b. Evaluate whether an obligation that persons responsible for keeping accounts report suspected bribery transactions would improve the prevention and detection of foreign bribery cases. (Revised Recommendation, Article V)

c. Require auditors to report indications of a possible foreign bribery offence to management and, where appropriate, corporate monitoring bodies, and consider requiring that such body in turn has a duty to report suspicions of bribery to the investigative authorities. [Revised Recommendation, Article V B, (iii) and (iv)]

d. Ensure that in practice the absence of an express obligation in the law requiring that money exchange bureaux report suspicious transactions to the Money Laundering Clearing House (MLCH) does not decrease the effective implementation of money laundering legislation, and undertake a consistent and effective approach to monitoring the compliance of real estate agencies with their reporting obligations to the MLCH. (Convention, Article 7)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences

The Working Group recommends that Finland:

a. Consider providing guidance to law enforcement agencies and prosecutors clarifying the application of the relevant Penal Code provisions to legal persons in respect of prosecutorial discretion, the statute of limitations and coverage of the law regarding state-owned/controlled companies. (Convention, Articles 2, 5 and 6)

b. Provide statistical information to the Working Group about the application of sanctions under the legislation implementing the Convention (i.e., the foreign bribery, accounting, and money laundering offences) to evaluate whether penalties are proportionate, dissuasive and effective in practice. (Convention, Article 3.1; Phase 1 Evaluation, section 4).

c. Inform accounting professionals of the practical consequences of the recent Supreme Court decision in which it was decided that anyone who exercises actual authority in respect of bookkeeping could be prosecuted for an accounting offence, to clarify responsibility and raise public awareness in this regard. (Convention, Article 8.2)

Follow-up by the Working Group based on the Development of Litigation

The Working Group will follow up the issues below as litigation of the foreign bribery offences develops:

a. Decisions of relevant authorities, including the courts, in regard to the differentiation between aggravated and non-aggravated bribery. (Convention, Article 1.1)

b. Decisions of relevant authorities, including the courts, with regard to cases involving bribes to foreign public officials through intermediaries. (Convention, Article 1.1)

c. The application of the foreign bribery offence to determine whether it is necessary to prove that, pursuant to the laws of the foreign public official's

© OECD 2003

country, the foreign public official had the exact powers to provide the act or omission that the briber intended to obtain. (Convention, Article 1.1; Commentary 3)

d. The application of sanctions under the legislation implementing the Convention (i.e. the foreign bribery, money laundering and accounting offences) and in the framework of this assessment the Working Group will also:

   (i) review the application of confiscation due to the absence of the authority of the court to order monetary sanctions of a comparable effect and the seemingly low sanctions that have been applied to domestic bribery offences. (Convention, Article 3.3; Phase 1 Evaluation, section 2)

   (ii) assess the impact of the Criminal Code provisions on the lapsing of sanctions (in respect of fines, confiscation and imprisonment) (Convention, Article 3.1)

e. The consequences in practice of the non-applicability of the accounting offences to legal persons to determine whether Finland is able to effectively address accounting offences connected with the concealment of foreign bribery. (Convention, Article 8.2; Commentary 29; Phase 1 Evaluation, section 5).

© OECD 2003

APPENDIX 1

Evaluation of Finland by the OECD Working Group (July 1999)

Legal Framework

© OECD 2003

Evaluation of Finland[1]

General Remarks

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

The Working Group considered in light of the available documentation and explanations given by the Finnish authorities that the Finnish legislation conforms to the standards of the Convention. As far as the issue of forfeiture of a bribe is concerned, the Working Party agreed that this matter raises a general question of interpretation of Article 3 paragraph 3 of the Convention.

Specific Issues

Actions in Relation to the Performance of Official Duties

Sections 13 (1) and (2) of the Penal Code apply to “actions in service”. The issue was raised whether this covers also omissions of a foreign public official. The Finnish authorities confirmed that the term “actions in service” has a broad meaning. It covers any act or omission that has “some link” to the public official’s position.

The Finnish legislation even goes beyond the requirements of the Convention, because it is not necessary that the bribe be given in order to obtain or retain business or other improper advantage.

Forfeiture of Bribe

The issue was raised whether the Convention requires that the bribe can be forfeited if it is still in the briber’s possession. The Convention does not specifically address this matter. The Finnish authorities explained that in certain cases forfeiture might be possible under domestic law. However, it remained unclear what kind of situations this would be.

Jurisdiction

It was recognised that the Finnish legislation includes both territorial and nationality jurisdiction. It fulfils the requirements of Article 4 paragraph 2 of the Convention**.** With regard to the issue of nationality jurisdiction, the Working Group noted that, if the offence has been committed in the territory of a foreign state, Finnish law will only apply provided that the offence is punishable also under the law of the place of commission, and a sentence could have been passed on the offence by a court of the foreign state (e.g. the offence was not barred by the statute of limitations, etc.). In light of the requirements of Article 4 paragraph 4 of the Convention, the Working Group agreed that this issue should be reviewed in phase 2 of the evaluation process.

1. This evaluation was completed by the Working Group on Bribery in July 1999.

© OECD 2003

Sanctions against a Corporation

The question was raised whether there can be additional civil or administrative sanctions against a corporation or other legal entity. The Finnish authorities explained that there would be the possibility to prohibit the offender (i.e. the natural person who gave the bribe on behalf of the legal entity) from doing business for at least three and at most seven years. Such a sanction can be imposed by a court on request of the public prosecutor.

As in the case of other countries, the Working Group raised the issue of liability of a Finnish company if a non-Finnish agent committed the offence of bribery abroad. The Working Group agreed that this is a general issue that needs to be discussed further in order to ensure an effective implementation of the Convention.

Accounting

There is the issue of how high a fine could be under the Finnish Accounting Act. The Finnish authorities explained that the Accounting Act covers only minor offences that do not amount to an accounting crime under the Penal Code. The Accounting act itself does not specify the amount of the fine.

As far as fines against natural persons are concerned, the Penal Code provides for so-called "day fines" (the minimum day fine being 20 FINM[2]; there is no upper limit). For an accounting crime, punishment includes imprisonment of up to three years.

No corporate fines can be imposed concerning violations of the Accounting Act or accounting crimes.

2. After the Finland examination that was held in July 1999, new legislation on fines came into force on 1 October 1999. Since then, the minimum day fine is 40 FIM.

© OECD 2003

APPENDIX 2

Principal Legal Provisions

A. The Offence of Bribing a Foreign Public Official:
Chapter 16, sections 13, 14, and 20 of the Penal Code

B. Liability of legal persons:
Chapter 9 of the Penal Code.

© OECD 2003

A. The Penal Code: Chapter 16. Offences against public authorities.

Section 13. Bribery

1. A person who to a public official, to an employee of public corporation, to a soldier, to a person in the service of the European Communities, to an official of another Member State of the European Union, or to a foreign public official, for his actions in service, promises, offers, or gives a gift or other benefit, intended to the said person or to another, that affects or is intended to affect or is conductive to affecting the actions in service of the said person, shall be sentenced for *bribery* to a fine or to imprisonment for at most two years.

2. A person who, for the actions in service of a public official or another person mentioned in (1), promises, offers, or gives a gift or other benefit mentioned in the said paragraph to another person, shall also be sentenced for bribery.

Section 14. Aggravated bribery.

If in the bribery

1. the gift or benefit is intended to make the person act in service contrary to his duties with the result of considerable benefit to the briber or to another or of considerable loss or detriment to another; or

2. the value of the gift or benefit is considerable,

and the bribery, also when assessed in whole, is to be deemed aggravated, the offender shall be sentenced for *aggravated bribery* to imprisonment for at least four months and at most four years.

Section 20. Definitions.

3. *A person in the service of the European Communities* means any person who is in a permanent or temporary service relationship with the European Parliament, the Council of the European Union, the European Commission, the Court of Justice of the European Communities, the Court of Auditors, the Committee of the Regions, the Economic and Social Committee, the European Ombudsman, the European Investment Bank, the European Central Bank, or another body founded on the basis of the Treaties underlying the European Communities, or who performs a task on assignment for an institution of the European Communities or another body founded on the basis underlying the European Communities.

4. *An official of another Member State of the European Union* means any person who according to the legislation of that State is subject to criminal liability as a public official or authority.

5. *Foreign public official* means any person who in a foreign State has been appointed or elected to a legislative, administrative or judicial office or duty, or who otherwise performs a public duty for a foreign State, or who is an official or agent of an international organisation under public law.

© OECD 2003

B. The Penal Code: Chapter 9 - Corporate criminal liability(743/1995)

Section 1—Scope of application(743/1995)

1. A corporation, foundation or other legal entity[1], in whose operations an offence has been committed, may on the request of the public prosecutor be sentenced to a corporate fine, if such sanction has been provided in this Code.
2. The provisions in this chapter shall not apply to offences committed in the exercise of public authority.

Section 2—Prerequisites for liability(743/1995)

1. A corporation may be sentenced to a corporate fine, if a person belonging to a statutory organ or other management thereof has been an accomplice to an offence or allowed the commission of the offence, or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.
2. A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.

Section 3—Connection between offender and corporation(743/1995)

1. The offence shall be deemed to have been committed in the operations of a corporation, if the offender has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation.
2. The corporation shall not have the right to compensation from the offender for the corporate fine that it has paid, unless such liability is based on separate provisions on corporations and foundations.

Section 4—Grounds for sentencing(743/1995)

When the sentencing of a corporation to a corporate fine is being considered, especially the following shall be duly taken into account:

1. the nature and extent of the corporate neglect and the participation of the management in the offence, as referred to in section 2(1);
2. the status of the offender as a member of the organs of the corporation;
3. the seriousness of the offence committed in the operations of the corporation and the extent of the criminal activity;
4. the other consequences of the offence to the corporation;
5. the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the neglect or offence; and
6. where a member of the management of the corporation is sentenced to a punishment, the size of the corporation and the share of the corporation held by the offender, as well as the personal liability of the offender for the commitments of the corporation.

---

1. In the following, a "corporation"

© OECD 2003

Section 5—Corporate fine(743/1995)

A corporate fine shall be imposed as a lump sum. The corporate fine shall be at least FIM5,000 and at most FIM5,000,000.

Section 6—Basis for calculation of the corporate fine(743/1995)

1. The amount of the corporate fine shall be determined in accordance with the nature and extent of the neglect and the participation of the management, as referred to in section 2, and the financial standing of the corporation.
2. When evaluating the significance of the neglect and the participation of the management, the following shall be duly taken into account: the nature and seriousness of the offence; the status of the offender as a member of the organs of the corporation; whether the violation of the obligations of the corporation manifests heedlessness of the law or the orders of the authorities; as well as the grounds for sentencing provided elsewhere in the law.
3. When evaluating the financial standing of the corporation, the following shall be duly taken into account: the size of the corporation; its solvency; as well as the earnings and the other essential indicators of the financial standing of the corporation.

Section 7—Prosecutor's discretion(743/1995)

1. The public prosecutor may waive the bringing of charges against a corporation, if:
   (1) the corporate neglect or participation of the management, as referred to in section 2, are of minor significance, or
   (2) only minor damage or danger has been caused by the offence committed in the operations of the corporation
   (3) and the corporation has voluntarily taken the necessary measures to prevent new offences.
2. The bringing of charges may be waived also if the offender, in cases referred to in section 4(6), has already been sentenced to a punishment and it is to be anticipated that the corporation for this reason will not be sentenced to a corporate fine.
3. The provisions in sections 15b(1), 15b(3), 15c and 15d of the Decree on the Implementation of the Penal Code on the waiver of prosecution apply correspondingly to the decision to waive the bringing of charges against a corporation. In cases referred to in section 15b(3) of that Decree, the prosecutor shall submit, instead of the question of culpability, the question of the existence of grounds for corporate criminal liability to be considered by a court.

Section 8—Joint corporate fine(743/1995)

1. If a corporation is to be sentenced for two or more offences at one time, a joint sentence of corporate fine shall be passed in accordance with the provisions in sections 5 and 6.
2. No joint punishment shall be passed for two offences, one of which was committed after a corporate fine was imposed for the other. If charges are brought against a corporation which has been sentenced to a corporate fine by a final decision, for an offence committed before the said sentence was passed, a joint corporate fine shall also not be imposed, but the prior corporate fine shall be duly taken into account when sentencing to the new punishment.

© OECD 2003

Section 9—Statute of limitations(743/1995)

1. If the offender is not be sentenced to a punishment due to the statute of limitations, also the corporation on whose behalf he/she has acted shall not be sentenced to a punishment. However, the minimum period of limitations as regards corporate fines shall be five years.
2. The enforcement of a corporate fine shall lapse in five years from the date of the final judgment imposing the fine.

Chapter 10 [repealed by 563/1998]

© OECD 2003

APPENDIX 3

Suggested Further Reading

Further implementing laws

1. Non-tax deductibility of bribe payments: Act on Taxation of Business Profits and Income from Professional Activities

2. Other provisions implementing the Convention can be found as follows: confiscation (Chapter 40, section 4 of Penal Code, and Chapter 2, section 16 of Penal Code); enforcement (Criminal Investigation Act); statute of limitations (Chapter 8, Penal Code); nationality jurisdiction (Chapter 1, section 11 of Penal Code); extradition (Extradition Act); money laundering offence (Chapter 32 of Penal Code); money laundering reporting (Act on Preventing and Clearing Money Laundering); accounting and auditing (Accounting Act, Auditing Act and chapter 30, section 9 of Penal Code); mutual legal assistance (International Legal Assistance in Criminal Matters Act)

Further Reading

1. Phase 1 Report: http://www.oecd.org/dataoecd/14/20/2386203.pdf
2. *Economic Survey of Finland* (OECD, 2002): http://www.oecd.org/pdf/M00023000/M00023043.pdf

© OECD 2003

APPENDIX 4

i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Commentaries on the Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Annex
Agreed Common Elements of Criminal Legislation and Related Action

iii) Recommendation of The Council on the Tax Deductibility of Bribes to Foreign Public Officials

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

© OCDE 2003

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

© OCDE 2003

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

   a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

   b) "foreign country" includes all levels and subdivisions of government, from national to local;

   c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall 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.

© OCDE 2003

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

© OCDE 2003

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

© OCDE 2003

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

© OCDE 2003

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

© OCDE 2003

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

© OCDE 2003

Annex

Statistics on OECD Exports

OECD EXPORTS			
	1990-1996	1990-1996	1990-1996
	US$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	**1 459 148**	**81,0%**	**100%**
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	**1 801 661**	**100%**	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996
Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

© OCDE 2003

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

© OCDE 2003

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.,*

© OCDE 2003

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. “Public international organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. “Foreign country” is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

© OCDE 2003

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

© OCDE 2003

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

  - a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

© OCDE 2003

-- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

© OCDE 2003

(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

© OCDE 2003

General

I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: "that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

© OCDE 2003

Accounting Requirements, External Audit and Internal Company Controls

V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

© OCDE 2003

Public Procurement

VI) **RECOMMENDS:**

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.[1]

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.[2]

International Co-operation

VII) **RECOMMENDS** that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

© OCDE 2003

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the member countries;

ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
- a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

© OCDE 2003

Relations with International Governmental and Non-governmental Organisations

XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

© OCDE 2003

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.

ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

© OCDE 2003

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

© OCDE 2003

(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

© OCDE 2003

(iv) PARTIES TO THE CONVENTION

Countries Having Ratified/Acceded to the Convention*

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
21	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34.	Slovenia[1]	6 September 2001
35.	Ireland	22 September 2003

* In order of ratification/accession received by the Secretary General.

1. Slovenia, as a new member in the OECD Working Group on Bribery, deposited it's accession instrument

© OCDE 2003