Implementing the OECD Anti-Bribery Convention

GERMANY

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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 GERMANY

Foreword

This report surveys the legal provisions in place in Germany 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.

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 Germany 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.

Table of Contents

The Foreign Bribery Offence: Application and Practice by Germany

Introduction[1]

Nature of the On-Site Visit

During June 3-7, 2002 the Federal Republic of Germany (FRG), as a Party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, participated in a Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions.

The team from the OECD Working Group was composed of lead examiners from Austria and Japan as well as representatives from the OECD Secretariat. The visit consisted of five days of discussions between the examining team and panels of representatives from federal and Länder government, civil society, and the private sector (See Annex I for the list of participants from Germany). The panel interviews took place at the Federal Ministry of Economics and Technology in Berlin, and at the Regional Court Frankfurt, The Federal Financial Supervisory Office (BAFin), and the Kreditanstalt fur Wiederaufbau (KfW – Credit Agency for Reconstruction) in Frankfurt am Main. Discussions were held in both Berlin and Frankfurt in order to meet with representatives in relevant federal ministries in Berlin, as well as public prosecutors, police, and tax administration officials in both Berlin and Frankfurt. Frankfurt was included in the visit due to its specialised economic crime unit**s**, and also because Frankfurt is one of Germany's leading financial centres. The examining team also met with private sector and civil society representatives from the NGO community in Berlin.

The on-site visit team is grateful to the German authorities for their co-operation, in particular the Federal Ministry of Economics and Technology who organised all the participants, the locations, and the extensive logistics involved, and the Federal Ministry of Justice who participated in or observed numerous sessions and explained the relevant areas of German criminal and administrative law.

Methodology

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 onsite visit was to study the structures in place in the Federal Republic of Germany to enforce the laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor Germany's compliance in practice with the 1997 Recommendation. In preparation for the on-site visit, Germany provided the Working Group with answers to the Phase 2 questionnaires together with documentary appendices and translations of legislation, which were reviewed and analysed by the visiting team in advance. Both during and after the on-site visit, the German authorities continued to provide the visiting team with follow-up information.

1. This report has been examined by the Working Group on Bribery in December 2002.

The Phase 2 Review reflects an assessment of information obtained from Germany's responses to the Phase 2 questionnaires, consultations with the German government and civil society during the on-site visit, a review of all the relevant legislation, and independent research undertaken by the lead examiners and the Secretariat.

This Phase 2 Report is structured as follows: the introduction, Part A, explains the sources of information for the report. Part B provides background information regarding the scope of German business transactions in foreign countries and a description of the business environment in which German businesses operate that may be useful in assessing the impact of the Convention. Part C reviews the various factors, which, in the view of the lead examiners, have a bearing on the effectiveness of the measures available in Germany for preventing and detecting foreign bribery. Part D reviews the workings of the system for prosecuting foreign bribery and money laundering offences, with specific reference to features which appear to have a pronounced impact, either positive or negative, on the effectiveness of the overall effort. Part E sets forth the specific recommendations of the Working Group, based on its conclusions, both as to prevention and detection and as to prosecution. It also identifies those matters which the Working Group considers should be followed up as part of the continued monitoring effort.

The implementing legislation in Germany, the Act on Combating Bribery of Foreign Public Officials (*Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr – IntBestG*), entered into force on the same day as the Convention, 15 February 1999. The principal change introduced by the ACIB[2] was the criminalising of bribery of foreign public officials which also had the effect of making the granting of advantages that are illegal thereunder non-deductible under the Federal Income Tax Act. No indictments for violations of the ACIB have been brought since its enactment. In addition, there does not yet appear to have been a case where a tax deduction was disallowed on the basis that it represented a bribe to a foreign public official. The German authorities informed the on-site team about investigations relating to alleged violations of the ACIB pending in several public prosecution offices. Two investigations were discontinued as the facts took place prior to the ACIB's entry into force; one is most likely a fraud-related case; two other investigations are still in early stages. There is also a pending request for legal assistance which might lead to the opening of an investigation.

Germany has extensive experience in the investigation and prosecution of domestic bribery. For this reason, the examining team sought information pertaining to this experience to assist the evaluation. Where applicable, this Report has attempted to reference this experience in assessing the operation of the relevant legal structure in preventing, detecting, and prosecuting foreign bribery. However, due to the federal system in Germany this information is mainly compiled by the Länder authorities, who have prosecutorial responsibility in these matters.

German Legal Structure

Germany is a federation of 16 Länder subject to a federal constitution--the Basic Law--and federal legislation. The Basic Law provides federal exclusive and concurrent (with the

2. In addition, the EU Bribery Act (10 September 1998) implements the First Protocol of 27 September 1996 to the Convention on the Protection of the European Communities' Financial Interests and the Convention of 26 May 1997 on the fight against corruption involving public officials of the European Communities or of the Member States of the European Union, which address the bribery of EU officials and EU member states' officials.

Länder) legislative power in enumerated areas, including those that govern the operation of the legal system.[3] The Länder influence federal legislation through their participation in the Federal Council, or Bundesrat. However, the actual investigation and prosecution of the majority of all criminal offences, including domestic and foreign bribery, is conducted by the governments of the 16 Länder. Each Land is responsible for funding and administering the criminal justice system, including the police and prosecutors. The police function (public safety and crime prevention) is generally within the jurisdiction of the Land Minister of Interior, and the prosecutorial function (including police criminal investigations) is generally within the jurisdiction of the Land Minister of Justice. The Land ministers are subject to control by the Land Parliaments. The main duties of the Federal Ministry of Justice are the preparation of draft laws, participation in the federal legislative process and representing the Federal Government in its area of competence. It also takes part in discussions between Land ministries of justice or other Land authorities that may have an impact on federal legislation. The funding and administering of the revenue authority is primarily a function of the individual Land, operating pursuant to federal tax legislation. The Chamber of Accountants is a self-regulatory body responsible for the compliance of auditors with standards and professional duties. The Federal Financial Supervisory Authority (BAFin) is responsible for the supervision of credit institutions, insurance companies, investment firms and other financial institutions.

Legal persons are subject to administrative monetary sanctions, not a penal fine as determined by the Criminal Code, for the commission of offences (i.e. where a representative, etc. of the legal person commits a criminal or administrative offence on its behalf and certain conditions have been met). This is a general feature of German law that is not specific to the ACIB. The status of legal persons was a central topic of discussion with practitioners during the on-site visit, and has ramifications for a number of areas that are the subject of the Phase 2 review. This issue is addressed in more detail in part D of this Report.

Relevant Features of the German Economy

General Framework

Germany, the world's third-largest economy, is the biggest European country in terms of number of inhabitants and output. As a founding member of the European Union (EU), Germany is a strong advocate of closer European integration, and its economic and commercial policies are increasingly determined within the EU.

Germany’s domestic as well as its international development has been strongly affected by the October 1990 unification of the Federal Republic of Germany and the German Democratic Republic (GDR). The combination and application of the standards of one of the most advanced economies to an area of low productivity with an almost obsolete capital stock led to structural and financial difficulties as well as increased external vulnerability.

3. Relevant areas of federal legislation addressed in this Report include civil, criminal law and penal measures, court organisation and procedure, the legal profession, notarial and legal advice services, co-operation between the Federation and the Lander in criminal police work, the establishment of a Federal Criminal Police Office (Bundeskriminalamt), international action to combat crime, and statistics for federal purposes. Other relevant areas of federal legislation include economic affairs (including trade, industry, commerce, banking, and the stock exchange), labour relations, and measures to prevent abuse of economic power.

Foreign Trade and Investment

Germany is highly engaged in the global economy, being the second OECD exporter and the fourth OECD country of origin of foreign direct investments (FDI).

Foreign sales abroad account for over one-third of Germany's domestic output. However, the high trade surplus of the 1980s strongly contracted in the 1990s. This, in combination with the secular decline of the service balance and the deterioration of the income account resulted in a current account deficit over the last decade. It is only in 2001 that the diverging patterns in exports and imports together with an improvement in the balance of invisibles led again to a current account surplus.

The deterioration of Germany's trade balance is mostly attributable to the weakness of the East German export sector[4]. West German enterprises originate high per capita output and are major exporters.

Germany's traditional preference of serving foreign markets by products from Germany has somewhat changed with the acceleration in the second half of the 1990s of direct investments abroad. By contrast, FDI flows into Germany remain below outward investments[5]. Commercial relations are predominantly with OECD countries, which account for 80 per cent of Germany's foreign trade. Whereas the United States is the single most important country of destination of German exports, EU countries together comprised above 50 per cent of foreign trade in 2000, with exports to the EU about 55 per cent. Fifty-two per cent of Germany's imports originated from EU countries. Within the EU, leading trading partners are France, the UK, Italy, the Netherlands and Belgium/Luxembourg. Other major OECD trading partners are Japan, Switzerland and EU accession candidates Poland, the Czech Republic and Hungary. While there has been a slightly rising trend in imports from non-OECD countries over the second half of the 1990's, exports to non-OECD countries contracted and comprised less then 20 per cent of total German sales abroad in 2000. The most important non-OECD region of destination is the Far- and Middle East (7 per cent of exports in 2000), followed by Central and Eastern Europe (3 per cent of 2000 exports). Central or South American countries and Africa account both for below 2 per cent of total exports in 2000. The most important non-OECD countries of destination are China, Russia - to which Germany is the largest G7 exporter, Brazil and Chinese Taipei.

A similar picture emerges regarding direct investments, although they are even more concentrated among OECD partners, which originate and receive around 90 per cent of foreign direct investments (FDI). The investment trend in the second half of the 1990s is mostly attributable to re-positioning by German companies in relation to the EU integration[6] and their decision to place production closer to their overseas markets, in particular in North America. It is noteworthy that German direct investments also surged in certain destination countries in Asia (in particular China, Chinese Taipei, Hong Kong, Singapore), Latin America (mainly Argentina and Brazil) as well as in Israel and South Africa. German investment flows to Russia are modest.

Goods (mostly manufactured goods) accounted for over 85 per cent of all exports in 2000. Machinery and transport equipment account for over half of these exports, with

4. East German producers mostly serve local or regional markets and, apart from a few exceptions, have not established themselves in international markets.

5 . The net cumulative FDI outflow between 1992 and 2001: US$ 135.1 billion.

6 . Within the EU, the UK is a key recipient but other neighbouring countries also play an important role.

vehicles and parts, as well as machine tools and appliances representing a major part. Germany also is an important exporter of chemicals. In contrast, services account for 60% of direct investment abroad, and were almost evenly distributed between business, financial services and real estate services until 1998 when financial services began to dominate. Foreign investment in manufacturing was at around 40 per cent in most years, with major flows recorded in the petroleum sector, chemical, rubber and plastic products, and in the vehicle and other transport equipment sectors. The sectors of metal and mechanic products and of office machines recorded small investment outflows.

Many of the large enterprises[7] are well-known internationally and have branches or research facilities overseas. These firms include the carmakers DaimlerChrysler, Volkswagen and BMW, the chemical corporations Hoechst, Bayer and BASF, the energy groups E.ON and RWE, the electrical equipment manufacturer Siemens AG, the Bosch Group and Ruhrkohle AG. But the wide variety of small or medium sized industrial enterprises also participate, directly or through their relation with the bigger firms, in international trade and investment.

Business Support

State-aid by the Federal Government mostly takes the form of subsidised capital input of enterprises in the East. The larger companies generally benefit from these funds. Specific measures to help the smaller industries are bundled in a distinct programme: "Aktionsprogramm Mittelstand". The Deutsche Ausgleichsbank is responsible for all federal financial support for SME's whereas the Kreditanstalt fuer Wiederaufbau administers the program's support for foreign direct investments.

The Association of German Chambers of Industry and Commerce (DIHK) is the organisation that heads the 82 German chambers of industry and commerce[8]. It supports approximately 110 offices of the German chambers of commerce abroad as well as the offices of delegates and representatives of German business and industry in more than 70 countries throughout the world. The offices abroad provide a wide range of services for small and medium-sized firms, including assistance to compete in foreign markets.

7. About 2 per cent of industrial enterprises employ around 40 percent of the total work force in the industrial sector and account for some 51 percent of industry's total turnover.

8. All German firms within the country – with the exception of craft and trade enterprises, the independent professions and agricultural operations – are by law members of the chambers of industry and commerce.

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

Steps to Promote Awareness, and Provide Resources and Training, regarding Foreign Bribery

General Awareness Promotion by Federal Institutions

The Federal Legislature enacted the Act on Combating Bribery of Foreign Public Officials (ACIB) in order to implement the Convention, and the EU Bribery Act in order to implement the First Protocol to the Convention on the Protection of the European Communities' Financial Interests and the Convention on the fight against corruption involving public officials of the European Communities or of the Member States of the European Union, which address the bribery of EU officials and EU member states' officials. The German authorities explain that pursuant to the Constitution (Basic Law) the application of the criminal law (i.e. investigation and prosecution) is the responsibility of the Land criminal justice authorities[1]. Therefore, Germany does not have a central office at the federal level charged with the promotion or co-ordination of activities relating to the Convention or ACIB.

Federal ministries are prohibited by law from providing advice to public and private legal practitioners on individual cases as well as assistance in interpreting regulations regarding criminal law, the law of criminal procedure and the law on regulatory offences. They are, however, permitted to provide general information on laws and legislative materials, and in this respect, the German authorities indicate that officials of the Ministry of Justice have been involved in the distribution of explanatory information on the Convention, for instance, by participating in meetings with Land authorities, industry representatives and NGOs as well as contributing to law journals published since 1998.

The German authorities indicate that other federal ministries, including the Federal Ministry of the Interior and the Federal Ministry of Economics and Technology, play an important role in promoting awareness of corporate responsibility issues and anti-corruption measures in a general sense. In 2000, the Federal Ministry of the Interior published a brochure entitled "Texts on the Prevention of Corruption", which covers domestic bribery and the bribery of EU officials, and contains the text of the ACIB. Prior to the entry into force of the Convention, the federal government issued guidelines addressing corruption generally in the public administration, entitled Federal Government Directive concerning the Prevention of Corruption in the Federal Administration.

The National Contact Point (NCP) at the Federal Ministry for Economics and Technology promotes the dissemination and implementation of the OECD Guidelines for Multinational Enterprises (voluntary principles and standards for responsible business conduct). The German authorities indicate that the NCP regularly draws attention to the chapter on combating bribery at presentations concerning the Guidelines, and has established a working group in which discussions are held with civil society concerning specific issues pertaining to them. However, some civil society representatives at the on-site visit stated they had experienced difficulty in obtaining relevant information from the NCP.

1. The federal authorities further explain that pursuant to the Federal Criminal Police, under certain circumstances (e.g. upon the request of the responsible Land authority) the Federal Office of Criminal Police may carry out police duties related to the prosecution of criminal offences.

Commentary

The lead examiners encourage the authorities from the federal institutions to continue efforts to increase public awareness of the foreign bribery offence and the Convention.

Private Sector

The German authorities explain that trade unions were involved in the consultation process leading up to the legislative proposals concerning the Convention, and that several trade unions were requested to provide comments regarding the draft implementing legislation. However, the German Trade Union Federation (DGB) stated that it had had difficulty in communicating with the government about the ACIB. Some civil society representatives are under the impression that the government does not consider itself as having a public awareness function with respect to the Convention.

The companies and associations participating in the on-site review were all aware that bribing a foreign public official is now illegal in Germany. Companies with extensive internal controls designed to detect bribery, including foreign bribery, generally deal with offenders internally. A representative from the industry stated that in some business sectors, where companies have become aware of foreign bribery by their competitors, mechanisms have evolved to resolve the situation to the mutual satisfaction of all companies concerned without notifying prosecutorial authorities. Among the private sector representatives participating in the on-site review, reporting to prosecutorial authorities was viewed as an option of last resort, due to the negative publicity that would follow and the possibility of incurring further civil and possibly criminal lawsuits involving the company. However, it was felt that the possibility of prosecutorial action due to the illegality of foreign bribery payments under the ACIB makes decisive internal action regarding corrupt employees and competitors possible. It was reported at the on-site visit that some companies have established special units and internal procedures for identifying and sanctioning employees involved in illegal acts, including bribery. Many compliance codes warn employees that criminal prosecution may result from bribe-related activity.

Many businesses, including all those that participated in the on-site review, have developed codes of conduct, and due to developments in capital markets and changes in perceptions of shareholder protection, these codes are assuming growing importance. The businesses with such codes tend to be medium and large enterprises. The codes presented by representatives from the construction industry contain provisions expressly forbidding bribes by employees. During the discussion, however, officials candidly portrayed the problems presented when foreign public officials solicited payments, whether characterised as facilitation payments or otherwise. Business representatives indicated that compliance efforts need to be increased especially in light of the results of the latest perception index that was cited by Transparency International (TI) during its presentation showing that German companies were still perceived as willing to pay bribes. TI also cited another survey among top managers (which did not differentiate between bribe payments to domestic and foreign public officials) of medium and small

enterprises by Forsa (Forsa Society for Social and Statistics Analysis Ltd.)[2] revealing that 14% of managers stated "they had used bribes to obtain business".

The government maintains close links to private sector business associations that have developed guidelines regarding corporate codes of conduct. The most recent example is the German Corporate Governance Code of Conduct, issued by a government chartered commission that examined conduct of supervisory and management boards of companies quoted on the German stock exchanges. This code contains 50 individual recommendations, the focus of which is accountability to shareholders, and includes a provision which states that "members of the Management Board and employees may not, in connection with their work, demand or accept from third parties payments or other advantages for themselves or for any other person, or grant third parties unlawful advantages".

The Federation of German Industry (BDI) and German chapter of the International Chamber of Commerce (ICC) have also begun to address the issue of foreign bribery in their written recommendations. The Federation of German Industries (BDI) recently published a guide for CEOs and managing boards in industry and trade ("Preventing Corruption—BDI Recommendations), which reviews legislative measures to combat corrupt behaviour, including the ACIB, and addresses the importance of codes of conduct as well as other measures such as increased transparency in accounting and auditing[3]. In addition, ICC Germany, in conjunction with BDI, the German Association of Chambers of Commerce (DIHK), and leading companies developed a Code of Conduct in 1996 designed to address corruption issues, which may similarly be updated with more information regarding the ACIB. DIHK and the Association of the Construction Industry have also published material relating to the foreign bribery offence. ICC Germany and Transparency International--Germany (TI German Chapter) are jointly sponsoring a conference on Codes of Conduct later this year that should specifically address the Convention as part of its program.

Commentary

The lead examiners note that the use of corporate codes is important for not only increasing awareness but also for preventing employees from engaging in corrupt activities. They therefore encourage Germany to promote corporate compliance programmes not only for large companies but for SMEs doing business internationally as well. In this context, the lead examiners recommend that Germany increase its efforts to educate the private sector about the Convention and the ACIB and the importance of developing and enforcing company codes.

Prosecutors and Police

The Federal Senior Police Training Academy in Munster is responsible for the training of senior police officials at both the Land and federal level. The Academy includes training for the investigation of domestic bribery, and considers foreign bribery investigations to be similar enough to domestic bribery as to not warrant any revision to the curriculum as a result of the ACIB. The *Deutsche Richterakademie*, a body

2. The Forsa Society for Social Research and Statistics Analysis Ltd. uses computer assisted telephone inquiries and population-representative questioning by InterNet in its surveys. Regarding the poll on corruption, 504 enterprises were interviewed between 27 March and 9 April 2002.

3. This guide revises and updates the 1995 "Recommendations to Managers regarding the Fight against Corruption in Germany".

responsible for federal-wide training of judges and prosecutors, organised several meetings in 2002 in several Länder, which included issues relevant to foreign bribery, such as meetings on economic crime in general, international co-operation in criminal matters, administration of criminal justice in Europe and organised crime.

The individual Länder, which in principle have the primary responsibility for training the police and prosecution, do not appear to have undertaken ACIB promotion or training activities in this respect. All 16 Länder combined possess a total of 4964 public prosecutors, who prosecute almost all criminal law violations including corruption offences (as of 31 December 2000). The Berlin and Hesse Länder interviewed by the examiners possess specialised corruption and economic crime units, but prosecutors from these units did not cite any training program specifically targeting foreign bribery. The German authorities contend that the training in respect of the domestic offences is for the most part applicable to the offences under the ACIB.

One specialised-unit chief prosecutor noted that severe resource problems limit the activity of the unit to managing its existing caseloads, which include cases of domestic bribery. He stated that the unit operates with insufficient human resources, and although there have been a small number of staff supports from the Land ministry of justice, it remains insufficiently staffed to undertake further investigation and trial responsibilities. He cited an example where he and two other staff members alone handled a case involving approximately 100 companies and 250 suspects. One of the police representatives also cited resource constraints, stating that his unit has only half the number of staff needed and that the lack of human resources limits the ability to investigate and/or prosecute legal persons.

The German authorities point out that the experiences with inadequate resources in some of the Länder do not necessarily reflect the situation in other Länder. They indicate that the Ministry of Justice of North Rhine-Westphalia reports that in recent years it has concentrated the competence for prosecuting large and complex corruption cases in four prosecutors' offices to increase efficiency. It has also provided special training courses on, for example, the seizure and confiscation of the proceeds of corruption, and created an additional 20 posts for prosecutors specialised in corruption offences.

Since cases involving legal persons can be extremely complex, involving expertise in matters such as accounting, it would appear that the resource problems in the specialised economic crime units would have particular significance with respect to investigating and prosecuting them. This expertise can be very difficult to obtain, particularly in the absence of an investigative unit dedicated to this kind of work. In Berlin for example, this expertise is usually found in the Land cartel office, which has developed significant experience but is understaffed. The Federal Cartel Office, by contrast, has a much larger staff but is dedicated exclusively to the investigation of violations of anti-trust law, and does not appear to play a role in bribery prosecutions other than forwarding any corruption information it may come across to the prosecutorial authorities.

The German authorities state that in view of the small number of foreign bribery cases since 1999, the previous general resources available for prosecuting domestic corruption offences are also sufficient for the prosecution of cases involving the bribery of foreign public officials.

Commentary

The investigation and prosecution of foreign bribery involves complex issues in relation to, for example, legal persons, international evidence gathering and

the analysis of international transactions recorded in books and records. The lead examiners therefore consider that the effectiveness of investigations and prosecutions would be enhanced by the provision of training programmes including such issues, and recommend that Germany ensure that the issue of foreign bribery is adequately addressed within training programmes, either at the federal or Land level, which are available to the relevant members of the police and the prosecution offices that would be engaged in the investigations and prosecutions of foreign bribery.

The lead examiners are concerned that resources in some of the Länder for investigating and prosecuting corruption, including foreign bribery offences may not be adequately allocated, especially for the more complicated cases involving legal persons, and encourage the German authorities to review whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases.

ACIB Promotion and Training in the Tax Administration

The administration of tax matters in Germany is primarily the responsibility of the Länder. The Federal Office of Finance (Federal Audit Division) generally only provides assistance through its involvement in audits of companies that are considered the largest, based on economic statistical data.

A representative of the Federal Office of Finance stated at the on-site visit that the issue of bribery and bribes is a subject for examination in all relevant sectors. The Federal authorities explained that a working group in North Rhine-Westphalia is examining the issue of bribes, and a representative of the Tax Offences office in Berlin reported that a conference of tax offence investigators organised by the regional finance directorates in north and west Germany held in May 2002 addressed the relevant provisions in the Income Tax Act on the non tax-deductibility of bribe payments. A similar program was recently provided at a meeting of officers of the regional finance directorates from the whole of Germany and another one is planned for December at a seminar to be offered by the Federal Finance Academy. Tax auditors have not been specifically trained in detecting foreign bribe payments that may be disguised as deductible expenses; however, the German authorities are currently preparing special training measures in this regard.

The Federal Audit Division is currently performing audits of the largest companies generally for the period 1995 to 1999, which means that for those companies the tax examiners have not yet begun to audit the returns filed after the enactment of the ACIB in 1999. Moreover, because the statute of limitations for the foreign bribery offence is 5 years, tax examiners will not be in a position to detect foreign bribe transactions involving these companies within the relevant period as long as the time lag continues.

The tax audits of large companies with operations in more than one Länder can be problematic due to the complex nature of their structure and sometimes due to the necessity of involving more than one local Land tax investigation office. It may also be necessary to exchange information with foreign tax offices. It is not clear that sufficient resources are available to address the difficulties presented by these audits even considering that the Federal Audit Division[4] would be involved in the audits of the largest

4. The Federal Audit Division has approximately 140 civil servants/employees, of whom 119 are federal tax auditors available for conducting external company audits.

companies. For instance, in Frankfurt approximately 170 tax auditors are available to audit approximately 200 groups, which have 80 to 100 subsidiaries.

When German tax auditors begin audits for the 1999 tax year, transitional issues will emerge. Deductions that were validly taken in the 1998 tax year for foreign bribe payments may no longer be valid in the 1999 tax year although the payments may span more than one calendar or tax reporting year. In this respect, Germany published an official instruction in November 2002 which provides the tax auditors with guidance for this transitional issue as well as other issues.

Commentary

The lead examiners welcome that Germany is preparing training courses for tax inspectors that specifically target the bribery of foreign public officials. As to tax audits of large companies, the lead examiners recommend that Germany take steps to reduce the time-lag for performing these tax audits, in order that any detection of foreign bribery offences is made within the statute of limitations period for criminal prosecutions.

ACIB Awareness in Publicly Subsidised Projects--Export Credits and Aid-Based Development Financing

Hermes, Germany's export credit insurance agency provides cover for large-scale projects. In 2000, Hermes began requiring contracting parties to declare on applications for cover that the underlying contracts were not obtained through the bribery of foreign public officials. Therefore, in the event of a claim by a contracting party, Hermes may deny cover, and forfeit premiums paid, if proof of such bribery is presented to them. To date, Hermes has never invoked this clause and has not denied cover on this basis. Their representative stated that they would examine allegations of corruption that are brought to their attention.

Germany also provides investment, export, and project financing through the Kreditanstalt fuer Wiederaufbau (Credit Agency for Development or KfW), a publicly owned bank. The KfW also acts directly on behalf of the Federal Ministry of Economic Co-operation and Development (BMZ) in financing investments and project-related advisory services in developing countries. In this capacity, the German government and the KfW have implemented numerous safeguards against corruption. These include, when dealing with governments, an anti-corruption clause in the summary record of government negotiations. In the realm of procurement, KfW also includes an anti-corruption clause in financial contracts with its local partners, the project executing agencies. The executing agencies are required to obtain from each participant in a tender a commitment to abstain from corruption. KfW regularly monitors the projects it finances and uses independent auditors as well as its own financial review teams who are instructed to include corruption checks as part of their work.

When KfW detects that its procedures have been violated it can stop disbursements and seek recovery of previously disbursed funds that have been misused. KfW can also ban a particular entity from participating in a particular bid or project pursuant to which KfW has determined that the entity acted corruptly. The project executing agency will be assisted by the KfW in improving its own anti-corruption safeguards before new contracts between the KfW and the agency can be signed. However, entities that have acted corruptly may participate in future projects run by the project executing agency.

KfW works closely with the Deutsche Gesellschaft fur Technische Zusammenarbeit GmbH (GTZ) in areas of technical co-operation. GTZ is a government owned entity operating as a private enterprise with a mandate to improve living conditions in developing and transition states. GTZ has also developed numerous rules specifically targeted to prevent, detect and, where necessary, report bribery. These rules are derived from their mission statement and included in their Code of Conduct, which applies to all projects supported by GTZ. Partners, target groups, and the public are encouraged to report violations of the GTZ Code of Conduct to the GTZ integrity advisor via a designated e-mail address. GTZ stated at the on-site visit that they have co-operated with prosecutorial authorities regarding corruption matters in the past, and would forward information regarding corruption to prosecutorial authorities where they believe the information is reliable.

Commentary

The lead examiners recognise the importance of the awareness of foreign bribery in the field of export credits, aid based development financing and publicly subsidised projects, and commend the efforts of the relevant agencies in this respect.

Communication and Co-ordination of Responsibilities between the Federal Government and the Länder as well as between the Länder

Generally

Pursuant to the German Basic Law, each Land within Germany generally operates autonomously in matters of the application of criminal justice. All Länder are subject to the same penal law and rules of procedure, which are enacted at the federal level. The investigation and prosecution of corruption cases are the exclusive responsibility of the Länder. This is a function of the constitutional principle that the federal government administers only those laws for which a central administration is necessary or expedient for the entire federation. Each Land funds its own ministries of justice and interior, which are headed by political officials and contain the prosecutorial and police functions respectively.

Communication between the Federal Government and the Länder

Each Land decides independently of the federal government whether to investigate or prosecute a particular case, and is not required to notify the federal government when a case of foreign bribery comes to its attention. However, since the Federal Ministry of Justice and the Foreign Office are involved in requesting MLA from most non-EU member states, the federal government is consequently aware of cases involving such MLA requests.

The Federal Criminal Police Office (BKA), as a central body supporting the Federal and Land police in the prevention and investigation of crimes, compiles nation-wide criminal police-related analyses and statistics. The German authorities state that with respect to the bribery offences, statistical information such as the number of cases and suspects, the percentage of cases solved and distribution of locations[5] are compiled and

5. Other statistical information that is compiled includes the proportion of male and female offenders, age categorisation and the information relating to foreign offenders.

published annually. However, to date, police statistics have not registered foreign and domestic bribery cases separately. In contrast, the Federal Office of Statistics, which compiles and publishes annual statistics on the outcome of court proceedings for the offences under the Criminal Code and other important offences prescribed in other legislation, has been required to compile cases of the ACIB in an independent statistical section since 2000. However, due to the difficulties within the eastern Länder in compiling a full range of relevant data, the compiled statistics on the court proceedings only reflect the situation in the Länder of the former West Germany and Berlin.

Further statistical information on foreign bribery, including information tracking cases through the whole proceedings is not available, and would be difficult to compile at the federal level. Detailed factual and procedural information about particular cases has not been always easy for the federal government to obtain in the absence of contacting each Land separately.

Commentary

The lead examiners realise that information pertaining to foreign bribery, including statistics, is, to some extent, easily available to the federal government, and encourage that the federal government continue further efforts with the Länder in order to compile more relevant information on the foreign bribery offence (i.e. investigation and sanctions) at the federal level (see the commentary below under D.a "Germany's Record concerning Prosecutions of Bribery").

Issues relating to Differences in Administration of Criminal Justice between Länder

Under the German legal system, for the purpose of criminal investigations, public prosecutors are authorised to take investigative actions anywhere in Germany. Thus, where in the course of the investigation, a public prosecutor from one Land needs to take certain investigative measures, such as questioning witnesses or search and seizure, in other Länder, he/she can take investigative actions himself/herself in other Länder or order the police in the relevant Land to carry out necessary measures[6]. Also, the police of each Land can carry out investigation themselves in other Länder or ask for assistance from other Länder[7].

At the police level, in addition to the option of using informal co-operation procedures, the central criminal police offices (Land criminal investigation departments) established in each Land pursuant to the Federal Office of Criminal Investigation Act function as "contact points", thus guaranteeing inter-Land and federal-Länder co-operation and information sharing. Moreover, pursuant to the Federal Criminal Police Act, the BKA may carry out police duties related to the prosecution of criminal offences under certain circumstances such as the request of the relevant Land authority. In this respect, the German authorities cite the Crime Reporting Service on Corruption at the

6. Pursuant to section 161 of the Code of Criminal Procedure, "..the public prosecution office may request information from all public authorities and may make investigations of any kind, either itself or through the authorities and officials in the police fore. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office."

7. Germany cites the Agreement on Extended Competence of the Police in the Federal Länder in Criminal Prosecution of 6 November 1969 and supplementary inter-Land agreements, which regulate this issue at the police level. As of the time of this report, the lead examiners did not have the opportunity to examine the relevant provisions of these agreements.

police level[8] based on an agreement between the Länder and the Federation in 1999, according to which the Land investigation departments inform the BKA of corruption-related proceedings which are of "considerable or inter-Land significance", enabling the BKA to assemble interrelated proceedings and to convey information to relevant Länder.

On the other hand, a formal or institutional mechanism in this respect does not exist at the level of the prosecution offices. However, the German authorities believe that there is no need for formal mechanisms at the prosecution level, since, in their view, the establishment of such mechanisms could result in a delay in transferring information. They add that the personal relationship between the members of numerous specialised public prosecution offices/sections for economic crime or corruption in many Länder[9] facilitates the informal exchange of information at the prosecution level.

The police and the prosecutors interviewed during the on-site visit were satisfied that the assistance procedure works effectively, and valued the autonomy exercised by each Land in the criminal justice system. However, one prosecutor was of the view that the informal nature of exchanging information between prosecutors in the Länder has not been effective. Also, some participants in the on-site visit noted that the police sometimes handled evidence and information internally and did not seek prosecutorial input, although this cannot happen according to the law.

Currently, the federal government participates with the Land in the Federal Central Criminal Registry, concerning defendants whose sentences are final. For the purpose of criminal proceedings, it provides courts and public prosecutors from the Länder access to criminal history information.

In 1999 an inter-Land public prosecution register (Central Public Prosecution Proceedings Register) was created. It contains information about ongoing and closed investigations and is accessible to the public prosecution offices of the Länder. Pursuant thereto, public prosecutors are obligated to convey information about a case when they receive a file of investigation and about the progress or changes in the proceedings, and information is available about the reasons for not bringing charges. However, a representative from a Land justice department states that at present, there are remaining technical difficulties with this registry, and thus, it has not yet played a major role in practice. The lead examiners are of the opinion that the inter-Land public prosecution office registry was too recently established to determine its efficacy.

The German authorities do not cite difficulties with respect to inter-Land decisions concerning the appropriate venue for cases involving more than one Land. Such a decision usually depends on the nature of the case in question, and is made informally among the competent authorities from the Länder involved. If a situation were to occur where more than one Land were involved in the investigation of a foreign bribery offence, and one Land were at a resource disadvantage compared to another, it appears that there is not a formal mechanism by which investigatory or prosecutorial resources could be shared to assist that Land.

8. The Crime Reporting Service on Corruption also has as its function to study cases reported from the Länder and to produce situational reports on, for instance, problematic sectors.

9. The German authorities cite specialised public prosecution offices for economic crime/corruption in Baden-Wuerttemberg, Bavaria, Brandenburg, Lower Saxony, North-Rhine/Westphalia and Thuringia, and special sections within the public prosecution offices of certain cities and smaller Länder.

Commentary

The lead examiners recognise that inter-Land communication and co-operation for criminal investigation and prosecution have been generally effective to date. However, in light of the complexity of economic crimes, and of the diffuse nature of competence under the federal system, they feel that it is necessary to ensure that it continues to be effective in the future. Further, they believe that it would be of a great utility to share the experience of foreign bribery cases between the Länder on a nation-wide basis, as each Land gains experience in this respect. They therefore recommend that Germany continue to keep under review whether the existing mechanisms for criminal investigations and prosecutions are effective, including the sharing of experience in prosecuting foreign bribery cases. In this respect, the lead examiners commend the German authorities for developing the database registers, which should contribute to the enhancement of the inter-Land communication at the prosecution level.

Issues relating to Public Procurement

In the area of public procurement, each Land has its own offices and procedures. Approximately 32,000 procurement offices exist in the 16 Länder in Germany. A few Länder and municipalities have established registers of unreliable companies (e.g. Hesse). However, at this time, procurement authorities in one Land cannot access information concerning bribery activity of companies bidding in their tender, that may be available to another Land.

Plans for a federal register, or blacklist, of unreliable companies in the procurement context were recently approved by the Bundestag but not adopted by the Bundesrat (the legislative body that represents the interests of the Länder at the federal level). The proposed register was a first attempt to disseminate the names of unreliable companies to procurement offices throughout Germany. It is expected that the draft legislation will be introduced again at the next legislative session.

The Federal Ministry of Economics and Technology, which is responsible for the proposed federal corruption register, consulted the Länder before advancing with its proposals. Some of the Länder and/or municipalities that already have their own corruption registers wish to maintain their registers after the proposed federal register becomes operational. However, the Federal Government is of the view that there is no need to maintain Land/municipal registers after the introduction of the federal register. The Federal Government intends to continue consultations with the Länder as this initiative proceeds (see further discussion of the federal corruption register on page 42).

Commentary

With respect to public procurement, the lead examiners believe that the establishment of a federal corruption register would be an effective tool to fight corruption. They note the Federal Government's intention to continue consultations with the Länder that have established registers of their own and encourage further efforts for bringing this issue forward.

Reporting Obligations

Auditors

Auditors are legally obligated to notify the legal representative or supervisory board of the company whose financial statements they audit of any "irregularities or violations of statutory provisions or facts that constitute serious violations of the law …by the legal representatives or employees", pursuant to section 321 of the Commercial Code (HGB). Auditors participating at the on-site visit stated that facts indicating foreign bribery would be included in this description as this constituted a criminal offence directly affecting the ongoing actions of the company. Neither the auditors nor company management have an obligation to report legal violations to prosecutorial authorities. In addition, the auditor's duty of confidentiality might further discourage or prevent such reporting. Instead the audited companies' supervisory board must address all issues presented by the external auditor to the auditor's satisfaction and address the audit report at the shareholders' meeting. Auditors at the on-site visit stated that if the audited company took no remedial actions concerning issues raised by the audit they would withhold certification of the financial statements or quit the audit for the company. An auditor's refusal, and reasons for refusal, to certify the financial statements accompanies the publication of the financial statements and carries wide ramifications for the relations of the company with capital markets. The auditor's report itself is not published. During the on-site visit, one such case was cited as an example, where the auditor quit after discovering a large portion of the company's revenue turned out to be fictitious.

An exception to this procedure is contained in the provisions governing audits of financial institutions, financial service providers, and insurance companies, which are regulated by the Federal Financial Supervisory Office (BAFin). Auditors of these companies are required to notify BAFin of material legal violations. BAFin is obligated to report facts indicating corruption to the prosecutorial authorities, although officials of the institution recall no instance of this occurring in recent years.

The new Act on Combating Money Laundering, enacted in August 2002 (see section on Financial Institutions and the Reporting of Suspected Money Laundering below), [implementing an EC directive (2001/97/EC)] creates a new reporting obligation for auditors when they identify facts that lead to the conclusion that a financial transaction serves, or could serve, the purpose of money laundering as defined in section 261 of the Criminal Code.

Independence of Auditors

All authorities participating at the on-site visit emphasised the importance of independent external audits to monitor the financial activities of businesses. The prohibitions from participating in audits under section 319 of the Commercial Code were recently strengthened, and have also been codified in binding form by the relevant public professional organisation pursuant to section 24 of the Professional Charter of the *Wirtschaftsprüferkammer*[10]. Under section 319(2) an auditor (including an auditing firm) or certified accountant cannot participate in an audit if he/she or a person with whom he/she jointly practices his/her profession "has received in each of the last five years more than 30 per cent of his/her total income from examining and advising the corporation to be examined and enterprises in which the corporation to be examined owns more than 20

10. Germany states that similar codification is expected under the Law Regulating the Profession of *Wirtschaftsprüfer*.

per cent of the shares…". Section 319(2) also requires the rotation of the audit manager where he/she has signed the certification of an officially quoted company six times in a ten-year period. The Corporation Law (AktG) requires auditors to examine whether companies listed on the exchange observe the provisions of the voluntary German Corporate Governance Code. Furthermore, the rules regarding quality assurance and their implementation have been under peer review since January 2001 pursuant to the Law Regulating the Profession of *Wirtschaftsprüfer*.

Although Section 332 of the Commercial Code sanctions "an auditor (...) who (…) conceals significant circumstances in the audit report or issues a substantively false certification of the financial statements", the German authorities advise that they are not aware whether this penalty has been imposed to date.

Commentary

The lead examiners feel that the effectiveness of the reporting obligation of auditors could be enhanced by obligating the legal representative or supervisory board of the company, to which the auditor already has a duty to report "serious violations of the law", to report suspicions of bribery to the competent authorities, which may be a general issue for many Parties. In addition, they are of the view that its effectiveness could also be enhanced by monitoring application of the existing sanctions for the non-reporting of serious violations of the law to the legal representative or supervisory board.

Tax authorities

Pursuant to section 4(5) of the Income tax Act, tax authorities are now obligated to provide information regarding suspected bribery payments to the public prosecution office or competent administrative office.

Commentary

The lead examiners feel that due to the newness of the obligation of tax authorities to report suspicions of bribery, and the time lag in examining tax returns (which means that tax returns from 1995 to 1999 are currently being examined), they are not in a position to comment on its effectiveness. They therefore recommend revisiting this issue once the German tax authorities have had sufficient time to examine the tax returns for the relevant years.

Financial Institutions and the Reporting of Suspected Money Laundering

In August 2002, the Act on Combating Money Laundering was enacted.[11] The new Act amends the Money Laundering Act governing the reporting responsibilities of financial institutions regarding suspicions of money laundering, by adding new categories of persons and bodies subject to the reporting obligations and providing that the Federal Criminal Police Office (BKA) shall support the Federal and Land police forces in the prevention and prosecution of money laundering and the funding of terrorist organisations. The BKA shall function as a "central agency" (financial intelligence unit) within the meaning of section 2(1) of the Federal Criminal Police Act. The new Act also obligates the BKA to compile statistics on suspicious reports. The German authorities

11 . The German authorities provide that the new Act complies with the regulations in Article 1, No. 2 of Directive 2001/97/EC of the European Parliament and the European Council of 4 December 2001 on amendments to Council Directive 91/308/EEC on preventing the use of financial systems for the purpose of money laundering.

comment that one of the purposes of the new Act is to reduce bureaucratic hurdles in the system of reporting.

Since the coming into force of the Money Laundering Act in 1993, statistics have been compiled annually concerning the number of suspicious transaction reports. In 2000, 4,401 suspicious transactions were reported, 7,308 in 2001, and 4,850 in the first six months of 2002. The lead examiners note the increase in reporting, but are unable to make other inferences from the information. The obligation to compile statistics under section 5(1) of the new Act requires the BKA to compile statistics that contain depersonalised data on the number of reports, individual predicate offences and the manner of their processing by the BKA. Section 5(1) also requires the BKA to regularly inform all persons subject to the reporting obligation about trends in money laundering. The lead examiners believe that these new obligations will result in an improvement in the informational value of the statistics on money laundering reporting.

Pursuant to section 11 of the new Act, almost all kinds of institutions, companies and individuals are covered by the obligation to report suspicious transactions. This includes lawyers, auditors, tax consultants, real estate brokers, gambling casinos in respect of customers buying or selling chips worth 1,000 Euro or more, and other "business persons in so far as they are carrying out their trade or business and are not subject to the obligation of identification pursuant to section 2". Section 11 also covers "persons who administer another person's assets against payment in execution of their administrative duties" in certain circumstances. Furthermore, money remitters and remittance services were already subject to a reporting obligation under section 11 of the Money Laundering Act, in connection with section 1(2)(4) of the same Act and section 1 (1a), second sentence, N° 6 of the Banking Act.

Section 11(3) provides that lawyers, legal advisers, etc., as well as qualified auditors, certified accountants, tax consultants and agents in tax matters are not obliged to make a report if the suspicion of money laundering is based on information on a client that was obtained in the course of providing legal advice to the client or representing the client in court. Germany states that, with respect to lawyers and legal advisors, in line with the provisions of the EU Money Laundering Directive (2001/97/EC, in particular recital 17), lawyer-client privilege is only lifted by this obligation where the lawyer or legal advisor acts as nothing more than a financial intermediary, or where he/she knows that the client is seeking legal advice for the purpose of money laundering. However, with respect to auditors and tax consultants, etc., the lead examiners believe that, in the absence of clear guidelines, it would be difficult to determine whether the relationship with a particular client was in whole or partly one of a legal advisor, where such a person's duties overlap with providing legal advice.

Previously, under section 11 of the Money Laundering Act, bodies and individuals covered by the reporting obligation were required to notify the relevant prosecutorial authorities in the Länder of suspicions of money laundering.

Under section 11 of the new Act, suspicions of money laundering shall continue to be reported to the "competent prosecutorial authorities", but a copy (either orally, by telephone, telex or electronic data communication) of the report shall now be forwarded to the BKA without delay. Financial services institutions have the additional obligation to forward a copy of each report to the BAFin[12]. Pursuant to the new Act, the

12. See side note 31 of the official announcement of the Federal Banking Supervisory Office concerning measures taken by financial services institutions on combating and preventing money laundering (30 December 1997).

responsibilities of the BKA include collecting and analysing suspicious transactions reports transmitted pursuant to section 11, informing the federal and Land prosecution authorities of information concerning the reports and publishing an annual report. At the time of preparing this report, the Egmont Group of Financial Intelligence Units had not yet identified the BKA as an agency meeting the Financial Intelligence Unit (FIU) definition.

The German authorities indicate that in 1999 assets totalling approximately 50 million-DM were confiscated on the basis of suspicious transaction reports. It is their view that this figure should increase due to the new role of the BKA pursuant to the new Act.

Germany informed the lead examiners that BAFin published a typology of money laundering in 1998 for the credit institutions and have supplemented it on the basis of the Financial Action Task Force's (FATF) typology reports[13]. The purpose of the typology is to provide guidance in detecting money laundering activities, and should assist institutions in designing systems for detecting money laundering and providing training courses for sensitising staff to these issues. Pursuant to section 11(8) of the new Act, in order to combat money laundering and the funding of terrorist organisations, the Federal Ministry of the Interior and the Federal Ministry of Finance are authorised to issue ordinances having the force of law (with the consent of the Bundesrat) for the purpose of "defining individual typified financial transactions deemed to be suspicious". Persons and entities subject to the reporting obligation would be required to report transactions resembling the typologies described therein.

Neither the Money Laundering Act nor the new Act on Combating Money Laundering establishes sanctions for the failure to report suspicions of money laundering. Instead, section 17 of the Money Laundering Act provides administrative sanctions (a fine up to 100,000 Euro) for informing the customer or a party other than a public authority of the filing of a report. In addition, section 261 of the Criminal Code provides for an offence of reckless money laundering[14] for which the penalty is up to 2 years of imprisonment or a fine, and section 258 establishes the offence of the obstruction of punishment, for which the penalty is up to 5 years of imprisonment or a fine. In addition, the German authorities state that administrative sanctions pursuant to the Banking Act (e.g. dismissal of managers, revocation of permission) are available for serious cases of non-reporting and BAFin applied them several times.

Commentary

The lead examiners welcome the enactment of the Act on Combating Money Laundering and believe that the BKA could represent an important measure for enhancing Germany's capability for detecting and preventing money laundering involving foreign bribery as the predicate offence. Due to the newness of the legislation, the lead examiners are not in a position to evaluate the effectiveness of the measures thereunder, and therefore recommend follow-up of their application once Germany has had sufficient time to put them into practice.

13. Germany indicates that in 2000 the BAFin distributed a special anti-corruption announcement to further supplement the typologies.

14. The German authorities indicate that in 2000, 14 sentences were passed in respect of the offence of reckless money laundering. They do not indicate whether any of these offences involved the failure to report of financial institutions.

In addition, the lead examiners recommend that the German authorities clarify the reporting obligation on auditors and tax consultants for the purpose of assisting them in determining whether the relationship with a particular client is one of a legal advisor. Such clarification could be made by, for instance, issuing guidelines or encouraging self-regulatory bodies to do so.

Members of the Public Administration

The German authorities explain that members of the public administration are generally obligated to report suspicions of corruption (specifically including sections 331 to 338 of the Criminal Code which include bribery) of which they learn in the course of performing their official duties, including foreign bribery, to their administrative superior[15], rather than to prosecutorial authorities. Reporting directly to the prosecutorial authorities may be considered a breach of official secrecy and may be subject to disciplinary measures unless the report is "well founded", which, according to representatives participating in the on-site review may be the case where the person reported to be committing an offence is clearly guilty or found guilty. Pursuant to the Federal Government Directive concerning the Prevention of Corruption in the Federal Administration, the administrative superior receiving a report of possible corruption is obligated to transmit the report through his/her relevant supervisor to his/her administrative supervisor, generally the person who is the head of the administration, who is in turn obligated to report to the prosecutorial authorities. The German authorities state that, therefore, reporting to the prosecutorial authorities is allowed at the level of "office management". The reporting employee is generally allowed to report to the administrative level above that of his superior's only in the event his immediate superior does not act on his report.

The lead examiners are concerned that this system of reporting might not work effectively due to a breakdown in the chain of reporting from the person who initially makes the report to the ultimate prosecutorial authority who is intended to receive the report. They are also concerned that the system would be of little utility where the person involved in the bribery act was the employee's superior.

The Federal Directive on Corruption of June 17, 1998 contains no guidance on measures to protect public sector employees reporting corruption from retaliation in the workplace[16]. The Directive does provide for the creation of the post of a corruption contact person, who may act as a liaison between someone with knowledge of corruption and office management, may provide advice through seminars and presentations, and may

15. Members of the public administration can be compelled to testify before the Federal Court of Audit (and Land courts of audit where applicable), which audits the financial administration of the federal public service. No testimony so obtained may be used against the testifying witness in a legal action, and the Court is obligated to insure confidentiality of witnesses unless this confidentiality is waived by the witness. The Federal Court of Audit reports its findings to the Bundestag. In some cases of economic crime, the courts of audit have provided limited information directly to the public prosecutors.

16. The German authorities submit that the following laws and principles are relevant to the protection of public sector employees reporting corruption: 1. The Law Regulating the Rights and Duties of Civil Servants, which contains the general duty of care and welfare maintenance pursuant to which superiors must guarantee the necessary and appropriate protection of employees who have reported suspicions of corruption either through official channels or to the corruption contact person (e.g. guarantee of anonymity). 2. The principle of tenure, professional identity and the right to suitable employment, pursuant to which a civil servant who makes a report (even one that proves to be unfounded) is protected from arbitrary measures on the part of his/her employer. 3. Restricted rights of termination of a contract in the public sector.

assist in public relations. Information provided to the corruption contact is not confidential, and the contact person must disclose all facts to office management, including information about who reported the case.

The German authorities explained that an Ombudsman has been established by some Länder and municipalities, and most notably by Deutsche Bahn, the privatised national railway. The Ombudsman concept is new to German law and business structure but appears already to have produced positive results with Deutsche Bahn, where substantial increases in the numbers of reports of corruption have followed the creation of the office. The example was cited positively by the Federal Ministry of Economics and Technology in remarks during the on-site visit. The Ombudsman is empowered to keep reports confidential and conduct limited investigations into matters of corruption. This office is outside the existing management structure and so retains a degree of independence in its actions and conclusions. Employees with knowledge of corruption are encouraged to report to the Ombudsman. This office makes recommendations to management which, under certain circumstances, must be implemented. The Ombudsman may also act as the interface between the Deutsche Bahn and prosecutorial authorities, although no information has been provided as to how often this has happened.

Another way to encourage witness reporting, is to create a legal obligation on government employees to report corruption to an anti-corruption unit. This is the approach adopted by the Bundeswehr (Ministry of Defence) to combat previous bribery problems within the ministry. The Bundeswehr created such a unit (ES) with internal investigative and preventive powers. Bundeswehr employees are required to report corruption to ES and/or their superiors. The ES reports directly to the executive group of the Ministry and represents the ministry in co-operating with prosecutorial authorities. This appears to have contributed to a reduction in corruption. The ES also participates in decisions to exclude companies from being awarded government contracts administered by the Bundeswehr, decisions to impose contractual penalties, and decisions regarding conflicts of interest. The ES may question contractors and if not satisfied with their responses recommend that they be blacklisted.

Commentary

The lead examiners recognise that this issue has more relevance for domestic bribery but that there are instances when certain government agencies participate in foreign transactions involving large amounts of funds. The lead examiners recognise that the creation of the office of an Ombudsman, as has been done by some Länder and municipalities, the creation of anti-corruption units within the various government agencies, as has been done by the Ministry of Defence, or the establishment of a hotline, could be an effective approach to facilitate the members of public administration to report bribery cases without being at risk of breaching official secrecy, and therefore recommend that Germany consider creating any of such mechanisms for all members of public administration. The main advantage of these approaches is that employees are more likely to report bribery knowing that their reports will be confidential.

The lead examiners emphasise that the effective investigation and prosecution of foreign bribery is dependent on the reporting of relevant information to prosecutors from all sectors of society and public administration, and therefore encourage German authorities to consider taking appropriate measures, as discussed above, in order to facilitate the effective transmittal of such information.

Effectiveness of Money Laundering and Accounting Offences

It is recognised that bribery cases are often detected through the investigation and the prosecution of money laundering and accounting offences. Therefore, the effectiveness of these offences, including their coverage and the level of sanctions, are discussed below in light of whether they are sufficiently effective to contribute to the detection of foreign bribery.

Money Laundering Offence

The German authorities informed the lead examiners of a few cases involving bribery and money laundering that are currently at the investigative stage. In one case, the suspicion of bribery and money laundering was detected through the reporting of suspicious money laundering transactions. Furthermore, the German authorities have compiled the following statistics (which do not identify the relevant predicate offence) on convictions for money laundering in the Länder of former West Germany and East Berlin:

- In 1999, 51 persons were convicted and prison sentences of between 5 and 15 years were imposed in two cases (in conjunction with other offences).
- In 2000, 82 persons were convicted, of whom 36 were given a prison sentence of which terms of between 2 and 5 years were imposed in three cases.

The money laundering offence under section 261 of the Criminal Code applies where the predicate offence is bribery of a domestic or foreign public official. A significant exception to the offence is the bribery of a domestic[17] or foreign Member of Parliament.

In addition, there is a defence where the offender voluntarily reports the money laundering transaction to the competent authorities before the authorities discover the offence, which is aimed at encouraging the self-reporting of money laundering transactions in order to facilitate their detection. The German authorities state that in order to apply this defence, the full extent of the offence should be reported to the competent authority. No example where this defence has actually been used has come to the attention of the German authorities.

Although the failure to include the bribery of a foreign Member of Parliament as a predicate offence does not constitute violations of section 7 the Convention, the lead examiners are concerned that this factor could be an obstacle to the effective detection of bribery involving foreign Members of Parliament.

Commentary

The lead examiners are unable to draw conclusions at this time about the effectiveness, etc. of the sanctions imposed in practice for money laundering offences where the predicate offence is bribery from the statistical information provided by the German authorities. Moreover, in the absence of information on reported cases, the lead examiners have difficulty commenting on the extent to which the exception to money laundering where the predicate offence is bribery of a foreign Member of Parliament could undermine the effective detection of foreign bribery. Therefore, it is recommended that the Working Group follow-up the application of sanctions for the

17. The offence of bribery of a domestic MP under section 108e of the Criminal Code only applies where bribe is made in respect of voting by the MP.

money laundering offence as well as whether the money laundering offence is sufficiently effective to contribute to the detection of foreign bribery, as litigation evolves.

Accounting Offences

The German accounting regulations are broadly designed and many of the largest companies already use the Generally Accepted Accounting Principles (GAAP) standards because they list on United States securities exchanges. Pursuant to EU directives, International Accounting Standards (IAS) for audited financial statements of companies quoted on German stock exchanges will officially come into effect in 2005. The lead examiners were also informed that the German Institute of Auditors and the German Accounting Standards Committee are currently incorporating the international standards into their standards. This will help ensure that audited companies that do not list on German exchanges do not treat financial transactions substantively differently than those using international standards.

The consolidation of financial statements (required by IAS 27) by a parent company is intended to permit a fair and true view of the financial condition and operating result of a business group (i.e. a group of enterprises, including foreign subsidiaries, under the control of a parent). This accounting method is very important from the point of view of detecting and preventing foreign bribery because it is easier to conceal cases where subsidiaries have been used as intermediaries or the recipients of the proceeds of bribery where consolidation does not occur. For this reason, it is notable that there is no consolidation requirement in the following situations: 1) when the parent exercises economic control or decision-making authority but owns below 50 per cent of the subsidiaries' shares; 2) when the subsidiary is involved in a different activity than that of the parent company; and 3) when certain exceptional circumstances occur. Exemptions notably apply where the parent and subsidiary combined, for two consecutive balance sheet dates, meet two of the following three conditions: assets under 16.5 million Euro, net sales under 33 million Euro, and not more than 250 employees. Other combinations of these figures in smaller amounts can also trigger exemptions from the consolidation requirement. The German authorities state that following the proposal of the European Commission (28 May 2002) to amend the EU Directive on consolidated accounts, Germany intends to review its law with a view to extending the requirements for the consolidation of financial statements.

Further, where financial statements are consolidated, parent corporations are not legally obligated to ensure that their foreign subsidiaries maintain their internal books and records in accordance with German legal standards. The German authorities provide that it would not be possible to introduce a statutory obligation for the foreign subsidiaries of German companies to apply German accounting standards due to the excessive extraterritorial effects of such a measure. Furthermore, they state that in practice parent companies in Germany tend to require that their foreign subsidiaries use the same accounting standards as the parent in order to facilitate the preparation of consolidated accounts.

A key feature of German policy on small businesses is that small companies are subject to simplified accounting standards pursuant to EU directives, and are exempted from external audit requirements in order to minimise the burden on their resources. However, the lead examiners note that this means that small companies with significant international operations and business activities would not be legally required to submit to

an external independent audit. The lead examiners also note that this exemption is not specific to Germany.

Accounting offences (criminal or administrative) are prescribed under the Criminal Code (section 283b), the Commercial Code (sections 331, 332 and 334), the Stock Corporation Act (sections 400 and 403), the Act on GmbHs (section 82), the Act on Co-operatives (sections 147 and 150) and the Disclosure Act (sections 17 and 18). The offence under the Criminal Code applies only where certain conditions, such as the insolvency of the company, have been met. The German authorities point out that, on the other hand, the accounting offences under the other statutes do not contain such a requirement. The German authorities could not cite examples where any of these accounting offences had been applied to either domestic or foreign bribery.

The German authorities indicate that the question of strengthening the criminal law on accounting violations, including the criminalisation of reckless falsifications of accounting documents, is currently under discussion.

Commentary

In the absence of examples of the application of the accounting offences, the lead examiners are unable to comment on their effectiveness, including the practical implications of the requirement of insolvency in respect of the offence under the Criminal Code, and therefore recommend a future assessment when Germany has had adequate time to compile the relevant information. In this regard, the lead examiners welcome that Germany is considering strengthening the accounting offences. The lead examiners also welcome that Germany is considering strengthening the requirements for consolidated financial statements.

Whistle-blower/Witness Protection and Investigative Powers

Protection of Whistle Blowers

There is no specific legislative protection of whistle-blowers under German law. Representatives from civil society, particularly the DGB, cite the absence of legal protection for whistle blowers as the biggest obstacle to the reporting of bribery offences to authorities. DGB believes that until its members are protected by a comprehensive legislative system, they will be reluctant to report bribery. DGB feels these protections should focus initially on issues affecting the workplace environment, so that all members of the business entity understand that the reporting of bribery will not result in retaliation.

The German authorities state that regardless of the absence of specific legislative protection for whistle-blowers[18], existing labour law provisions and the Constitution provide some protection. They also cite some case law where these laws have been applied to the involuntary dismissal of an employee. The German government will be examining the issue of whether specific legislation is required in this regard.

Witness Protection

The Code of Criminal Procedure provides certain measures for the protection of witnesses, including the disclosure of limited personal information at trial, video-taping

18. With respect to reporting of suspected money laundering transactions, entities subject to the reporting obligation are not liable for a breach of a duty of confidentiality pursuant to section 12 of the Money Laundering Act, unless the report was intentionally or negligently made in error.

testimony, and questioning by a commissioned judge. If the life of the witness is "at risk" the public may be excluded for the duration of the main proceedings, and for the period of his/her testimony the accused may be ordered removed from the courtroom. Where the risk to the witness is high, police protection schemes are available.

In exceptional cases, prosecutors may promise confidentiality to a witness where the information provided would solve prior crimes or prevent the commission of crimes that would lead to serious damage to the public. A Land justice department official informed the lead examiners that the exceptional measures, such as keeping a witness' identity secret, have only been used in relation to organised crime.

Investigative Powers

The German authorities state that police and public prosecutors may use search and seizure, mail confiscation, and undercover agents, in the investigation of economic crime and corruption cases. They also provide that acoustic surveillance is available for investigating domestic and foreign bribery. The interception of communications is available for offences such as murder, manslaughter, extortion, robbery, drug offences and money laundering but not for bribery. One Land justice department official expressed his view that the interception of communications would be a useful investigative measure if it becomes available for bribery offences.

The Federal Ministry of Justice has commissioned the Max Planck Institute for Foreign and International Criminal Law to undertake a study on the efficiency of monitoring telecommunications pursuant to sections 100a and 100b of the Code of Criminal procedure and other investigative measures. In the context of this study, consideration will be given to whether it is advisable to expand the categories of offences for which the interception of communications should be available. Completion of the study is expected some time in 2003.

Commentary

The lead examiners welcome the German initiative to consider whether legislation specifically concerning the protection of whistle-blowers would be appropriate. Additionally, they welcome the possibility of extending the application of investigative measures. They believe that, due to the highly covert nature of foreign bribery transactions, various investigative tools, such as the interception of communications, where used with due consideration for the protection of privacy rights of individuals could enhance the ability to detect the foreign bribery offence.

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

Germany's Record Concerning Prosecutions of Bribery

Since 2000, the statistics on conviction published by the Federal Statistical Office (provided thereto by the Land authorities) have included criminal proceedings regarding offences against the ACIB and the EU Bribery Act. During that same year, no criminal proceedings regarding offences under either of these acts was pending before any court. With respect to domestic bribery offences, for the year 2000, statistics compiled by the German police authorities disclose that 5,223 cases involving corruption offences under sections 108e, 299, 300 and 331-335 of the Criminal Code[1] were recorded, and that 4,593 persons were suspected of having committed corruption offences[2]. In the Länder of former West Germany and Berlin, 169 were convicted of the active domestic bribery offence (section 334, Criminal Code) and 12 of the "especially serious offences of active and passive domestic bribery" (section 335) in 2000. These figures do not include cases where other more serious offences are also involved[3]. Since Germany compiles statistics at the police and the court level, statistical information on the disposition of cases at the prosecution level is not available.

In order to assess whether the bribery allegations reported to the police have been adequately investigated, prosecuted and convicted, it would be misleading to compare the aforementioned figures on the number of recorded cases or suspected persons to the number of convictions for the following reasons: (i) categories of offences covered by the statistics for convictions and suspicions are different [4]. (ii) The statistics on recorded cases and suspected persons refer to cases in the entire state of Germany, whereas those on conviction only refer to the Länder of the former West Germany and Berlin. (iii) The reported cases in a particular year were not necessarily prosecuted in the same year.

With respect to statistical information in a specific region, statistics of the Munich I Public Prosecutor's Office, Anti-Corruption Division, since its establishment in 1994 to September 2002, indicate that, prosecutions for "corruption" offences, including fraud, anti-trust violations, etc., resulted in 683 convictions[5] and 2 acquittals (see Annex II). It is also reported that more than 50% of the suspects involved in the cases which were received and investigated by this Division received a conviction during this period.

1. These offences are: active bribery of Members of Parliament (section 108e), active and passive private to private bribery in business transactions (section 299), passive domestic bribery not involving breach of duties (section 331) and involving breach of duties (section 332), active domestic bribery not involving breach of duties (sections 333) and involving breach of duties (section 334), and especially serious offences of active and passive domestic bribery (section 335).

2. These figures were taken from the Police Statistics on Crime (*Polizeiliche Kriminalstatistik*).

3. These figures and information were provided by the Federal Ministry of Justice.

4. The number for the foreign bribery offences in the police statistics (i.e. recorded cases and suspected persons) are recorded under the corresponding domestic bribery statutes whereas statistics on convictions record foreign bribery separately from the domestic. Moreover, although Germany compiles statistics on investigations as well as on convictions for each section of the Criminal Code and other criminal statutes on corruption, the relevant police statistics on sections 334 and 335 (which correspond to the court statistics) have not been provided.

5. Imprisonment sanctions were a total of 593 years.

At present, statistics are not compiled on the imposition of the administrative fine for legal persons for bribery offences. As of 1 January 2003, statistics on administrative fines of more than 200 Euro imposed on legal persons and unincorporated firms under the Administrative Offences Act will be entered in the Central Trade Register. However, these statistics will not be broken down according to the type of offence.

Commentary

The lead examiners believe that information on investigation of the foreign bribery offence for both natural and legal persons, as well as on sanctions of the foreign bribery offence for both natural and legal persons is necessary for future assessment. They therefore recommend that Germany compile such information, including in respect of former East Germany, at the federal level. They note that, if available, information on the disposition of foreign bribery cases at various stages of the criminal proceedings could be useful for assessment, but recognise that the necessity of such information could be reviewed at a later stage on a horizontal basis.

Effectiveness of the Administrative Liability of Legal Persons for the Foreign Bribery Offence

Conclusion of the Commission on the Reform of the Criminal Law Sanction System not to Establish Criminal Liability

In January 1998, the Federal Minister of Justice set up the Commission on the Reform of the Criminal Law Sanction System to review the system of criminal law sanctions including whether to introduce criminal corporate liability[6]. At that time, the legal policy debate in Germany did not favour the introduction of criminal corporate liability[7]. In its final report in March 1999, the Commission recommended not to introduce corporate criminal liability in light of the absence of such an obligation in an international agreement and its opinion that no practical reason therefore had been established. Further, the Commission believed that any improvements to the legal situation would be outweighed by the difficulties relating to its introduction. In the view of the Commission, the existing measures which consist of administrative fines under the Administrative Offences Act and other measures, including criminal seizure and forfeiture, additional administrative sanctions (e.g. prohibition from trade, liquidation of the company) and civil compensation, had effectively addressed the issue of corporate responsibility, and the standards to attribute liability to legal persons are sufficiently broad. The German authorities explain that related issues, such as the application of prosecutorial discretion and the provision of MLA were not discussed in detail by the Commission since it was unanimously felt that their application had not posed any difficulties.

The issue of corporate liability was mainly discussed in meetings held by a subgroup set up by the Commission (Working Group on the Liability of Legal Person). The Working Group met three times before submitting a report to the Commission, which in turn discussed this issue in one of eleven meetings. The Working Group was composed

6. Corporate liability was one of the fifteen issues discussed by the Commission.

7. As a related initiative, in 1998, a bill introducing corporate criminal liability was submitted to Bundesrat by the Land of Hesse, which was later withdrawn. Also, Bundestag debated the issue in response to a question from the Social Democratic Party. Furthermore, in 2002, an interdepartmental working group on anti-corruption of the Land of North-Rhine/Westphalia independently reviewed this issue, which resulted in a recommendation to amend the present law, but not to introduce corporate criminal liability.

of six members who represented the Federal Ministry of Justice, one Land ministry of justice (although neither prosecutorial authorities nor members of the judiciary were directly involved), German industry, private practitioners and academia. The Commission was composed of eleven to twelve members, including four prosecutors (one from the Federal Public Prosecutor's Office) and one judge, in addition to representatives from the federal and some Land governments, private practitioners and academia.

Bribery Offences Involving Legal Persons

Germany establishes the liability of legal persons, including liability for the foreign bribery offence, under the Administrative Offences Act. The Act provides not only administrative fines for legal persons but also sanctions for administrative offences committed by natural persons. Administrative offences cover a wide variety of subjects, including the contravention of traffic regulations, environmental violations and certain anti-trust violations, and are in principle sanctioned by the relevant administrative agencies, unless the act also constitutes a criminal offence and thus only being subject to prosecution for the criminal offence.

Non-Criminal Nature of the Liability

Number of Cases

During the on-site visit, the lead examiners were informed by the representative from the Berlin Senate Justice Department (a former prosecutor) and a prosecutor from Frankfurt[8] that administrative fines have rarely been imposed on legal persons for corruption offences. Also, the judges from the Commercial Crime Court in Frankfurt (i.e. specialised division for economic crimes), which has dealt with 40-50 domestic bribery cases since its establishment in 1995, stated that they have had no cases against legal persons for economic crimes, although they knew of a few tax fraud cases in respect of other divisions.

However, the Federal Ministry of Justice informed the lead examiners that administrative fines against legal persons have been frequently imposed in other fields such as anti-trust, tax evasion and environment, and in some jurisdictions it has been applied to bribery more frequently than in Berlin or Frankfurt. For instance, the Munich I Public Prosecutor's Office, Anti-Corruption Division (Division XII), one of the offices most actively involved in prosecuting corruption offences, prosecuted 122 legal persons for corruption cases, including anti-trust violations[9], fraud, etc., which resulted in the imposition of administrative fines, since its establishment in 1994 to September 2002[10]. During the same period, 683 natural persons were convicted of such offences in the same jurisdiction[11] (See the discussion below under "Monetary Sanctions". Also, see Annex II for detailed statistical information). Concerning the jurisdiction of the main public prosecution service in Bochum in the Land of North-Rhine/Westphalia, the German

8. Berlin and Frankfurt establish specialised prosecution units for corruption. Other Länder/municipalities also establishes specialised unit for corruption or economic crimes.

9. Cases of anti-trust violations by large companies are normally dealt with by the Federal Cartel Office, thus not included in these figures.

10. From 1999-2002, the numbers of cases (on administrative fines for legal persons for such offences) per year were as follows: 11 cases in 1999, 12 cases in 2000, 6 cases in 2001, and 2 cases in 2002 (as of September 2002).

11. However, it would be misleading to simply compare these two figures (i.e. the number of cases for natural and legal persons), as the prosecutions for natural and legal persons do not necessarily cover the same cases/scope.

authorities cited—as examples— 3 cases of administrative fines for legal persons imposed for bribery, fraud and agreements in restriction in competition (the statistical year for these 3 cases is not clear[12]).

The lead examiners note that, in some jurisdictions, administrative fines are imposed on legal persons for bribery or similar economic crimes more frequently than in others. However, they have difficulty drawing further conclusions from the statistics in the absence of overall information such as the number of reported cases, the type of offences and the size of the companies involved. In particular, since the number of cases in Munich I area includes anti-trust violation cases, in which the Land Cartel Office takes part in the prosecutions, the lead examiners are uncertain how many of these prosecutions involved bribery offences (however, the statistical information shows that since 1999, in 2 cases out of 31 proceedings, administrative fines were imposed on legal persons by the Land Cartel Office for illegal bid rigging).

The German authorities point out that the low number of administrative fines in some jurisdictions does not necessarily indicate an overall low number of sanctions for legal persons in practice, since the forfeiture of proceeds or the monetary sanction of replacement value (sections 73 and 73a of the Criminal Code) against legal persons (as a third party) is available, in the course of proceedings against the natural person. However, the lead examiners do not believe that forfeiture, etc. as applied in Germany are effective alternatives to fines because they can only be ordered in the context of the criminal proceedings against a specific natural person[13]. The lead examiners believe that if the tendency in practice is to sanction legal persons for bribery only through forfeiture in this manner, this could impede the effectiveness of the system as a whole.

Despite the Federal Ministry of Justice's view that certain jurisdictions have frequently applied administrative fines against legal persons, given that prosecutions of domestic bribery cases against natural persons have occurred, the small number of cases against legal persons for bribery offences, at least in two of the most important regions in Germany in terms of the economy[14]--Berlin, the capital of the State, and Frankfurt, the financial centre of Germany—raises a question about whether the existing system for the liability of legal persons for foreign bribery offences is effective in practice.

One prosecutor in Frankfurt stated that the negligible use of administrative fines for legal persons is partly due to their non-criminal nature. According to the prosecutor, given the lack of sufficient resources to deal with large caseloads, it is necessary to prioritise tasks, and the prosecution of legal persons has been considered an additional and secondary task, since administrative fines have an insufficient deterrent effect to warrant the large burden on resources, including the high degree of expertise needed for assessing the illegal gains[15]. The prosecutor further elaborated that, in his view, administrative fines have not had a sufficient impact because they do not adequately

12. The German authorities provide 2 cases in the Land North-Rhine/Westphalia in 1999 and 2000, in which administrative fines were imposed on legal persons for "bribery in business sectors" (private to private bribery), etc. It is not clear whether the 3 cases in Bochum include these 2 cases.

13. However, the natural person need not be prosecuted, as the forfeiture from a third party is also possible in the course of independent proceedings for forfeiture against the "accused" (i.e. natural person).

14. Germany points out that Munich, Hamburg, Stuttgart and the Ruhr District in North-Rhine/Westphalia are economic regions of at least equal significance.

15. The authorities from the Federal Ministry of Justice emphasised that each Land is responsible for allocating resources to investigative and prosecutorial authorities so that no generalisation can be made from this observation.

reflect the high social and economic responsibility of companies. For instance, the amount of fine is limited and insufficient (see the discussion below on levels of fines). In his view, the prosecution of legal persons for bribery would increase if corporate criminal liability were introduced.

The representative from the Berlin Senate Justice Department stated that prosecutors are not fully aware that they are competent to prosecute legal persons for bribery offences, and therefore, administrative fines have mainly been indirectly imposed in relation to bribery as a result of prosecutions involving cartel offences that involved an element of bribery.

Also, some members of the police stated that there are insufficient resources to undertake the investigation of offences aimed at punishing legal persons for bribery offences.

Interrelationship between the Proceedings against Natural and Legal Persons

Under the Administrative Offences Act and the Code of Criminal Procedure, administrative fines against legal persons for bribery are in principle imposed in the course of the criminal proceedings against natural persons. The German authorities refer to court decisions, including the decisions of the Federal Court of Justice, which state that where the natural person is not prosecuted due, for example, to the exercise of prosecutorial discretion or because he/she has died or cannot be identified, it is possible to sanction the legal person in separate proceedings, which are also of a criminal nature (as long as there is an underlying criminal offence of a natural person), initiated upon the application of the public prosecution office.

However, the German authorities emphasise that the imposition of administrative fines for legal persons under the Administrative Offences Act is an "incidental consequence" of an offence for the natural person. They state that there is one offence for which there are separate consequences for the natural and legal persons. They further state that in practice they have not had any bribery cases where they have proceeded against a legal person without having proceeded against the natural person.

The lead examiners note that investigations and prosecutions against legal persons for bribery offences can be made without the involvement of a natural person. They emphasize the importance of proceeding independently, wherever necessary and legally possible, against legal persons in the foreign bribery offence. Independent proceedings would be particularly relevant for cases involving large corporations, which often have a decentralised structure involving complicated decision-making procedures, thus making it difficult or impractical to isolate a natural person or persons for prosecution. In addition, due to the diffuse nature of a decision to bribe in a corporation of this nature, it might not be considered fair to proceed against the natural persons involved due to the low level of responsibility taken by each one individually. Moreover, in deciding how to allocate resources, it may appear more sensible in particular cases to proceed only against the legal person.

The German authorities state that the criminal nature of the proceedings in respect of legal persons allows for the full use of investigative powers in Germany, including coercive measures. They further state that despite the absence of examples, the same powers would be available if an investigation were directed exclusively at the legal person, which in their view would be very exceptional in practice. However, there is no express reference in the law to the availability of criminal investigative powers where the legal person is not prosecuted with the natural person involved. The German authorities explain that such powers are available due to the principle that administrative fines for

legal persons under the Administrative Offences Act is an "incidental consequence" of a criminal offence committed by the natural person.

Mutual Legal Assistance

The German authorities are confident that the non-criminal nature of liability would not create any impediments in obtaining evidence through MLA in the future, either where the request is for the purpose of punishing the natural and legal person or only the legal person (in the independent proceedings), since the proceedings against legal persons are of a criminal nature. They are also of the opinion that a Party that totally or partially restricts the provision of MLA to criminal matters would not refuse to provide MLA on the basis that the information or evidence shall only be used for the purpose of criminal prosecutions in respect of the natural persons, for the aforementioned reason and also because the liability of the legal person is a consequence of the criminal offence involving the natural person. The German authorities foresee that, if requested, it might be necessary to provide some explanation of the specific nature of these proceedings.

Standard of Administrative Liability

Pursuant to section 30 of the Administrative Offences Act, as amended by the Act implementing EU instruments of 29 August 2002[16], the liability of legal persons is now triggered where any "responsible person" (he/she needs not be an authorised representative or manager) acting for the management of the entity commits a criminal offence—including bribery—or an administrative offence—including a violation of supervisory duties—which violates duties of the legal entity, or by which the legal entity gained or was supposed to gain a "profit". Prior to the amendment, triggering persons were limited to authorised representatives and managers of the entity.

According to the German authorities, with respect to domestic bribery, the liability of legal persons has been triggered in practice where managing directors, fully authorised representatives, holders of a special statutory authority in managing positions and/or trade representatives of a legal person have committed bribery, made an agreement to restrict competition, or violated his/her supervisory duty in relation to an offence of bribery committed by a subordinate employee. In the fields of the environment, health, waste management, etc., practice has developed the standards for a violation of supervisory duties, which includes consideration of factors such as whether the company has in place a monitoring system or in-house regulations for employees.

Where liability is triggered by a violation of the legal person's duty, in practice, this has included a violation of supervisory duties by a person in a high managerial post in preventing active bribery, in addition to those that are connected with the legal person's duties under administrative laws (e.g. employment, export/import, manufacturing). Also, liability is triggered by the gains of a "profit" (or intent for such gains) when certain criminal provisions, including domestic and foreign bribery statutes, are infringed. As regards the scope of the term "profit", the German authorities state that it covers any more favourable structuring of the assets (i.e. any increase in the economic value of the assets of the legal person or association of people resulting from the offence in question), including an indirect advantage such as an improved competitive situation resulting from bribery.

16. The amendments also refer to the increase of the maximum amount for administrative fines (see discussion below) and the extension of entities subject to liability to include certain type of partnerships, which do not have a legal personality under German law.

In order to proceed against the legal person, the law does not require that the natural person in the high managerial post in the legal entity, whose act or negligence triggers the liability, be identified or convicted. The only requirement in this regard is that it should be proved that someone in the leading circle of the entity committed the offence or violated the supervisory duty. Such application has been established in practice in respect of other fields such as environmental damage. Also, Germany cites a case of fraud where the court mentioned *in obiter* that the natural person need not be identified for the purpose of punishing a legal person for bribery. There has not been a bribery case where a legal person was prosecuted in the absence of identification of a natural person but there is no disagreement in practice and in academia that the independent proceedings against legal persons apply to bribery cases under the same conditions as other offences.

Pursuant to subsection 30(4) of the Administrative Offences Act, legal persons are exempted from liability where the natural person cannot be prosecuted for "legal reasons". The German authorities state that such reasons do not include the death of the natural person or the exercise of prosecutorial discretion not to prosecute him/her. The cases in practice and published commentaries only refer to an example where the statute of limitations expired for the natural person. However, the German authorities state that the situation where the natural person is convicted or acquitted in a Schengen country is likely to constitute a "legal reason", as the *non bis idem* rule is a binding rule in Germany under the Schengen Agreement as far as parties thereto are concerned. This might raise a question about the prosecution of legal persons, where the natural person was convicted in a Schengen country but the legal person was not prosecuted, although in principle, it is expected that the country proceeding against the natural person would take the primary responsibility of sanctioning the legal person.

Prosecutorial Discretion

While the principle of mandatory prosecution applies to natural persons, the principle of discretionary prosecution applies to legal persons. The German authorities explain that this distinction stems from the administrative law basis for the liability of legal persons, which generally provides for prosecutorial discretion. The German authorities state that, in exercising the discretion, all the circumstances, such as the importance and impact of the action, degree of culpability, frequency of infringements, existence of an economic advantage, and conduct after the act, should be taken into account, and it would be contrary to the law if prosecution were waived on account of the company's market position or for political reasons. The German authorities state that a decision of a prosecutor not to prosecute the legal person is not appealable.

It appears that there are no specific guidelines for exercising prosecutorial discretion for legal persons, including those for bribery offences. Moreover, during the on-site visit, it appeared that the view of the authorities from the Federal Ministry of Justice did not necessarily correspond to reports on practice in the field. In the view of the authorities from the Federal Ministry of Justice, the discretion not to prosecute a legal person for bribery would be possible in a limited case where the company did not gain any profit through the bribery transaction, or where the company's management was completely restructured after the revelation of the offence and if the internal control measures were sufficiently strengthened since then to prevent a further commission of bribery. On the other hand, as mentioned earlier, the prosecutors interviewed by the lead examiners stated that, in the field of corruption, legal persons are prosecuted only as a secondary option, indicating a far wider use of discretion in respect of them. In addition, TI German Chapter identifies prosecutorial discretion as one of the factors which limits the

effectiveness of administrative liability[17]. On the other hand, Germany cites statistics in Munich I area (see "Number of Cases" above), in which 122 legal persons were sanctioned from 1994 to September 2002. The lead examiners were informed by the Federal Ministry of Justice that it is currently preparing special references to the guidelines for prosecutors aimed at promoting the uniform exercise of discretion and emphasising the importance of the application of administrative fines to legal persons.

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

Monetary Sanctions

Administrative fines (consisting of the punitive portion and skimming off of the "financial benefit") under section 30 of the Administrative Offences Act, as amended, which preclude the cumulative application of administrative forfeiture (section 29a) and criminal forfeiture/monetary sanction of replacement value (sections 73-73a, Code of Criminal Procedure)[18], cannot exceed 1 million Euro[19], in principle. However, the German authorities explain that pursuant to subsection 30(3) and section 17, the fine shall be more than 1 million Euro where the "financial benefit" added to the punitive portion amounts to more than 1 million Euro. However, in such a case, the punitive portion cannot exceed 1 million Euro. In addition, 1 million Euro is the maximum fine if the court cannot establish the amount of the "financial benefit". The authorities from the Federal Ministry of Justice state that they have allocated extensive resources to training prosecutors to assess the "skimming off" of benefits of offences [for instance, approximately, 1 billion DM (approximately, 500 million Euro) in the year 2000]. They add that this has resulted in an increase of administrative fines in total, especially in the field of tax offences.

A representative from a Land justice department (a former prosecutor) and a prosecutor stated that in the case of active bribery, it is very difficult to assess the "financial benefit". The representative from the Land justice department stated that he could not explain how it has been, and would be assessed in a particular case, due to a lack of cases. In the view of the prosecutor, a high level of expertise and considerable resources are necessary to undertake the assessment of a "financial benefit". The authorities from the Federal Ministry of Justice point out that there are similar difficulties when assessing the proceeds of the offence for the purpose of forfeiture in the course of criminal proceedings against natural persons. They explain that experts can be commissioned to assist in the assessment of the "financial benefit".

17. Moreover, TI German Chapter is of the opinion that the nature of the administrative liability under the Administrative Offences Act is not sufficiently comparable to criminal liability. In addition to the insufficiency of the fines, etc. (see below), TI German Chapter points out that actions under the Administrative Offences Act are seen as representing only a warning of non-compliance with a legal obligation, without social or ethical disapproval, while a criminal conviction in Germany entails a serious ethical value judgement. TI German Chapter considers that the introduction of criminal liability would send a clear signal to the business community that bribery is "no longer business as usual".

18. See subsection 3(5) of the Administrative Offences Act. Germany explains that this provision is for avoiding a double sanction in respect of forfeiture of proceeds, and thus, it does not preclude the imposition of an administrative fine (apparently, only the punitive portion) after a criminal forfeiture, etc.

19. Prior to the amendments, the ceiling was 500,000 Euro.

The same prosecutor recognises that the statutory maximum of 500,000 Euro (i.e. the amount prior to the amendments of the Administrative Offences Act) has been insufficient for large companies, and believes that 1 million Euro would still be insufficient. He stated that the amount of fine should be unlimited and there should be a mechanism to calculate the amount of fine taking into account the economic size of the company, etc. The representative from the justice department in Berlin admits that a fine of 1 million Euro may not be sufficient for large companies, although it would be sufficiently high for many companies in Berlin given their economic size.

The authorities from the Federal Ministry of Justice do not believe that the statutory maximum of 1 million Euro, with the possibility of skimming off the benefit exceeding this amount, is insufficient or disproportionate to criminal penalties. They point out that the available highest criminal fine for natural persons is 1.8 million Euro and add that in the field of tax evasion, there have been many cases in several Länder where administrative fines far exceeding such an amount were imposed on legal persons. For instance, they cite a tax evasion case (complicity in tax evasion) where a large commercial bank was sanctioned with 37 million DM (approximately, 18.5 million Euro), consisting of 36 million DM (approximately 18 million Euro) of "skimming off" the benefit and 1 million DM (approximately, 500,000 Euro) of punitive monetary penalty. Also, they state that in the field of tax evasion, generally, the amount of administrative fines has been higher than criminal fines for natural persons. However, the lead examiners believe that, for the purpose of assessing the sufficiency of the amount of the administrative fines for legal persons, it would be misleading to simply compare the amounts of administrative fines for legal persons in actual cases with those of criminal fines for natural persons, because such a comparison does not take account of the following factors:

(i) The criminal fines were separately imposed from forfeiture, whereas the amounts of administrative fines included *de facto* forfeiture.

(ii) The criminal fines for natural persons are calculated on the basis of the person's financial situation (i.e. day-fine system), thus resulting in a lower amount compared to the corresponding amounts for legal persons that are, as a rule, wealthier.

(iii) A criminal fine is generally imposed on natural persons for cases that are not serious enough to warrant imprisonment.

With respect to the assessment of a "financial benefit", two cases of active bribery have been cited. In the first case, a company was fined 3 million DM (approximately, 1.5 million Euro) because its fully authorised representative bribed an airport official for the purpose of acquiring insider information on a building project. The second case involves a decision in March 2002 of the Federal Court of Justice, wherein it established the "financial benefit" of the briber as the speculative profit that he would obtain by selling his land in the case in which the bribe was given for rezoning the briber's land to a more valuable classification. The lead examiners are generally satisfied with the assessment of a "financial benefit" in these cases. However, in light of the number of prosecutions for legal persons, as discussed above, they feel that it would be interesting to follow how the litigation in this respect evolves in future foreign bribery cases.

According to the statistical information of the Munich I Public Prosecutor's Office, Anti-Corruption Division, from 1994 to September 2002, a total of approximately 6.46 million Euro of administrative fines were imposed on 122 legal persons (average:

approximately 52,920 Euro) for bribery, fraud, anti-trust violations, etc. (See the discussion above under "Number of Cases"). During the period since 1999 (plus one case in 1998), 32 legal persons were sanctioned by administrative fines ranging from 5,000 DM (approximately, 2,500 Euro) to 1 million DM (approximately, 500,000 Euro) with an average of approximately 94,726 Euro. During this period, administrative fines of 100,000 DM/50,000 Euro were imposed in 13 cases, more than 100,000 DM/50,000 Euro and up to 500,000 DM/250,000 Euro in 16 cases, and more than 500,000 DM/250,000 Euro and up to 1 million DM/500,000 Euro in 3 cases. No case resulted in a fine exceeding 1 million DM or 500,000 Euro (i.e. the statutory maximum amount prior to the amendment). In addition, from 1994 to September 2002 (during which 683 natural persons were convicted and 122 legal persons were subject to administrative fines), natural and legal persons were subject to forfeiture and compensation for civil damages amounting to approximately 82,412 Euro and 44.5 million Euro, respectively (See Annex II for more detailed information).

According to the statistical information of the public prosecution service in Bochum (North-Rhine/Westphalia), three cases of bribery, fraud and agreements in restriction of competition resulted in administrative fines of 250,000 DM, 150,000 DM and 50,000 DM (approximately, 125,000 Euro, 75,000 Euro and 25,000 Euro, respectively).

The German authorities have provided abstracts for some of these cases, which were made by the courts between May 1999-January 2002[20]. However, the lead examiners are unable to assess whether the level of the fines in these cases were sufficiently effective, proportionate and dissuasive, in the absence of essential information about the cases, such

20. Six cases [see also the sanctions for the natural persons in cases (1)-(4) which are cited afterwards] are cited where:

(1) A canal construction company was sentenced to 3 administrative fines of a total of 200,000 DM (approximately, 100,000 Euro) for bribing an executive responsible for canal construction in the city of Munich together with other construction companies, in return for the information that enabled them to reach fraudulent price agreements in numerous projects. The managing director of the company was liable for bribery (5 June 2000, Munich I area);

(2) Another canal construction company was sentenced to 5 administrative fines of a total of 350,000 DM (approximately, 175,000 Euro) in a parallel case with (1) above. The managing director of the company was liable for the co-perpetration of bribery (13 November 2000, Munich I area);

(3) A civil engineering company was sentenced to administrative fines of 125,000 DM (approximately, 62,500 Euro) for 3 co-perpetration of bribery (one in coincidence with an unauthorised exploitation of trade secrets) where its managing director, together with other parties, bribed a private sector issuing tenders to ascertain the name of participants of tenders and exploited the secret information to rig a bid. The managing director was liable for "these and other offences" (20 February 2001, Munich I area);

(4) A civil engineering and road construction company [a limited partnership formed with a limited liability company (GmbH&Co.KG)] was sentenced to administrative fines of 150,000 Euro for being a party to secret information following the payment of a bribe to a local highway department authority, and for reaching to an illegal agreement on a road construction project. The managing director was liable for "these criminal offences and other fraudulent bid rigging" (30 January, 2002, Munich I area);

(5) A long-distance heating company was imposed an administrative fine of 50,000 DM (approximately, 25,000 Euro) for its executive bribing an employee of a customer who demanded the bribe for maintaining the contract in August 1997 and February 1998 (7 May 1999, local court in North-Rhine/Westphalia).

(6) A in plant and construction engineering public limited company was imposed an administrative fine of 250,000 DM (approximately 125,000 Euro) for its branches and subsidiaries bribing other companies to ensure obtaining contracts and enabling tax evasion of the recipients for these payments. In this case, the chairman of the management board made available considerable amount of cash available to these branches and subsidiaries during 1994-1998 knowing that they would be used as bribes (26 May 2000, local court in North-Rhine/Westphalia).

as the amount of the punitive portion versus financial benefit, the size of the companies involved and the amount of the bribe and the proceeds.

The lead examiners note that Germany establishes a unique mechanism for calculating administrative fines for cartel offences. Under subsection 81(2) of the Act against Restraints of Competition, certain cartel offences could be punished with administrative fines up to three times the benefit[21]. The representative from the Federal Cartel Office states that the actual amount of a fine is determined upon certain criteria, and have resulted in fairly high amounts. For instance, in 2001, a total of 170 million Euro had been imposed on legal persons for cartel offences.

Additional Sanctions including Corruption Registers

Under German public procurement law, a company can be excluded from public contracts for bribing domestic or foreign public officials on the ground of "unreliability". At the Land or municipal level, several jurisdictions (e.g. Hesse) establish corruption registers and have excluded corrupted companies from public contracts thereby. However, in the absence of a nation-wide exchange of information between these registers, this would not appear to be a generally effective measure. Moreover, at the federal level, up to now, there has not been a system such as a corruption register, to ensure that contracting authorities can obtain information about whether a certain company has been involved in bribery.

However, a federal initiative to set up a nation-wide corruption register of unreliable companies is underway for the purpose of recording the serious failings of companies, including involvement in domestic and foreign bribery. At the stage of the on-site visit, only the general framework of the register had been set out in the form of draft legislation, and the German authorities expected that it would likely operate as follows: (i) offices involved in public procurement (which approximately amount up to 32,000 offices throughout Germany) would be required to consult the register before providing a contract under tender; (ii) foreign companies as well as German companies would be subject to registration; and (iii) a company considered as "unreliable" would be registered for a certain period unless it were shown to be "reliable".

The representatives from the German industry sector interviewed by the lead examiners generally welcomed the introduction of the federal corruption register. However, they expressed concerns as to whether registration and exclusion from public contracts would be performed impartially under clear criteria. Some of them expressed concern about being affected by the register due to an individual employee's misconduct that should not be attributed to the company. TI German Chapter also welcomes the corruption register.

In addition to the discussion about the corruption register, a prosecutor stated that sanctions for legal persons would be more effective, if exclusion from the stock exchange and/or public tenders and governmental control options are established as additional sanctions to a monetary penalty. The German authorities indicate that further sanctions including a prohibition from trade and the liquidation of a company, can be imposed under trade or company law, although no supporting cases were cited.

21. On the other hand, cartel offences which do not produce profits are only subject to a fine up to 500,000 Euro for both natural and legal persons.

Commentary

The lead examiners note the German authorities' view that there are no significant obstacles to prosecutions of legal persons for the foreign bribery offence under the existing legal system and, as the practice in some jurisdiction demonstrates, legal persons have been effectively prosecuted and sanctioned for bribery offences. However, in light of the available information, the lead examiners cannot conclusively determine that in accordance with Article 3.2 of the Convention, legal persons are subject to effective, proportionate and dissuasive non-criminal sanctions for the bribery of foreign public officials. In particular for large transnational corporations, it is important that sanctions be sufficiently dissuasive. Some questions affecting the effective application of liability of legal persons remain including the use of prosecutorial discretion.

The lead examiners recommend that Germany take measures to ensure the effectiveness of the liability of legal persons, which could include providing guidelines on the use of prosecutorial discretion for legal persons, and further increasing the maximum levels of monetary sanctions. The lead examiners recommend that the Working Group review whether, in practice, the sanctions against legal persons for the foreign bribery offence are effective, proportionate and dissuasive as case law on foreign bribery continues to develop in Germany.

General Impediments to Prosecuting the Foreign Bribery Offence

Prosecutorial Discretion

In Germany, the principle of mandatory prosecution prevails. Under the Code of Criminal Procedure (sections 153-154d)[22], certain circumstances allow for dispensing with prosecutions at the discretion of the prosecutor (or dismissal of the charge). In particular, pursuant to section 153a, which is applicable to "less serious offences", including domestic and foreign bribery offences[23], where the accused agrees, he/she may be exempted from prosecution where the "public interest" no longer requires the prosecution of the case by making compensation for damage, paying a certain amount of money to the Treasury ("informal fine"), etc. This arrangement is subject to consent by the court[24]. In addition, subsection 153c(3)[25] provides grounds for dispensing with prosecution where the offence was committed "within (the territorial scope of this statute), but through an act committed outside (of Germany), …if the conduct of proceedings would pose a risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution". The application of subsection 153c(3) was identified as an issue in the Phase 1 evaluation, as particularly relevant to the offence of foreign bribery, as it frequently involves

22. Pursuant to section 153, a "less serious criminal offence" need not be prosecuted if the perpetrator's culpability is considered to be of a minor nature and there is no public interest in the prosecution. An approval of the court is required for dispensing with prosecution under this section unless the offence is not subject to an "increased minimum penalty" and the consequences ensuing from the offence are minimal.

23. See section 12 of the Criminal Code.

24. According to a prosecutor, in practice, consent of the court is usually obtained and he cited only one case, to his knowledge, where the court expressed concern about granting consent.

25. The current subsection 153c(3) is referred to in the Phase 1 review (prior to an amendment to the statute) as subsection 153c(2).

transborder elements or is committed abroad[26]. The German authorities state that this subsection is not relevant to bribery offences, as it normally applies to offences relating to national security, defence, etc. Also, the Government authorities state that, in any case, Article 5 of the Convention would supersede the application of this subsection. The German authorities were not aware of any cases, including bribery cases or other economic crimes, where this provision had been applied.

The German authorities state that in cases of corruption, it can usually be assumed that there is a public interest in a criminal prosecution. Also, they refer to no. 260 of the "Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine" (*RiStBV*), which are nation-wide uniform instructions binding on the public prosecution offices that expressly state such a position for the offence of private to private bribery (section 299, Criminal Code)[27]. Moreover, they point out that Article 5 of the Convention, which requires that the investigation and prosecution of the bribery of a foreign public official shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, is directly applicable under German law. In addition, they state that, in order to assess whether there is a public interest in prosecution, the accused's personal factors (first offence, no risk of recidivism, personal stress situation, etc.) as well as concerns of the general public (time elapsed between the offences and its discovery, a lack of interest by the public, a lack of a need for satisfaction, etc.) may be relevant.

The German authorities state that the public interest could be mitigated in cases that are not particularly serious but are difficult or complex, necessitating excessive lengthy proceedings. A judge stated, during the on-site visit, that in certain cases potentially long proceedings could mitigate the "public interest" and could lead to the application of an informal fine under section 153a. In making such a determination, she considered factors such as what sanction would be appropriate for the particular case, and whether lengthy proceedings were warranted due to the nature of the case.

The authorities from the Federal Ministry of Justice state that, with respect to bribery offences, sections 153a and 153c could be applied only for minor cases. Also, a representative from a Land department states that, in principle, public interest has required prosecution of bribery cases, and not many cases have been dropped pursuant to section 153a. However, he adds that, for instance, where the damage caused by the offence was not serious or compensated, and if he/she had no prior criminal record, proceedings have been terminated applying informal fines under section 153a. He cites an example of a terminated case for passive bribery where the offender received a bribe not enriching himself.

One prosecutor believes that, given the limited resources for large caseloads, section 153a has been a way to cope with difficult or complicated cases, in order to at least deprive the offender of illegal profits through the imposition of an informal fine. In his view, the section is not misused although it may have been applied to some severe cases (e.g. resulting in informal fines of 2 million DM or more).

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26. The German authorities appear to state that this subsection does not apply to "non-cross border cases", hence not to the foreign bribery offence. However, in this respect, it appears that the foreign bribery offence is relevant, as it is often a "cross border case".

27. Prosecution of private to private bribery (section 299, Criminal Code) is possible only where there is a complaint from a victim, etc., or where the prosecutor considers *ex officio* that there is a special public interest to initiate the proceedings (section 301).

An "aggrieved party" who also files an application for criminal prosecution to the prosecutor's office, can appeal a decision not to prosecute to the Office of the Prosecutor General, and then to the court if the decision to not prosecute is upheld (section 172, Code of Criminal Procedure). However, an appeal to the court is not available if the decision not to prosecute was made under sections 153a[28], 153c, etc. Moreover, the scope of parties that are entitled to appeal appears to be narrow or at least unclear in practice, as a representative from the Berlin Senate Justice Department stated that a competitor is not entitled to appeal as an "aggrieved party" in the context of bribery of a foreign public official, whereas it was explained in the Phase 1 examination that a person who can appeal may include a competitor and the foreign authority affected. However, a "disciplinary complaint" to the head of the prosecutor's office, the prosecutor general or the Land ministry of justice is available to anyone, regardless if he/she qualifies as an "aggrieved party". Furthermore, a prosecutor stated that no formal or informal approval or consent has been required internally before making the decision not to prosecute.

Commentary

The lead examiners stress the importance of ensuring that prosecutorial discretion is applied impartially, in particular free of economic or political considerations and they note Germany's assurances in this regard. Nevertheless, they recommend that Germany consider whether guidelines could help provide a uniform determination of what would constitute a "minor" case for the purpose of applying sections 153a and 153c, as well as a uniform exercise of discretion between domestic and foreign bribery cases. The lead examiners recommend that the Working Group follow-up the application of prosecutorial discretion, including sections 153a and 153c of the Code of Criminal Procedure, as litigation of the foreign bribery offence evolves.

Availability of Mutual Legal Assistance

The lead examiners were informed by a prosecutor that, despite the treaties and other legal instruments that enable Germany to request mutual legal assistance, prosecutors have faced serious difficulties in obtaining evidence from other countries including from Parties to the Convention. In some international economic crime cases, he had to abandon the prosecution due to the delay in the response. He emphasised that rapidity of the response is a decisive factor for the investigation and the prosecution, and expressed concern that such delays in obtaining assistance could be a major obstacle to the future prosecution of foreign bribery.

On the other hand, the prosecutors interviewed by the lead examiners described their efforts in responding to mutual legal assistance requests from other countries[29]. For instance, in Frankfurt and Berlin, a special post, co-ordinator or unit is established for responding to MLA requests. Moreover, the special co-ordinator, etc. in Frankfurt is exclusively designated to respond to MLA requests, thus enabling them to provide assistance fairly quickly.

28. A decision to dispense with prosecution through the imposition of an informal fine or other obligations or orders and their fulfilment under section 153a has the effect of *res adjudicata*, and thus, it is impossible to re-open the case, for instance, upon new evidence, once such a decision is finalised.

29. In addition, the German authorities cited some recent cases where Germany provided (or is at the stage of providing) assistance to other countries in relation to bribery and/or money laundering.

Commentary

The lead examiners commend Germany for the high level of efforts made by some prosecutors' offices in responding to MLA requests from other countries. Additionally, they share the concern of the German authorities that MLA may not be provided within an appropriate timeframe to enable effective prosecutions of future foreign bribery cases.

The Elements of the Foreign Bribery Offence

Bribes through Intermediaries

The domestic and foreign bribery statutes do not expressly apply to bribes through intermediaries. Instead, Germany relies on a general provision of the Criminal Code (section 25), which states that "anyone who commits an offence himself, or through another person, is liable to be punished as an offender". The German authorities, including the judges and a prosecutor whom the lead examiners interviewed, stated that section 25 is adequate to cover the notion of bribes through intermediaries. Moreover, a judge is aware of an actual case in which the briber made a payment to a public official through a third party.

Commentary

The lead examiners are satisfied that although the foreign bribery offences do not expressly cover the case where a bribe is made through an intermediary, section 25 of the Criminal Code can adequately cover this situation.

Definition of Foreign Public Officials

Sections 2.1 (i.e. bribery of foreign public officials) and 2.2 (i.e. bribery of foreign MPs) of the ACIB, apply to bribery of public officials, judges, etc. of a "foreign state". However, the law does not provide for the definition of the term "state". Therefore, there is a question of whether these sections would, in practice, apply to bribery of public officials of local subdivisions of a foreign government (see Article 1.4b) or of organised foreign area or entity, such as an autonomous territory or a separate customs territory (see Commentary 18), which are not necessarily encompassed by the literal meaning of this term. The German authorities from the Federal Ministry of Justice are quite confident that, despite the absence of cases in this regard, bribery of these categories of foreign public officials would be prosecuted and convicted in future cases, since under the German interpretation rule, the Convention, which was adopted by Parliament, and its commentaries should be used as the primary tools for the interpretation of the implementing legislation, unless such interpretation contradicts the letter of the statute.

Commentary

The lead examiners recognise that the German authorities are confident that the term "state" would be broadly applied. The exact scope of this term would be definitively determined through the court decisions in the future.

"Future Judicial or Official Act"

Section 2.1 of the ACIB applies to bribery of a foreign judge or public official concerning a "future judicial or official act", whereas section 2.2 applies to bribery of a foreign MP "in connection with his/her mandate or functions". Therefore, an issue was

raised by the Working Group in the Phase 1 evaluation about whether the element of "future judicial or official act" may be narrower than the Convention, which covers any use of the public official's position, whether or not within the official's authorised competence (see Article 1.4c). The German authorities state that this element has been broadly interpreted in practice to cover any official's act within his/her "abstract" competence (i.e. not simply "authorised" competence), and cite the explanation in the *Strafgesetzbuch und Nebengesetze*, a widely used commentary for criminal lawyers, including prosecutors and judges, which states that it is sufficient if the official's act is, by its nature, in a loose connection with his/her office or service. Moreover, the German authorities cite three cases where domestic bribery offences applied in accordance with such interpretation:

- Bribery of a public housing administration agency official for helping a person to procure housing, where the official's competence was only to provide real estate documents in this agency (Court of Appeal in Berlin, 1998);
- Bribery of a tax revenue official for helping a person to recover wage taxes where the official was not in charge with the procedure of the person (Federal Court of Justice, 1960);
- Bribery of a public building construction agency employee (of high rank) for providing information on house owners needing tools indicating leaks to a tank protection firm, where the employee was not competent to provide such information (Court of Appeal in North Rhine-Westphalia, 1973).

Commentary

The lead examiners are satisfied that a case where a bribe is offered, promised or given to a foreign public official for the purpose of obtaining the public official's act/omission in relation to the official duties, whether or not within his/her authorised competence, would apparently be adequately covered by the ACIB.

Are the Relevant Sanctions for Natural Persons Sufficiently Effective, Proportionate and Dissuasive in Practice?

Statistics provided by the German authorities indicate that most of the convictions for natural persons have resulted in fines or relatively short terms of imprisonment with suspension. In the Länder of the former West Germany and Berlin, during the year 2000, 169 and 12 persons were convicted of the active domestic bribery offence under section 334 of the Criminal Code, and the "especially serious offences of active and passive domestic bribery" (section 335), respectively (cases which involve other offences or where the offender voluntarily returned the instrumentality and proceeds of the offences are excluded). Under section 334, 89 resulted in fines, 68 in imprisonment with suspension, and 8 in imprisonment without suspension[30]. Imprisonment terms were: below 6 months (8 persons), 6 months-1 year (40 persons), 1-2 years (25 persons), 2-3 years (2 persons) and 3-5 years (1 person). Fines were: below 31 days (4 persons), 31-90 days (50 persons) and more than 90 days (35 persons). Under section 335, 5 conviction resulted in fine, 2 in imprisonment with suspension, and 5 in imprisonment without suspension. Imprisonment terms were: 1-2 years (2 persons), 2-3 years (1 person), and 3-5 years (4 persons). Fines were: 31-90 days (2 persons) and more than 90 days (3 persons). Pursuant to section 40 of the Criminal Code, the daily amount of

30. Other 4 persons were subject to proceedings under the juvenile law.

day-fines for natural persons is calculated on the basis of the average net income of the person fined, the minimum amount of which shall be 2 DM (1 Euro) and the maximum amount 10,000 DM (5,000 Euro). Information is not generally available on the actual amount of the day-fines that have been ordered. Moreover, 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, whether the defendant pleaded guilty and benefited from sentence bargaining (*Absprachen*)[31] or penal order proceedings[32]]. Furthermore, information is not available on the sanctions imposed in the Länder of the former East Germany other than Berlin.

The German authorities provided statistics on convictions for other comparable economic crimes (i.e. theft, burglary, embezzlement and fraud). As for the statistics on domestic bribery offences, these statistics do not include essential information about the cases. Therefore the lead examiners are only able to conclude in a very general sense that the sanctions applied to the domestic bribery offences are consistent with those for comparable economic crimes.

The German authorities provided information on four bribery cases (including private to private bribery) in Munich[33], which clarifies the actual sanctions imposed and provides an abstract of the acts committed, including the purpose of the bribe, the recipient of the bribe and the briber's position in the company. However, further information would be necessary in order to assess the effectiveness, etc. of these sanctions.

31. In Germany, there are practices of sentence bargaining, which is called *Absprachen*, where the defendant agrees to plead guilty in exchange for a reduced penalty. Sentence bargaining is performed by informal agreements between prosecutor, defence and the court for a confession by the defendant. This information was taken from *Settlements Out of Court: A Comparative Study of European Criminal Justice Systems.*

32. Penal order is a written order of conviction by the court without opening main hearing. Available sanctions are imprisonment up to 1 year or fine. See sections 407-412 of the Code of Criminal Procedure.

33. The cited cases are the following (see also the cases cited above in relation to the discussion about monetary sanctions for legal persons):

(1) A managing director of a canal construction company was sentenced to 1 year and 9 months of imprisonment and 360 days fine with the daily rate of 200 DM (approximately, 100 Euro) for bribery. The case was committed together with other construction companies, and the bribe was given to an executive responsible for canal construction in the city of Munich in return for the information that enabled the companies to reach fraudulent price agreements in numerous projects (5 June 2000, Munich I area);

(2) In a parallel case with (1) above, a managing director of another canal construction company was sentenced to 2 years of imprisonment and a fine of 360 days fine with the daily rate of 250 DM (approximately, 125 Euro) for co-perpetration of bribery (13 November 2000, Munich I area);

(3) A managing director of a civil engineering company was sentenced to a total of 1 year and 9 months of imprisonment. The managing director was liable for bribing a private sector issuing tenders together with other parties to ascertain the name of participants of tenders and the exploitation of the secret information to rig a bid, as well as for other offences (20 February 2001, Munich I area);

(4) A managing director of a civil engineering and road construction company [a limited partnership formed with a limited liability company (GmbH&Co.KG)] was sentenced to a total of 2 years of imprisonment and 300 days fine with the daily rate of 250 Euro. The managing director was liable for being a party to secret information following the payment of a bribe to a local highway department authority, and for reaching to an illegal agreement on a road construction project, as well as for other fraudulent bid rigging (30 January, 2002, Munich I area).

Commentary

The lead examiners recognise that sentences imposed in criminal cases are a matter for the domestic courts. Further, it can be concluded that the sanctions applied for domestic bribery are consistent with similar economic crimes such as theft, fraud and embezzlement. However, due to the absence of foreign bribery convictions, the lead examiners remain, to some extent, uncertain about whether the German authorities will seek severe enough penalties for foreign bribery within the parameters of the Criminal Code. Moreover, they recognise that it is impossible to make an overall assessment without the information about the actual sanctions for relevant offences in the former East Germany. The lead examiners therefore recommend that in order to be able to evaluate whether future penalties for foreign bribery are effective, proportionate and dissuasive, relevant statistical information, including for the former East Germany, be compiled, and that the sanctions for bribery be revisited by the Working Group following the development of some case-law in this regard.

Is the Statute of Limitations Adequate in Practice?

The statute of limitations for the foreign bribery offences, as well as for the domestic bribery offences, is five years. It starts to run from the completion of the offence and shall be interrupted by facts enumerated in subsection 78c(1), which include: the first interrogation of the accused, the notice of the initiation of investigation against him/her or an order of such an interrogation or notice, a judicial interrogation of the accused or an order thereof, a commissioning of an expert after the first interrogation of the accused/notice of the initiation of proceedings, a judicial order of search and seizure, an arrest warrant, a public indictment, the institution of trial proceedings, and a judicial request of an investigative act abroad. The limitations period is renewed after each interruption, however, the prosecution is barred by the absolute lapse, which is ten years for the domestic and foreign bribery offences[34].

In accordance with a decision of the Federal Court of Justice, the same limitations period applies to legal persons (instead of the three-year limitations period for administrative offences under the Administrative Offences Act) where the natural person committed a criminal offence, including bribery. The German authorities confirm that as long as the liability is triggered in relation to the bribery offence (i.e. criminal offence), the five-year period applies regardless of whether the manager committed the criminal offence itself, or violated his/her supervisory duties in relation to the criminal offence committed by a subordinate.

The statute of limitations has not yet expired as regards the cases of foreign bribery committed after the entry into force of the ACIB in 1999. No statistical information has been available about the cases of domestic bribery or other comparable economic crimes where a natural and/or legal person could not be prosecuted due to the expiration of the limitations period. Similarly, no information has been available about how long it has taken to detect, investigate and prosecute these offences. However, according to the German authorities, surveys of the Länder show that only a small number of prosecutions were barred on account of the expiration of the limitations period with respect to economic crimes.

34. In addition, the limitations period shall be extended for five years from the initiation of the trial proceedings in the case of "especially serious case" of bribery (section 335 of the Criminal Code, section 2.1 of the ACIB), if the proceedings are initiated before the Regional Court (*Landgericht*).

Commentary

Due to the absence of information relevant for the foreign bribery offence, the lead examiners are unable to comment on the adequacy of the statute of limitations in practice. Therefore, they recommend that this issue be revisited by the Working Group following the development of some case law in this regard, and recommend that relevant information in respect of the foreign bribery offence, such as statistics, case law or surveys, be collected in order to aid in their assessment.

Recommendations

The Working Group commends Germany for their efforts and co-operation in providing information throughout the whole examination process, including during the on-site visit. Germany has extensive experience with investigation and prosecution of domestic bribery offences, as well as other economic crimes, which is relevant for investigating and prosecuting foreign bribery cases. The experience in practice with respect to these offences facilitated the Working Group's examination of the application of the Convention and the Revised Recommendation in Germany.

In conclusion, based on the findings of the Working Group with respect to Germany's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Germany. In addition, the Working Group recommends that a number of issues be revisited as case law develops.

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

The Working Group recommends that Germany increase its efforts to raise the level of general awareness of the foreign bribery offence and the Convention. With respect to the private sector, the Working Group recommends that Germany encourage the continued development and adoption of adequate corporate compliance programmes including for small and medium sized enterprises doing business internationally [Revised Recommendation, Articles I and V.C(i)].

With respect to the police and the prosecutorial authorities, the Working Group recommends that Germany:

1. Ensure that the issue of foreign bribery is adequately addressed within training programmes (Revised Recommendation, Article I);

2. Evaluate whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases (Commentary, 27; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6).

With respect to the tax authorities, the Working Group recommends that Germany undertake to reduce the time-lag with regard to the performance of tax audits of the largest companies (Revised Recommendation, Articles I and IV);

The Working Group recommends that Germany continue to keep under review whether the existing mechanisms for the inter-Land communication and co-operation for criminal investigations and prosecutions are effective, including the sharing of experience in prosecuting foreign bribery cases (Revised Recommendation, Article I).

With respect to the reporting of suspected bribery or money laundering to the appropriate authorities, the Working Group recommends that Germany:

1. Consider clarifying the obligation to report suspicious transactions for auditors and tax consultants, for example, by issuing guidelines (Revised Recommendation, Article I);

2. Consider the establishment of mechanisms such as an Ombudsman, anti-corruption unit or hotline in order to facilitate reporting of suspicion of bribery by members of public administration (Revised Recommendation, Article I).

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences

The Working Group recommends that Germany compile at the federal level for future assessment information on investigations of the foreign bribery offence for both natural and legal persons, and sanctions of the foreign bribery offence for both natural and legal persons (Convention, Article 3; Phase 1 Evaluation, section 2);

The Working Group recommends that Germany take measures to ensure the effectiveness of the liability of legal persons which could include providing guidelines on the use of prosecutorial discretion, and further increasing the maximum levels of monetary sanctions (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).

The Working Group recommends that, as concerns the prosecution of natural persons, Germany consider issuing guidelines which could help provide a uniform application of sections 153a and 153c of the Code of Criminal Procedure, as well as a uniform exercise of discretion between domestic and foreign bribery cases (Convention, Article 5; Commentary, 27; Phase 1 Evaluation, section 3).

Follow-up by the Working Group

The Working Group will follow up the issues below:

1. The effectiveness of the reporting of the suspected bribery transactions by the tax authorities in practice (Revised Recommendation, Article I);

2. The effectiveness of the operation of the new financial intelligence unit within the BKA under the new Money Laundering Act in practice (Revised Recommendation, Article I);

3. The application of sanctions under the legislation implementing the Convention (i.e. the foreign bribery, money laundering and accounting offences) [Convention, Articles 3, 7 and 8.2; Revised Recommendation, Article V.A(iii)];

4. The impact of the exception for the money laundering offence where the predicate offence is bribery of a foreign MP, on the effective detection of foreign bribery in practice (Convention, Article 7; Revised Recommendation, Article I);

5. The adequacy of the statute of limitations for the foreign bribery offence (Convention, Article 6);

6. Whether, in practice, the sanctions against legal persons for the foreign bribery offence are effective, proportionate and dissuasive (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).

Annex I

Participants from Germany at the On-site Visit
(in an alphabetical order for each topic)

Criminal Law (in Berlin and Frankfurt)

Federal Ministry of Justice [Divisions for Substantive Criminal Law on Corruption (including sanctions), for the Act on Administrative Offences, for Law on Criminal Procedure, and for Mutual Legal Assistance]

Prosecution in Practice, Training and Specialisation

(in Berlin and Frankfurt)

Berlin
Berlin Prosecutor General Central Office for Combating Corruption
Berlin Regional Court
Berlin Senate Justice Department
Federal Criminal Police Office
Senior Police Training Academy

Frankfurt
Frankfurt Criminal Police
Frankfurt Public Prosecutor Economic Crimes Office
Frankfurt Prosecutor General's Office
Hesse Commercial Crime Court
Hesse Criminal Police Office
Hesse Ministry of Justice

Measures within the Public Administration regarding Transparency

(in Berlin and Frankfurt)

Berlin
Federal Ministry of Interior (officials with responsibility for guidelines on corruption, the draft law on freedom of information, and the law on public officials)

Frankfurt
Federal Ministry of Defense [Anti-Corruption Unit (ES)]

Role of Courts of Audit (in Berlin)

Berlin Court of Audit
Federal Court of Audit

Taxes, Accounting and Auditing

(in Berlin and Frankfurt)

Berlin
Berlin Chamber of Accountants
Berlin Fiscal Tax Administration (Criminal Section)
Federal Chamber of Tax Consultants
Federal Office of Finance (Department for Company Audits and Taxes)
Federal Ministry of Economics (Division for Liberal Professions)
Federal Ministry of Finance (Taxation Division)
Federal Ministry of Justice (Division for Accountancy Tax and Balance Sheet Law)
Representatives of the private tax law and accounting sectors

Frankfurt
Frankfurt Fiscal Tax Administration (Civil Section)

Public Procurement Law and Cartels

(in Berlin)

Federal Cartel Office
Federal Ministry of Economics (Public Procurement Division)

Export Credits

(in Berlin)

Federal Ministry of Economics (Divisions for Export Credits and Foreign Direct Investment)
Hermes
PriceWaterhouseCooper

Guidelines for Multinational Enterprises

(in Berlin)

Federal Ministry of Economics and Technology National Contact Point on Guidelines for Multinational Enterprises

Private Sector

(in Berlin)

Association of the Construction Industry
Association of German Chambers of Industry and Commerce (DIHK)
Federation of German Industries (BDI)
German Trade Union Federation (DGB)
International Chamber of Commerce Germany
Representatives from enterprises (Bauer Spezialtiefbau GmbH, DaimlerChrysler AG and HochTief AG)

Civil Society

(in Berlin)

Bickmann & Collagen business consultants
Evangelical Development Service/VENRO
German Crime Prevention Society
KPMG Integrity Services
Transparency International

Financial Supervision and Money Laundering (in Frankfurt)

Deutsche Bank AG
Federal Agency of Financial Services Supervision (BAFin): Banking Supervisory Office, Insurance Supervisory Office and Securities Supervisory Office

Development Policy (in Frankfurt)

Credit Agency for Reconstruction (KfW)
Federal Ministry of Economic Co-operation and Development
Society for Technical Co-operation (GTZ)
World Bank Germany Office.

Annex II

Statistical Information of the Munich I Public Prosecutor's Office, Division XII

Table I:
Statistics of the Munich I Public Prosecutor's Office, Division XII, on Administrative Fines Imposed on Legal *Persons*
(7 May 1998 and 1999-September 2002 in a chronological order).

Number	Date of the Decision	Amount of the Administrative Fines (*Geldbusse*)
1	7/5/1998	1,000,000 DM
2	25/1/1999	200,000 DM
3	1/3/1999	200,000 DM
4	22/3/1999	50,000 DM
5	26/4/1999	11,000 DM
6	8/6/1999	130,000 DM
7	16/7/1999	200,000 DM
8	2/8/1999	239,000 DM
9	27/10/1999	534,000 DM
10	27/10/1999	64,000 DM
11	27/10/1999	5,000 DM
12	15/12/1999	45,000 DM
13	1/2/2000	150,000 DM
14	16/3/2000	150,000 DM
15	17/3/2000	150,000 DM
16	27/3/2000	70,000 DM
17	29/5/2000	100,000 DM
18	5/6/2000	200,000 DM
19	7/6/2000	200,000 DM
20	7/6/2000	10,000 DM
21	28/9/2000	60,000 DM
22	7/11/2000	50,000 DM
23	13/11/2000	350,000 DM
24	16/11/2000	800,000 DM
25	20/2/2001	125,000 DM
26	4/4/2001	10,000 DM
27	26/4/2001	275,000 DM
28	26/4/2001	9,500 DM
29	17/5/2001	200,000 DM
30	1/12/2001	35,000 DM
31	30/1/2002	150,000 EUR
32	31/5/2002	70,000 EUR

Notes:

1. *The statistics are on the cases of "corruption" offences, including bribery, fraud, anti-trust violations, etc.*
2. *No.19 and 20 are the cases of illegal bid rigging where the Barvarian State Ministry of Economics (as the Land Cartel Office) imposed administrative fines.*
3. *1 DM values at 0.5 Euro.*

Table II:
Statistics of the Munich I Public Prosecutor's Office, Division XII on Convictions, Fines, Administrative Fines, etc. for Natural and Legal Persons
(1994-September 2002)

Number of convictions	683
Prison sentences (years)	593 years
Penal Fines ("*Geldstrafen*")	5 346 666.25 Euro
Requirements to pay an amount of money ("*Auflagen*")	14 354 112 49 Euro
Damage Compensation (for the public authorities)	44 456 181.62 Euro
Forfeiture ("*Verfall*")	82 412.29 Euro
Searches	1 920
Number of proceedings with non-penal fines	122
Total amount of non-penal fines ("*Geldbussen*")	6 456 217.08 Euro
Total money payments	70 695 589.72 Euro

APPENDIX 1

Evaluation of Germany by the OECD Working Group (April 1999)

Legal Framework

Evaluation Of Germany[1]

General Remarks

The Working Group complimented the German authorities for the rapid implementation of the Convention into German legislation. The Working Group appreciated the recent measures taken to deny tax deductibility of bribes without procedural pre-conditions, e.g. a prior criminal conviction. Delegates thanked the German authorities for their co-operation in the evaluation process, including the speedy translation of relevant legal material.

The Working Group identified the following specific issues, which require clarification:

Specific Issues

1. Performance of official duties

Article 1 of the Convention requires that the offender bribe "in order that the official act or refrain from acting in relation to the performance of official duties". Section 334 of the German Criminal Code covers bribery concerning a "future judicial or official act" and Article 2 section 2(1) of the Act on Combating International Bribery (ACIB) applies to a future act or omission of a foreign Member of Parliament in connection with his/her mandate or functions.

The issue has been raised whether the German legislation may be narrower than the Convention. The German authorities confirmed that as Article 2 of the ACIB implements the Convention, it would have to be interpreted in conformity with Article 1.4.c of the Convention and the commentaries. This means that the term "official act" would cover any activity linked to the performance of an official's functions, not just an official's specific responsibilities.

2. Responsibility of legal person

The German law does not establish criminal responsibility of legal persons. However, legal persons can be held responsible under the German Administrative Offences Act -- which imposes non-criminal fines.

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

The German authorities explained that pursuant to section 30 of the Administrative Offences Act, the legal person can be held liable if a natural person who holds a leading position in the company commits bribery. In addition, in the case where a subordinate commits bribery, the legal person can also be liable if an employee in a leading position has violated his/her supervisory duties. Section 9 of the Act extends liability under section 130 to all possible persons to whom the duty of supervision can be delegated.

The concern was raised that corporate liability would not apply if the natural person acting for a company could not be prosecuted himself/herself for "legal reasons". Germany pointed out that the term "legal reasons" was understood to include procedural impediments, such as the expiration of the statute of limitations.

A question was raised about the liability of a German company for bribery committed by a non-German agent abroad. Germany responded that this is not the type of situation that falls under the notion of "legal reasons" creating impediments to prosecution of the legal person. This is a case where the legal person is not liable because there is no punishable offence in Germany. However, Germany provided that prosecution would be possible if the non-German agent were found in Germany, the act were considered a criminal offence at the place of commission and the act were extraditable under the Extradition Act (although extradition had not been requested, had been refused or could not be executed). The German courts would also have jurisdiction if somebody in Germany who had a supervisory duty violated that duty. The Working Group agreed that the liability of legal persons for bribery committed by non-German agents abroad was an issue it needs to pursue further.

The Working Group welcomed the statement by the German authorities that the question of introducing criminal or other sanctions against legal persons is being considered.

3. Enforcement

According to section 153c subsection 2 of the German Code of Criminal Procedure (CCP), the office of public prosecutor may refrain from prosecuting criminal acts within the purview of this law, but committed outside the territorial scope of this law, if prosecution would create the risk of a serious disadvantage for Germany or is predominantly opposed to other public interests. On the other hand, Article 5 of the Convention requires that enforcement procedures 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 person involved.

The German authorities affirmed that section 153c subsection 2 could only be invoked in exceptional circumstances, such as a threat to national security interests. They also stated that Article 5 of the Convention, being incorporated into German legislation by the ratification of the Convention, provides the relevant standard for prosecution of international bribery notwithstanding section 153c of the CCP.

4. Statute of limitations

Germany has a statute of limitations for bribery of a foreign public official of five years, provided that the limitation period is not interrupted. Absolute lapse occurs after ten years (sections 78 subsection 3 No. 4; 78a and 78c of the Criminal Code). Article 6 of the Convention requires an adequate period of time for investigation and prosecution. The

Working Group agrees that this is a general issue for a comparative analysis of the legal situation in member states, and that it should therefore be taken up again at a later stage.

Conclusion

The Working Group considered in light of the available documentation and explanations given by the German authorities that the German legislation conforms to the standards of the Convention.

APPENDIX 2

Principal Legal Provisions

A. Act on Combating Bribery of Foreign Public Officials In International Business Transactions (unofficial translation)

B. Act on the Protocol dated 27 September 1996 to the Convention on the protection of the European Communities' financial interests (EU Bribery Act) (unofficial translation)

C. Extract of Administrative Offences Act; sections 17, 29a, 30 and 130 (unofficial translation)

A. Act on Combating Bribery of Foreign Public Officials In International Business Transactions

dated 10 September 1998

(Unofficial translation by the German authorities)

Article 1:

Approval of the Convention

The Federal Parliament approves the Convention signed in Paris on 17 December 1997 by the Federal Republic of Germany on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention is herewith published with an official German translation.

Article 2:

Implementing Provisions

Section 1

Equal treatment of foreign and domestic public officials in the event of acts of bribery

For the purpose of applying section 334 of the Criminal Code (Strafgesetzbuch), also in conjunction with sections 335, 336 and 338 subsection 2 of the Code, to bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions, the following shall be treated as equal:

1. to a judge:
   a) a judge of a foreign state,
   b) a judge at an international court;
2. to any other public official:
   a) a public official of a foreign state,
   b) a person entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a foreign state,
   c) a public official and other member of the staff of an international organisation and a person entrusted with carrying out its functions;
3. to a soldier in the Federal Armed Forces (Bundeswehr):
   a) a soldier of a foreign state,
   b) a soldier who is entrusted to exercise functions of an international organisation.

Section 2

Bribery of foreign Members of Parliament in connection with international business transactions

(1) Anyone who offers, promises or grants to a Member of a legislative body of a foreign state or to a Member of a parliamentary assembly of an international organisation an advantage for that Member or for a third party in order to obtain or retain for him/herself or a third party business or an unfairadvantage in international business transactions, in return for the Member's committing an act or omission in future in connection with his/her mandate or functions, shall be punished by imprisonment not exceeding five years or by a fine.

(2) The attempt shall incur criminal liability.

Section 3

Acts committed abroad

Regardless of the law of the place of commission, German criminal law shall apply to the following offences committed abroad by a German:

1. Bribery of foreign public officials in connection with international business transactions (sections 334 to 336 of the Criminal Code in conjunction with section 1);

2. Bribery of foreign Members of Parliament in connection with international business transactions (section 2).

Section 4

Application of section 261 of the Criminal Code

In cases failing under section 261 subsection 1 second sentence No. 2 (a) of the Criminal Code, section 334 of the Criminal Code shall also be applied in conjunction with section 1.

Article 3:

Entry into force

(1) Article 2 of this Act shall enter into force on the day on which the Convention enters into force for the Federal Republic of Germany. In other respects, this Act shall enter into force on the day after its promulgation.

(2) The date on which the Convention enters into force in the Federal Republic of Germany in accordance with Article 15 of the Convention shall be notified in the Federal Law Gazette (Bundesgesetzblatt).

B. Act on the Protocol dated 27 September 1996 to the Convention on the protection of the European Communities' financial interests (EU Bribery Act)

(Unofficial translation by the German authorities)

dated 10 September 1998

The Federal Minister of Justice

Schmidt-Jortzig

The Federal Parliament [Bundestag] has adopted the following Act:

Article 1

Approval of the Convention

The Federal Parliament approves the Protocol to the Convention on the protection of the European Communities' financial interests signed in Brussels on 27 September 1996 by the Federal Republic of Germany on the basis of Article K.3 of the Treaty on European Union. The Protocol is published herewith.

Article 2

Implementing Provisions

Section 1

Equal treatment of foreign and domestic public officials in the event of acts of bribery

(1) For the purpose of applying sections 332, 334 to 336 and 338 of the Criminal code [*Strafgesetzbuch*] to an act of bribery for a future judicial or official act, the following shall be treated as equal:

1. to a judge:
   a) a judge of another Member State of the European Union;
   b) a member of a Court of the European Communities;
2. to any other public official:
   a) a public official of another Member State of the European Union, to the extent that the person's position corresponds to a public official within the meaning of section 11 subsection 1 no. 2 of the Criminal code;
   b) a Community official within the meaning of the Protocol of 27 September 1996 to the Convention on protection of the European Communities' interests;
   c) a member of the Commission and of the Court of Auditors of the European Communities.

(2) For the purpose of applying

1. section 263 subsection 3 second sentence no. 4 and section 264 subsection 2 second sentence nos. 2 and 3 of the Criminal Code, and
2. section 370 subsection 3 second sentence nos. 2 and 3 of the Tax Code [*Abgabenordnung*], also in conjunction with the Act to implement the common Market Organisations [*Gesetz zur Durchführung des Gemeinsamen Marktorganisationen*],

a Community official as designated in subsection 1 no. 2 letter b) and a member of the Commission of the European Communities shall be treated as equal to a public official.

Section 2

Acts committed abroad

Regardless of the law of the place of commission, sections 332 and 334 to 336 of the Criminal code, also in conjunction with section 1 subsection 1, shall apply to an offence committed abroad if:

1. the perpetrator
   a) is a German at the time of the act, or
   b) is a foreigner who commits the act
      aa) as a public official within the meaning of section 1 subsection 1 no. 2 of the Criminal code,
      bb) as a Community official within the meaning of section 1 subsection 1 no. 2 letter b, who is the member of one of the bodies set up in accordance with the Treaties establishing the European communities which has its seat in Germany.

or

2. the act is committed in respect of a judge, any other public official or a person to treated as equal pursuant to section 1 subsection 1, provided that they are German.

Article 3

Revision of the Criminal Code

The Federal Ministry of Justice can announce the wording of the Criminal Code in the version in force on 1 January 1999 in the Federal Law Gazette [*Bundesgesetzblatt*].

Article 4

Entry into force

(1) This Act shall enter into force on the day after its promulgation.

(2) The date on which the Convention enters into force in the Federal Republic of Germany in accordance with Article 9 paragraph 3 of the Protocol shall be notified in the Federal Law Gazette.

The constitutional rights of the Federal council [*Bundesrat*] have been heeded.

The above Act is hereby executed and will be promulgated in the Federal Law Gazette.

Berlin, 10 September 1998

The Federal President
Roman Herzog

The Federal Chancellor
Dr. Helmut Kohl

C. Extract of Administrative Offences Act (Gesetz über Ordnungswidrigkeiten - OWiG)

(unofficial translation)

Section 17

Amount of the fine

(1) The amount of the fine shall not be less than ten Deutsche Mark and, if not otherwise provided by law, shall not exceed one two thousand Deutsche Mark.

(2) If the law provides for a fine in respect of wilfully and negligently committed acts, without differentiating with regard to the maximum punishment, an act committed through negligence may be punished with at most half the assessable maximum amount of the fine.

(3) The seriousness of the administrative offence and the charge of which the offender is accused shall constitute the basis for the assessment of the fine. The financial situation of the offender is also to be considered; the financial situation shall however as a rule not be taken into consideration in the case of minor administrative offences.

(4) The fine shall exceed the financial benefit which the offender has gained from the administrative offence. If the legally assessed maximum fine is insufficient for this, the fine may exceed the maximum amount.

Section 29a: Forfeiture

(1) If the offender has gained anything for or from an act which is punishable by a fine, and if a fine has not been assessed against him/her in respect of the act, forfeiture of a sum of money up to the amount of what has been gained may be ordered.

(2) If the offender has acted for a third party in committing an act punishable by a fine, and if the latter has gained anything thereby, forfeiture of a sum of money up to the amount designated in subsection 1 may be ordered against him/her.

(3) The extent of what has been gained may be estimated. Section 18 shall apply mutatis mutandis.

(4) If no administrative fine proceedings are initiated in respect of the offender, or if they are discontinued, forfeiture may be ordered independently.

Section 30

Fine imposed on legal entities and associations

(1) lf a person

1. acting in the capacity of an agency authorised to represent a legal entity, or as a member of such an agency,
2. as the board of an association not having legal capacity, or as a member of such a board,
3. as a partner of a commercial partnership authorised to representation, or
4. as the fully authorised representative or in a leading position as a procura holder, or as general agent of a legal entity or of an association as specified in Nos. 2 or 3

has committed a criminal or administrative offence by means of which duties incumbent upon the legal entity or the association have been violated, or the legal entity or the association has gained or was supposed to gain a profit, a fine may be imposed on the latter.

(2) The fine shall be

1. up to one million Deutsche Mark in cases of a wilfully committed offence;
2. up to five hundred thousand Deutsche Mark in cases of a negligently committed offence.

In cases of an administrative offence the maximum amount of the fine shall be assessed in accordance with the maximum fine provided for the administrative offence in question. The second sentence shall also apply in cases of an offence which at the same time is both a criminal and an administrative offence if the maximum fine imposable for the administrative offence is in excess of the maximum fine in accordance with the first sentence.

(3) Section 17 subsection 4 and section 18 shall apply mutatis mutandis.

(4) If criminal proceedings or administrative fine proceedings in respect of the criminal or administrative offence are not initiated, or if they are discontinued, or if no punishment is deemed appropriate, the fine may be assessed separately. It may be specified by means of a statute that the fine may also be assessed separately in further cases. Separate assessment of a fine on the legal entity or association shall however be ruled out if the criminal or administrative offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.

(5) The assessment of a fine against the legal entity or association shall preclude forfeiture pursuant to sections 73 and 73a of the Criminal Code or Section 29a being ordered against it for the same act.

Violation of obligatory supervision in firms and enterprises

Section 130

(1) Whoever, as the owner of a firm or an enterprise, wilfully or negligently fails to take the supervisory measures required to prevent contraventions of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.

(2) A firm or an enterprise in accordance with subsections 1 and 2 shall include a public enterprise.

(3) If the administrative offence is subject to punishment, it may be punished by a fine not exceeding one million Deutsche Mark. If the violation of duty is punishable by a fine, the maximum amount of the fine for a violation of obligatory supervision shall be dependent on the maximum amount of the fine provided for the violation of duty. The second sentence shall also apply in the event of a breach of duty which at the same time is punishable by a penalty and a fine if the maximum amount of the fine is in excess of the maximum amount in accordance with the first sentence.

APPENDIX 3

Suggested Further Reading

(1) Phase 1 Report: http://www.oecd.org/dataoecd/14/1/2386529.pdf

(2) Other implementation laws and regulations

Legislation

- Criminal Code
- Code of Criminal Procedure
- Act on Combating Money Laundering
- Banking Act
- Commercial Code
- Corporation Law
- Act on GmbHs
- Act on Co-operatives
- Disclosure Act
- Law Regulating the Profession of *Wirtschaftsprüfer*
- Law on International Assistance in Criminal Matters
- Income Tax Act
- Basic Law (Constitution)

Others

- Charter of the *Wirtschaftsprüferkammer*
- German Corporate Code of Conduct
- Federal Government Directive concerning the Prevention of Corruption in the Federal Administration

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

(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;

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.

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.

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.

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.

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.

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.

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.

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.

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.*,

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.

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.

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;

-- 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.

(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;

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.”

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.

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.

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.

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.

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.

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.

(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.

(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