Implementing the OECD Anti-Bribery Convention

ICELAND

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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 ICELAND

Foreword

This report surveys the legal provisions in place in Iceland 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 Iceland 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.

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The Foreign Bribery Offence: Application and Practice by Iceland

Introduction[1]

Nature of the On-Site Visit

Iceland was the first OECD country to deposit its instrument of ratification on 17 August 1998. The implementing legislation entered into force on 30 December 1998. The Icelandic legislation was reviewed under Phase 1 in October 1999 and the on-site visit for the Phase 2 exam took place in May 2002.

The Phase 2 examination team from the OECD Working Group was composed of lead examiners from Denmark and the Slovak Republic as well as representatives of the OECD Secretariat. The meetings took place over the course of four days, and brought together officials from the following Icelandic government departments and agencies: Ministry of Justice, Director General of the Public Prosecutions, National Commissioner of Police, Iceland Coast Guard, Consultation Committee on the Implementation of Measures against Money Laundering, Statistics Iceland, Financial Supervisory Authority, Competition Authority, Ministry of Finance, Internal Revenue Directorate, National Audit Office, Government Procurement Agency, Icelandic International Development Agency, External Trade Department, and the Ombudsman. The team also visited the Unit for Investigation and Prosecution of Serious Economic Crime and the Parliament.

The OECD team met with representatives of the Icelandic Bar Association, the Council of Auditors, the Icelandic Chamber of Commerce, the Confederation of Icelandic Employers, Association of Certified Public Auditors, the Icelandic Confederation of Labour, the newspaper Morgunblaðið, the National Icelandic Broadcasting Service and University representatives. The team also met with senior representatives of three corporations: Icelandic Freezing Plants Corporation Plc., the National Bank of Iceland ltd., and DeCode Genetics, as well as two law firms: Logos legal services and Lex law offices.

Pursuant to the procedure agreed to by the Working Group for the Phase 2 self and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in Iceland to enforce the laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor Iceland's compliance in practice with the 1997 Recommendation. In preparation for the on-site visit, Iceland provided the Working Group with answers to the Phase 2 questionnaires together with documentary appendices, which were reviewed and analysed by the visiting team in advance. Both during and after the on-site visit the Icelandic authorities continued to provide the visiting team with follow-up information.

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

Methodology and Structure of the Report

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

The Phase 2 Report is structured as follows: the introduction, Part A, explains the background and context with regard to Iceland. Part B examines the various factors, which, in the view of the lead examiners, have a bearing on the effectiveness of the measures available in Iceland for preventing and detecting foreign bribery. Part C reviews the workings of the system for prosecuting foreign bribery and money laundering offences, with specific reference to features that appear to have a pronounced impact, either positive or negative, on the effectiveness of the overall effort. Part D sets forth the specific recommendations of the Working Group, based on the main conclusions reached by the lead examiners, both as to prevention and detection and as to prosecution. It also identifies those matters that the Working Group considers should be followed up as part of the continued monitoring effort.

General Observations about the On-Site Visit

The visiting team is grateful for the active participation of the representatives of the Ministry of Justice and the National Commissioner of Police in the Phase 2 examination and for their preparedness to explain the legal background against which the anti-corruption provisions are implemented. This proved to be of great assistance to the lead examiners, as it became clear that any objective assessment of the anti-corruption provisions requires an understanding of certain features inherent in the Nordic legal systems.[2]

The present report seeks to explain why, taken in context, bribery is not perceived as a threat by Icelandic society, as well as to point up areas which could be improved upon. The lead examiners hope that the present review will promote such understanding.

An absence of bribery in Icelandic society?

The Icelandic authorities state that "by reason of a small population, geographical situation and other factors, corruption and related crimes have not constituted a problem of the same magnitude as the case may be among larger nations, where the administrative system may be more complicated and the economy more diversified. In spite of this, Icelandic authorities are fully aware that corruption is a threat to Iceland as to other countries."

This perception seems to correspond to the situation in Iceland. However, certain factors are evolving in a way that could raise the potential for business to engage in corrupt practices.

2. After having been under the rule of the Danish crown for more than 500 years, national independence was achieved in 1918, when Iceland became a sovereign state, albeit in a monarchical union with Denmark, which meant that the Danish monarch remained the head of state. In 1944 Iceland terminated its monarchical union with Denmark and founded a republic. Consequently, the Icelandic legislation is to some extent still based on the Danish legislation - mainly in criminal law and criminal procedure - and inspired by Nordic principles of law.

The low number of cases of domestic corruption and the absence of cases of foreign bribery

Five cases of domestic bribery have been prosecuted, of which two led to conviction, two led to acquittal and one led to conviction for passive bribery and acquittal for active bribery. (See chapter C.1. for more details). All the persons met during the on-site visit consider that the small number of prosecuted cases is due to the absence of bribery in business transactions in Iceland.

Cultural factor: Strong Rejection by the population

The theory that the low number of corruption cases in Iceland possibly indicates a rejection of such practices in society is supported by the findings of the Transparency International (TI) Corruption Perceptions Index (CPI). This survey measures the level of perceived corruption in the public service in a number of countries by way of polls. In the 2001 and 2002 CPI, Iceland ranked as the fourth least corrupt country, together with Singapore in 2001, out of 91 countries, after Finland, Denmark and New Zealand. In the 2000 CPI, Iceland had ranked sixth[3].

The strong rejection of bribery and corruption in Icelandic society is further confirmed by the impact on public opinion of media disclosure about the recent bribery case involving a Member of Parliament. An extensive public debate took place in relation to this case, resulting in the resignation from Parliament of the person involved soon after the beginning of the investigation. An allegation of transnational bribery that took place more than 20 years ago involving fish exports to Nigeria is still remembered today by a wide range of people, including representatives from the private sector, from the judiciary and Members of Parliament.

Economic Factors

Economic Sectors: In Iceland, traditional economic business activities abroad and those which generate exports are largely concentrated in fishing and fish processing, which can be considered as sectors that would not particularly expose Icelandic companies to bribery of foreign public officials. Iceland is absent or almost absent from those international markets, which are reputed for being particularly prone to corruption, such as public works/construction, arms and defence and oil and gas.

Import and Export Partners: The main trading partners of Iceland are the members of the European Union (EU), and to a lesser extent the United States and Japan.[4] On the other hand, international business transactions in regions like Eastern Europe or Africa are traditionally rare. Moreover, the exposure of the traditional Icelandic economic sectors to bribery of foreign public officials could mainly arise in the context of the attribution of quotas and the payment of import/export taxes, as these are the most common situations where fishing companies deal with public officials. However, Iceland

3. TI has also published a "Bribe Payers Survey", but Icelandic businesses were not among those that the participants were asked to rate in terms of their propensity to bribe.

4. Following the trend of recent years, trade with the EU dominated Iceland's foreign trade in 2000. Almost 68% of Icelandic exports went to the EU while 66% of imports originated there. Outside the EU, 12% of all exports were sold to the US and 5% to Japan. The Economist Intelligence Unit, Country profile 2001, Iceland

mainly trades with countries of the European Economic Area (EEA) [5] where there is an agreement lifting most of these restrictions.

Geographic Location

Finally, Iceland is a fairly isolated island - between Norway and Greenland - which has no common border with any other country. To a large extent its isolation does not facilitate its involvement in the shadow economy (e.g. organised crime and smuggling activities).

From these factors, it could reasonably be assumed that corruption is, in general, not accepted in society and is currently low in Iceland. However, this perception is balanced by the existence in Iceland of a grey area of conflicts of interest and by the evolution of the economy of Iceland.

Sensitive points: the grey area and changes in economic structure

A grey area of conflicts of interest and exchange of advantages

Due to the small size of the Icelandic population,[6] a certain grey area of conflicts of interest and exchange of advantages may exist in Iceland. The Icelandic authorities have indicated that politicians are permitted to have business interests but there are no special rules on their disclosure. Furthermore, there are no rules on conflicts of interests or on disclosure of business interest by public officials. The GRECO experts noted that "the fact that Iceland is a country with a small population on the one hand can help ensure transparency but on the other hand can generate conflicts of interest and compound corruption."[7] Several facts and statements support this concern.

For instance, a poll involving 1261 persons was conducted in April 2000, measuring the importance of nepotism, personal contacts and clientelism in Icelandic municipalities. The results of the poll show that these factors were considered to be perceived as significant for almost 80% of respondents.[8] Also, in a 1986 passive bribery case, an assistant customs inspector was convicted of having accepted goods when engaged in the customs clearance of a departing vessel. The official in question revealed that he was accustomed to receiving gifts from the crew of vessels to be inspected and that this was, in his view, customary. Overall, statements from civil society representatives indicate a general perception that only bribes in the form of monetary advantages constitute

5. EEA forms the basis for a common market for goods, services, capital and labour between the 15 member countries of the European Union and three member countries of the European Free Trade Association (EFTA), which includes Iceland.

6. The population is less than 300,000, making it one of the least populated countries in Europe. Most of the population lives in the capital Reykjavik.

7. First Evaluation Round, Evaluation report on Iceland; adopted by GRECO at its 6th plenary meeting; Strasbourg, 10-14 September 2001; [Greco Eval I Rep (2001) 10E Final]

8. To the question "Do you think nepotism, personal contacts and clientelism are important in your municipality for getting things done?" the responses were: Very important: 25%; Rather important: 34%; Makes a difference: 20%; Rather unimportant: 13%; Makes no difference: 9%; (Total: 100%). Gunnar Helgi Kristisson (2001): Staðbundin stjórnmál (Reykjavik: Háskólaútgáfan), p. 100.

corruption. This may undermine the apparent strong rejection of bribery in Icelandic society and may raise questions about the attitude of Icelandic companies abroad.[9]

Furthermore, some indicators show that economic criminality is rapidly growing in Iceland, in parallel with the rapid growth of the economy during the 90s (see below). In that context, the number of tax frauds grew exponentially, including VAT evasion.[10] The public authorities are devoting a lot of effort to stemming this growing economic criminality as is indicated by the high conviction rate for tax fraud.

Changes in the economic structure of Iceland

Over the last decade, national production was boosted as a consequence of radical economic changes. The government, in line with its obligations as a participant in the EEA[11], favoured market liberalisation, public sector rationalisation and privatisation as well as other structural reforms. A fully functioning financial market was established with the creation of a stock market as well as the privatisation of state-owned banks and the disbanding of government-run investment credit funds. These various measures helped attract private investors, including from abroad, which resulted in a diversification of the economic structure, away from the traditionally dominant marine industries towards services such as telecommunications, software and energy-based industries.

These reforms resulted in an opening up of the Icelandic economy. Since the mid-90s, foreign trade and foreign investment have played a stronger role. Exports have been growing, accounting for 33-36% of GDP. Imports of goods and services have increased at an even higher rate during that period, leading to a current account deficit since 1998. Similarly, foreign direct investment also increased in the second half of the 90s. Foreign investors were attracted by the new investment and export opportunities and, at the same time, domestic enterprises and pension funds diversified their exposure abroad.

The bulk of Iceland's international trade and investment remains with OECD countries, mostly the EEA (more than 65 per cent of foreign trade) and to a lesser degree the United States and Japan. Also, the leading domestic industries -- fishing and fish processing -- still account for 70-75 per cent of Iceland's total exports of goods (and around half its foreign currency earnings). However, Iceland recently started to develop some transactions with "transition countries" and Russia. Furthermore, it seeks to improve its terms of trade and diversify its exports in the context of fluctuating fish prices and quotas. Exports of metals and ores, including aluminium, increased, including through new foreign investment ventures. Exports of software and a range of equipment for the fishing industry also grew, the latter due to the expansion of Icelandic companies in Baltic countries or Russia. Finally, biotechnology has also reached the export stage.

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9. It should be noted, in this respect, that the GRECO report indicates that some of the interlocutors met by the examining team "expressed doubts about the attitude of Icelandic companies doing business abroad, in particular in eastern European countries."

10. Each year about 100 cases of suspected tax fraud are investigated, of which the most serious are thought to be in the areas of deductible corporate expenses and unpaid VAT in the construction and restaurant sectors. There has been a noticeable increase in the number of cases going to court from about one or two per year to 20 or more in recent years. Likewise the average size of penalties has risen steeply. Source: *OECD Economic Survey 2001, Iceland.*

11. The Agreement creating the European Economic Area was signed in May 1992 and entered into force on 1 January 1994. The Agreement is principally concerned with freedom of movement of goods (but agriculture and fisheries are included in the Agreement only to a very limited extent), freedom of movement of persons, of services and of capital.

An example illustrating how Icelandic companies are starting to invest abroad in countries previously not invested in and in non-traditional markets was given by a media representative, who explained that since 2000, an Icelandic company has run Bulgaria's largest pharmaceutical distributor and producer, which bought three of the privatised pharmaceutical factories and operates subsidiaries, including in Russia and Ukraine. Three years ago, this Icelandic company operated exclusively in Iceland and now most of its operations are overseas.[12]

The on-going transformation of the Icelandic domestic economy, characterised by privatisation and diversification, could lead to an increase in the number and sophistication of financial crimes. Indeed, the GRECO report indicates that "Given the size and location of the country, the number of investors and competitors in the privatisation process is limited. The increase in economic activity and flow in cash, and the close links between Government and the business community, can generate additional opportunities for corruption." In parallel, as a result of the changes in Icelandic exports and investment abroad, there is a growing exposure of Icelandic corporations and their foreign subsidiaries to sensitive business environments world-wide.

Given these important transformations, it can be expected that the existence in Iceland of a grey area of conflicts of interest and the evolution of the economy could make the risk of corruption evoked by the Icelandic authorities less hypothetical.

12. The company produces both compounds for making drugs, as well as most types of drugs, and related goods. Bulgaria has long been one of the chief producers of pharmaceuticals in Eastern Europe, with half of its production sold on international markets, and exports going to 32 countries, including Western Europe and the US.

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

The multiplicity of possible sources and ways of obtaining information on acts of bribery[1] requires that all those involved in the prevention and detection of bribery be aware of the potential for corruption and know the procedures available to report suspicious acts. Both the public and the private sectors have a role to play in the prevention and detection of corruption. This implies the need for measures, which aim at preventing both bribery and the commission of tax offences and money laundering.

Awareness

Within Icelandic

No specific measures have been taken in order to publicise the ratification by Iceland of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It may be noted that last year some public discussion took place on the situation in Iceland as regards corruption, in connection with Iceland's participation in the GRECO (Group of States against Corruption, under the auspices of the Council of Europe). The GRECO Report on Iceland was made available to the general public and published on the home page of the Ministry of Justice in Icelandic, and distributed to the media, where is was widely discussed.

This may indicate that there has not, until recently, been any general discussion among the public at large concerning the problem of bribery of foreign public officials. In order to promote awareness, the lead examiners invite the Icelandic authorities to consider the publication of the Phase 1 and Phase 2 reports on the home page of the Ministry of Justice in Icelandic.[2]

Within the administration

No specific measures have been taken in order to publicise the introduction in the General Penal Code (hereafter GPC) of the offence of bribery of a foreign public official and the Convention within the administration, and no specific training has been offered to the different agencies involved in some way or another in the prevention and detection of bribery cases.[3] While there appears to be limited knowledge of the Convention as such, there does appear to be a general awareness or, in certain cases, an assumption that bribery of foreign public officials is a criminal offence in Iceland.

In practice, when investigating a company, the agencies met by the lead examiners during the on-site visit appear to direct their investigation exclusively at the offences in

1. The detection of violations of section 109 of the General Penal Code can take several forms. Sources of allegations can include control institutions, competitors, former employees, agents, subcontractors, companies themselves that have an internal audit process and have discovered suspicious payments, joint venture partners, foreign government officials or party representatives, overseas representatives of Iceland, and the media. Indeed, the recent case of passive bribery was uncovered because of information provided to a newspaper. Allegations can be made in person, by telephone, facsimile transmission, mail, etc.

2. The 1997 Convention has been translated into Icelandic and is available on the internet through the web-site of the Althingi: http://www.althingi.is/altext/122/s/1066.html. The commentaries to the Convention have not been translated.

3. These are Statistics Iceland, the Financial Supervisory Authority, the Competition Authority, Ministry of Finance, Internal Revenue Directorate, National Audit Office, Government Procurement Agency, Icelandic International Development Agency and External Trade Department.

terms of their principal field of competence, and not at corruption as a possible related offence. This is illustrated by the fact that the Competition authority has never been confronted with a case involving a violation of article 26 of the Competition Law on bribery in the private sector in the course of its investigations[4]. Another example is the call for tender procedures developed by the Icelandic International Development Agency, which does not contain any policy statement on corruption.

The Icelandic authorities indicate that "as the courts have never had to examine any suspicions or issues concerning bribery of foreign public officials, a comprehensive policy concerning specific measures to combat such offences has not been laid down as yet." The representative of the Competition authority agrees that it is desirable that additional training should take place to enhance the investigation capacities of this authority. But this has not yet happened and he is uncertain as to whether training on bribery in general and on bribery in the private sector in particular will be organised, as bribery in the private sector has never been detected and therefore such training might be considered unnecessary. Finally, the Directorate of Tax Investigations indicates that it "will increasingly focus on bribery matters in the future, when there is deemed to exit a reason to do so."

However, this waiting strategy might be ineffective as one might suppose that it would be difficult for investigators of administrative institutions to discover any bribery offence linked to the activities that they supervise and/or control if they do not know about the legal definition of the offence, the way bribes can be hidden in their specific area of expertise, or the means to detect bribes.

In the absence of a comprehensive policy on the detection of corruption, it is suggested that the Icelandic authorities should aim to enhance awareness within the agencies responsible for detecting and/or investigating the offences usually related to bribery offences, such as offences against accounting rules, tax violations including customs, public procurement, etc.. Furthermore, the Icelandic authorities are invited to ensure that these agencies are better equipped for the detection of possible cases of corruption (e.g. special training).

Within the private sector

The lead examiners met with a number of Icelandic companies active in the international market. However, it was not possible to meet with the main airline company or fishing company. The lead examiners also met with media representatives. As with public authorities, there was a general awareness or sense that bribing a foreign public official is a criminal offence under Icelandic law (even though there was no real knowledge of the level of the possible sanctions).

Most Icelandic companies are of small and medium size and either recently established or unaccustomed until recently to competing in the international market. During the on-site visit, representatives of the private sector acknowledged that bribery of

4. Article 26 of the Competition law states that "Influencing, in the course of a business activity, an employee of another party or a person representing another party by gifts or other benefits, or by promises of such advantages, is prohibited, if this is done without the other party's knowledge and in the purpose of obtaining for the giver or others a commercial privilege or benefit not offered to others, provided the gift or the benefit is suited to obtain this purpose. If gifts are given or benefits provided after a violation has been committed as described in Paragraph 1 the provisions of that Paragraph shall apply, if the gain thus obtained is deemed to constitute an excessive remuneration." According to the information provided to the lead examiners, the Competition Council rendered 349 decisions and 127 opinions since 1993.

foreign public officials does occur, but they do not consider that this is a practice adopted by Icelandic companies abroad. On the other hand, the representative of the Icelandic Chamber of Commerce indicated that there have been some instances in which its affiliates have been the object of solicitation.

The President of the Chamber of Commerce, who is also a Member of Parliament, explained that the main risk is not direct bribery by Icelandic companies but acts committed by intermediaries, explaining that it is difficult for Icelandic companies to know about the activities of agents. The lead examiners consider that the risks inherent in using local intermediaries and the need to enhance control over their activities should be better explained to Icelandic companies, and particularly to those entering new markets.

Whereas until now the Icelandic Chamber of Commerce has relied on general guidelines for exporters prepared by the Trade Council of Iceland (which constitutes part of the Ministry of Foreign Affairs), there seems to be scope for an increasing and more proactive role on its part. Policy guidance on how to deal with solicitation of bribes would be particularly appropriate.

Despite the fact that there seems to be a certain lack of awareness on the threat of corruption in international business transactions, the Icelandic authorities indicate that no specific measures have been taken in co-operation with private sector organisations on this issue. The principal reasons given by the authorities are that such bribery is not regarded as a serious problem in Icelandic business and industry coupled with the fact that no cases have come to light that have demanded particular action.

The lead examiners further consider that the establishment of a national chapter of an organisation like Transparency International could play a useful role in promoting awareness within the private sector.

Commentary

The lead examiners encourage the development of public and private policies and programmes on the fight against international bribery combined with further efforts to raise the level of general awareness on bribery in international business transactions.

The administrative framework to detect and investigate bribery offences

The lack of guidance concerning detection and inter-agency co-ordination

The prevention and detection of bribery in Iceland involves many different agencies in various ways. There is no centralised anti-corruption agency responsible for the co-ordination of the various institutions dealing with different aspects of the fight against corruption, nor specific procedures to ensure co-operation. Given the size of the country, there does not appear to be a need for the establishment of a co-ordinating body.

The detection of bribes is often difficult due to administrative weaknesses, such as the lack of a methodology for researching and identifying offences, including corruption. Given that the Convention widens the scope of activities of the involved agencies, more attention should be paid to these matters.

The various bodies co-ordinate and communicate amongst themselves on an informal and case by case basis. There have been calls for a clearer distribution of tasks amongst

the involved agencies in the absence of clear reporting requirements[5] and in view of the fact that the investigation of bribery is still considered to be the sole responsibility of the police and the prosecution authorities.

Commentary

The lead examiners note that Iceland has a number of law enforcement agencies and no formal co-ordinating mechanism. While the informal co-operation is satisfactory, according to the various agencies concerned, these same agencies have expressed the desire to have some general guidelines in place on how to detect cases of domestic or international bribery and on what course of action to follow. The lead examiners believe that such guidelines would provide a very useful purpose. Publicly stating that all public officials should report bribery offences of which they become aware would also constitute an appropriate policy message.

The Unit for investigation and prosecution of serious economic and environmental crimes: structure and efficiency

A comprehensive revision of the criminal procedural law has taken place over the last ten years, as well as a complete re-organisation of the court system and the police.

The police are organised and directed in accordance with the Police Act, No. 90/1996. The Minister of Justice is the supreme head of the police in Iceland. Located within the office of the National Commissioner of Police, the Unit for investigation and prosecution of serious economic and environmental crimes (hereafter the Unit) is specialised in the investigation of any cases concerning tax and economic offences, irrespective of where they may have been perpetrated. The Unit is in charge of investigating cases of bribery of foreign public officials but must hand over the files to the Prosecutor General for prosecution. It also fulfils the role of financial intelligence unit in Iceland.

The Prosecutor General is appointed by the Minister of Justice for an indefinite period. He is assisted by a Deputy Director and other prosecutors, who are commissioned by the Minister of Justice for a period of five years. According to the Code of Criminal Procedures (CCP), the "law ensures for the Prosecutor General particular independence, similar to that enjoyed by judges." Nevertheless, "the Minister of Justice can temporarily relieve the Prosecutor General from office."

The Unit is currently staffed with nine investigators and three lawyers, including a prosecutor. Additional experts can be called in to assist in specific investigations. According to the GRECO report, the Unit is understaffed and therefore can only respond to reports of bribery, as opposed to proactive investigative work. The 1998-1999 FATF report[6] notes that "So far results have been very limited, and the Unit has managed with limited resources, however if it is to fully develop the functions of an FIU, it will need increased resources. This will allow it to perform tasks such as proactive analysis and targeting, international co-operation, providing increased training and education for the financial sector and for local police forces, as well as giving increased feedback. Efforts should also be made to co-ordinate and co-operate with the Customs authorities more

5. The Icelandic authorities indicated during the on-site visit that there is no express obligation for public officials to report crimes that they become aware of in the conduct of their functions. They nevertheless explained that the non-reporting would constitute a breach of duty and would be sanctioned pursuant to section 141 GPC, which provides that "A public servant guilty of gross or repeated negligence or dereliction in the performance of his functions shall be fined or imprisoned for up to one year."

6. FATF Second Round Mutual Evaluation, X Annual Report (1998-1999), 2 July 1999.

closely in appropriate areas." A civil society representative further indicated his impression that when the police investigate a complex case, they focus almost exclusively on the main offence and do not investigate possible related offences.

The lead examiners are not in a position to evaluate whether the Unit is indeed understaffed. Until now, the Unit was able to investigate all the cases it was confronted with but, on the other hand, it does not appear to have initiated any investigation itself. The lead examiners note that the Unit was first set up to tackle money-laundering and drug cases and that most of the cases it currently deals with are tax frauds. They further note that the increasing level of sophistication of economic crimes like bribery requires rigorous training programmes and the acquisition of new skills.

Commentary

The lead examiners commend Iceland for the setting-up of a centralised unit in charge of investigating and prosecuting serious economic crimes and encourage the Icelandic authorities to continue to provide appropriate financial and human resources to further enhance the Unit's efficiency and specialisation.

The role of the private sector

Corporate codes of conduct

Corporate codes of conduct are increasingly becoming an inherent feature of Icelandic companies even though there are some notable exceptions[7]. Most of the corporate codes of conduct of the companies represented during the on-site visit expressly prohibit the receiving of bribes, but there is no express prohibition for giving or offering of bribes. This should be viewed against the background of an increasing trend of acquisitions abroad with a corresponding increase in risks.

The translation of the OECD Guidelines for Multinational Enterprises into Icelandic is in its final stage. The Ministry of Industry and Commerce has been gathering information on Icelandic companies possessing any kind of affiliates abroad (branches, agencies, etc) or having extensive economic activities in foreign countries. Once the translation is completed, the Ministry envisages publicising it on its website and plans to contact each of the above-mentioned companies and encourage them to familiarise themselves with the Guidelines. The Ministry hopes to finish this process before the end of 2002.

In the view of the lead examiners, this initiative is very useful and could provide a good opportunity for fostering public awareness of the risks of bribery in international business transactions. The promotion of the OECD Guidelines on Multinational Enterprises could be complemented by a similar promotion of the OECD Convention.

Reporting procedures, including witness protection and whistle blowers

No directives or legislative provisions or rules exist with regard to the protection of witnesses and/or of their families in cases of bribery of a foreign public official.

7. The second largest fishing company met by the lead examiners, which conducts 98% of its business abroad and has foreign subsidiaries in 8 countries, has no corporate code of conduct to date.

Furthermore, no specific tools or mechanisms are available to the public to report corruption, such as a hot line.[8]

A media representative reported a case in which an employee was dismissed because he had informed a newspaper of unethical acts committed in his company instead of informing the board of directors. At that time, the question of the protection of whistle blowers was raised, but no action was taken. Indeed, the case was never brought before court, but the trade union representative did not think that the employee would have obtained more than the usual three months of salary as damages for having been dismissed.

Trade unions and journalists are of the opinion that hot lines and programs for protection of whistleblowers and witnesses are not urgently needed in Iceland. One of the reasons is that in view of the good economic situation, an employee dismissed for having testified against his/her company would easily find a new position. Similarly, the Icelandic authorities state that it is difficult to provide broader witness protection in a small country like Iceland, with a closely-knit community.

The lead examiners are nevertheless of the opinion that the possibility to dismiss an employee because he/she reported a criminal offence represents a disincentive for reporting and, in this context, encourage Iceland to reflect further on this issue.

The role of the media and public opinion

A recent case of passive bribery was uncovered due to information on suspected embezzlement provided to a newspaper. The representatives from media and trade unions are of the opinion that the person preferred to go to the newspaper rather than to the police for several possible reasons, including the fear of possible repercussions, as well as the expectation of a reward from the newspaper.

Until recently in Iceland, newspapers were very closely linked to political parties, and there is little tradition of investigative journalism. The lead examiners are of the view that, as the press evolves, it could play an increasingly visible role both in the detection of foreign bribery and in the sensitisation of the public in Iceland to the issues surrounding it.

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 Iceland to promote internal corporate compliance programmes for exporting companies.

Importance of the Accounting and Auditing Requirements

General observations

The legal environment concerning accounting and auditing rules is based on the Annual Accounts Act no. 144/1994 and the Accounting Act no. 145/1994. The former sets out rules for disclosure and reporting, reports by management, consolidation of

8. The Prosecutor General has issued Directions to the police and prosecutors on the handling of information from covert informants, but these do not relate to the bribery of foreign public officials. The Icelandic authorities state that the police are not obliged to disclose the identities of informants in court. However, persons testifying in court cannot remain anonymous.

accounts and the continuing development of accounting standards through the creation of an Accounting Standards Board. The latter includes rules on accounting principles and practices and aligns Icelandic accounting legislation with relevant EEA legislation.

Accounting

Professional standards

The Ministry of Finance is responsible for enforcing professional standards in both accounting and auditing. The continuing development of accounting standards is under the responsibility of the Accounting Standards Board,[9] which is in charge of promoting the development of generally accepted accounting principles through the publication and presentation of harmonised rules that must be followed when preparing the annual accounts.[10] However, the Icelandic authorities indicate that there is no established procedure to enforce professional standards in both accounting and auditing.

The Icelandic authorities indicate that by 2005 all companies will have to respect the international standards because of the implementation in Iceland of relevant EC rules.[11] During the on-site visit, a representative of the association of public accountants indicated that the association currently does not provide any training on international standards, but that such training is under preparation in co-ordination with the University of Iceland.

Accounting offences

The lead examiners identified potential gaps in the accounting provisions that could impede the effective detection of foreign bribery transactions. It would seem that there are no accounting standards providing for the disclosure of related party transactions and for the accurate determination of the fair value of assets and liabilities. In addition, there is no official definition in the law of accounting principles to be used for foreign currency transactions, in contrast to the ISA standards.[12]

Sanctions

Both natural and legal persons are liable for the eventual breach of accounting and auditing obligations. Pursuant to section 40 of the Accounting Act no. 145/1994, "A legal entity may be fined for a violation of this Act irrespective of whether the violation is traceable to a criminal action of a director or employee of the legal entity. If its director or employee has become guilty of violating this Act, the legal entity may be fined and deprived of its rights of operation, provided the violation is committed for the benefit of the legal entity or it has profited from the violation."

9. This Board is composed of five experts. The Institution of Chartered Accountants in Iceland, the Faculty of Economics and Business Administration of the University of Iceland, the Iceland Chamber of Commerce and the Minister of Finances each nominate one member. The fifth member is an Auditor General. The Minister selects the chairman of the Board from among its members. See Annual Accounts Act, articles 79 to 81.

10. The Board also delivers its opinion on what it considers to be generally accepted accounting principles.

11. The Ministry of Finance is considering the possibility to translate some or all of them into Icelandic.

12. "Doing Business in Iceland"; publication of the Investment in Iceland Agency (an independent agency of the Ministry of Industry and Commerce, Trade Council of Iceland and the National Power Company); 1999.

The Icelandic authorities state that the criminal penalty applied has, in most cases, been imprisonment, from 30 days to 12 months (in some cases on probation) and a considerable fine.[13] In less serious cases, the penalty has only consisted of a fine.[14]

Commentary

The lead examiners welcome the forthcoming incorporation of international standards into the Icelandic accounting standards and recommend that particular attention be paid with respect to related party transactions and the determination of the fair value of assets and liabilities.

Auditing

Pursuant to article 59 of the Annual Account Act, No. 144/1994, at least one auditor shall be elected in companies where restricted equity amounts to at least ISK 50 million, liabilities and restricted equity amount to at least ISK 100 million, annual net turnover amounts to at least ISK 200 million or the number of employees (man-years) is higher than 50. The Icelandic authorities indicated that around 35% of Icelandic companies are audited.

Article 63 of the Annual Account Act, No. 144/1994 adds that "in the case of a parent company, auditors and examiners shall also audit the consolidated accounts." However, a parent company is exempt from preparing consolidated financial statements if its shares, or the shares of its subsidiaries, are not listed on a stock market within the EEA, and if it fulfils certain other conditions.[15]

Reporting Obligations for Auditors

The only reporting obligation for auditors or examiners is to report at the annual general meeting where they have discovered that managers of a company have in the course of their work committed an offence which might entail liability of the managers or the company or that they have infringed the company's articles of association (Article 63(3) of the Annual Accounts Act, No. 144/1994).

It appears that there is no obligation for auditors to report the discovery of bribery committed by a person other than a manager at the annual general meeting. Moreover, this kind of report occurs only once a year. Also, there is no obligation for them to report possible corruption offences to enforcement authorities, even if the shareholders do not take the necessary remedial actions.[16]

The Icelandic authorities indicated that no prosecution has ever been initiated by a report by an auditor of a suspicious transaction to the annual general meeting, company management, a corporate monitoring body or the competent authorities.

In addition, Article 68 of the Annual Account Act, No. 144/1994 and Article 35 of the Accounting Act No. 145/1994 prohibit the auditors from giving information relating to the company's financial position or regarding the state of the company to individual

13. In some cases there is a suspended sentence on probation for few years. If the fine is not paid, extra time is added to the imprisonment.

14. In those cases, if the fine is not paid, the convicted person is put in prison for a short time.

15. "Doing Business in Iceland".

16. The only obligation to report offences to law enforcement authorities concerns the suspicion of money laundering offences.

members or unauthorised persons. It is the view of the Icelandic authorities that these provisions could not be interpreted as preventing auditors from reporting a crime to the law enforcement authorities.

Section 85(3) of the Annual Account Act, No. 144/1994 provides that auditors or examiners are guilty of punishable violations of the present Act by acting, or as the case may be, failing to act (…) "if, in their report, they give wrong or misleading information or neglect to disclose important items relating to the result of operations or the financial position of the company."

As the term "important items" appears subjective in nature, the lead examiners are not certain that this would be applied to the non-reporting of suspicions of foreign bribery. This concern is confirmed by a statement of the representative of auditors, who stated that if an auditor discovers something significant in the accounts, or if large amounts of money were involved, he/she would report it, but that in general the role of an auditor is to check whether the accounting law is respected.

Independence of Auditors

During the on-site visit, the lead examiners emphasised the importance of independent external audits to monitor the financial activities of businesses.

Rules regarding the independence of auditors require that an auditor comply with the following criteria:

i) He/she may neither be indebted to the company nor to companies belonging to the same group of companies nor must they have issued any guaranties on his behalf (Paragraph 60(3) of the Annual Accounts Act, No. 144/1944.

ii) He/she (or the audit company) shall not audit a company from which he/she has received more than 20 per cent of his/her revenue for more than 3 years.

iii) He/she must be a certified accountant, unless certain criteria are satisfied, which essentially permit the election of a non-certified accountant where the company's shares or securities have not been admitted to official listing on a stock exchange; restrictions are imposed upon transactions respecting the company's holdings; or certain size limits regarding equity, liabilities annual net turnover and the number of employees are not exceeded according to article 59 of the Annual Accounts Act.

iv) If he/she is a certified accountant, pursuant to article 9 of the Act on Certified Accountants, No. 18/1997, he/she shall not audit a company with which he/she has a connection that could question his/her independence.

The lead examiners are of the opinion that the requirement that a certified accountant who performs an audit shall not have a connection with that company that could question his/her independence is vague and open to various interpretations, and thus could be a further impediment to the effective reporting of suspicious transactions. For instance, there do not appear to be clear rules regarding the participation in audits of partners, members of the Board of Directors or the Supervisory Board, the Managing Director, an employee or a spouse of one of the aforementioned. In addition, the rules do not appear to address the participation in audits of partners, shareholders, managers, etc. of the parent or affiliates (including foreign subsidiaries) as well as former partners, etc.

Awareness and training

During the on-site visit, a representative of the Council of Auditors indicated that detection of bribery or other economic crimes is not part of the mandatory training programme. The training programme is mainly focused on accounting and auditing rules. The representative of the Council of auditors indicated that the institution was considering the possibility to adopt a code of ethics for auditors. The Icelandic authorities explained during Phase 1 that "When reviewing further the laws on business records, audit and internal company controls, there would be a reason to examine especially whether the important objectives of these instruments can be yet further secured. However, such a review has not yet taken place." The Icelandic authorities confirm that the Phase 1 examination situation has not changed.

Commentary

The adoption of a code of ethics by the auditing profession is encouraged. In addition it is felt that Iceland should require auditors to report indications of a possible act of bribery committed by any employee or person acting on behalf of the company to management and, as appropriate, to a corporate monitoring body without delay. The lead examiners further recommend that the Icelandic authorities consider requiring auditors to report such indications to the competent authorities (Revised Recommendation 1997, Article V.B.iii and iv). Finally the lead examiners encourage the auditors to consider organising special training sessions focussed on economic crimes like bribery, in the framework of their professional education and training system.

The role of related measures to detect bribery: the prevention of tax deductibility of bribes and money laundering

Tax administration

Section 52 of Act No. 75/1981 on Tax on Income and Capital (the Tax Act) as amended by Act No. 95/1998 provides for the non-tax deductibility of bribes. The tax authorities indicate that a violation of section 52 could result in imprisonment of up to six years (in instances of serious violations) and/or fines amounting to the fraudulent tax deduction.

The awareness of tax inspectors of the possibility that bribes might be hidden as deductible charges in tax statements, backed by a solid methodology of detection of these fraudulent charges, is fundamental to avoid and/or eradicate these practices. According to the tax authorities, inspectors of the Directorate of Tax Investigations[17] receive training on the assessment of evidence, including on Icelandic criminal law (which contains the bribery offence). However, tax inspectors do not receive any specialised training on the detection of bribes disguised as legitimate payments, and the training mentioned seems to be provided only to the inspectors of that particular directorate and not to all inspectors of the fiscal administration. Also, it appears that they did not have available to them the OECD Bribery Awareness Handbook for Tax Examiners.

17. The Icelandic tax authorities are divided between the Internal Revenue Directorate, the State Internal Revenue Board, and the Directorate of Tax Investigations. The latter, established in 1993, is in charge of the investigation of the alleged violations of the tax law, particularly of the more serious nature, and decides upon penalty procedures for such violations.

So far, there has been no systematic investigation into whether hidden bribery exists, and there has not been a case where a bribe was detected disguised as an allowable expense. The tax authorities doubt that such an offence could be detected by a routine review of tax returns, and indicate that in their opinion only a detailed investigation of documents seized during an investigation on site could reveal such an offence.

General tax control under the supervision of the Directorate of Internal Revenue has been increasing and more stringent control is exercised in relation to, for example corporate expenses and value added taxes. The lead examiners consider that in this context, information on the possible ways to hide a bribe as a deductible expense could be provided to all tax inspectors.

The tax authorities indicate that if an illegal claim for deductibility of a bribe would be discovered by a district tax inspector or the Internal Revenue Directorate, the matter would be handed over to the Directorate of Tax Investigations for preliminary investigation, as the former are obliged by law to report all cases of suspected tax fraud to the latter. The investigations directorate would prepare a report on the unlawful tax return, which would constitute grounds for further criminal action.

According to the tax authorities, the Tax Act states that it is up to the Directorate of Tax Investigations to decide whether a case involving a suspicion of bribery shall be subject to criminal action. The Icelandic authorities indicate that there is no obligation for the tax authorities to report such cases to the enforcement authorities, but that in practice the tax authorities always report investigation on criminal offences to the police. The tax officials are nevertheless subject to section 141 GPC on breach of duty (see chapter *The lack of guidance concerning detection and inter-agency co-ordination* above).

Where the Directorate decides that a given case shall be subject to criminal action, the tax authorities provide full assistance to the enforcement authorities. However, if a case has not been brought to the police for handling, according to the tax authorities, there is a question as to whether the Directorate is authorised to provide the police with information. On the other hand, the enforcement authorities consider that the tax authorities have the obligation to provide them with full access to tax information.

Commentary

The lead examiners believe that appropriate training would constitute a relevant mechanism for the detection of foreign bribery. They also consider that a clearer obligation for all tax officials to inform the law enforcement authorities of any suspicion of bribery and to provide them information at their request would constitute appropriate deterrents to foreign bribery.

An increase in money laundering prevention

Pursuant to Article 7 of the Act on Measures to Counteract Money Laundering, No. 80/1993, as amended by Act No. 38/1999, "An individual or legal entity referred to in Article 1 [including credit institutions and financial institutions][18] is obliged to have any transactions suspected of being traceable to a violation as referred to in Article 2 carefully examined [including bribery], and shall notify the National Commissioner of Police of any transaction considered to be so related. Upon the request of police

18. It is not certain whether real estate companies and money remittance companies are covered by this provision. However, the Icelandic authorities indicate that a comprehensive rethinking of the act in underway, and that this issue should be enclosed in the general revision, which could take place next autumn.

investigating cases of money laundering, any information deemed necessary on account of such notification shall be provided."

Reporting obligations

So far, no cases have been forwarded to pre-trial investigation in which financial institutions provided information about suspicious transactions involving the proceeds of bribery of foreign public officials. However, the number of reports from financial institutions to the Unit of Economic Crimes of the National Commissioner's office on suspicious transactions has been increasing considerably in recent years. Only one report was issued in 1994, 11 in 1997, 51 in 1999, and 125 in 2001. Some of these reports led to police investigations that have on some occasions resulted in criminal cases and convictions before the courts, mainly relating to economic crimes such as fraud, embezzlement or laundering of the proceeds of drug offences.

The Icelandic authorities believe that the increase in reporting suspicious transactions could be partly due to increasing awareness of the legislation on the prevention of money laundering among Icelandic financial institutions (there are no foreign banks in Iceland). But they do not exclude the possibility that the increase in reporting may also be linked to an increase in suspicious transactions. The representative of the financial institutions met during the on-site visit believes that the increase in reporting is solely due to a growth in awareness and training.

There is no specialised financial intelligence unit for the purpose of receiving reports from financial institutions about suspicious transactions. Instead, the Unit of Economic Crimes of the National Commissioner of Police fulfils the role of a financial intelligence unit in Iceland. Two officers of the unit are in charge of money laundering.

Modification of the legislation

The 2000-2001 FATF annual report provides that "The provisions of FATF Recommendations 14, 19 and 28 have not been fully implemented; therefore, Iceland is in partial compliance with these Recommendations. Recommendation 21 has not been implemented yet."[19] The Icelandic authorities informed the examining team that the Ministry of Commerce was considering a comprehensive revision of the Act on the prevention of money laundering, in order to implement a new EC directive, which amends the existing Directive on Money Laundering.[20] They add that those recommendations of FATF, which have not been complied with would be taken into consideration in that process. If a change of legislation is needed, a bill will possibly be presented in the next session of the Althingi (2002-2003).

Commentary

The lead examiners note that the Icelandic authorities are considering changes in their legislation on money laundering and welcome these changes which should enhance the effectiveness of the regulatory framework.

19. Recommendations 14 and 19 deal with the increased diligence of financial institutions (special attention to complex, unusual transactions, and programmes by financial institutions). Recommendation 28 deals with the role of regulatory and other administrative authorities (issuance of guidelines to the financial institutions). Recommendation 21 deals with measures to cope with the problem of countries having no, or insufficient, anti-money laundering measures.

20. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.

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

The absence of cases of bribery of a foreign public official and the difficulty to assess the application of the implementing legislation

Since the entry into force of the implementing legislation in Iceland in December 1998, there has been no case of bribery that would fall under the scope of the Convention. Therefore, the Icelandic authorities provided information on existing cases of domestic bribery to provide an understanding of the structures for prosecuting foreign bribery in Iceland.

There have been few domestic cases involving active or passive bribery, but the facts underlying them have some limited explanatory potential. The two cases of active bribery concerned persons under the influence of alcohol having offered bribes to traffic policemen (conviction in 1944 and no conviction in 1946). The two passive bribery cases concerned a bank cashier (no conviction, 1935) and a customs officer (conviction, 1986). A new case started in 2001 implicates a Member of Parliament and involves both active and passive bribery charges.[1] One investigation not followed by prosecution took place in 1997, when a weekly publication alleged that a drug dealer was operating under police protection. At the request of a number of members of Parliament, an investigation subsequently took place, but the Prosecutor General concluded that there was no ground for action due to insufficient evidence.

Where possible, the Icelandic authorities support their interpretations of the relevant general principles of criminal law with material from other areas of case law as well as concerning their interpretation of the elements of the offence of bribery or general principles related to its application.

The interpretation of certain elements of the offence

There have not been any litigated domestic cases testing the interpretation of the elements of section 109 GPC[2] or resolving questions about the involvement of intermediaries, the treatment of payments to third party beneficiaries, or the scope of the definition of a "foreign public official". Only the question of the definition of the bribe has somewhat evolved. Nevertheless, some questions raised during Phase 1 have been addressed and more fully discussed during the on-site visit.

Definition of the Bribe

Section 109 GPC expressly covers the case where "a gift or other advantage" is given, promised or offered to a public official. During Phase 1, the Icelandic authorities asserted

1. The case was decided after the on-site visit. Judgement of the District Court of Reykjavík from 3 July 2002 (case number S-1393/2002). The public official was convicted for one of the two charges of passive bribery present in the indictment. The two persons charged with active bribery were acquitted. The Prosecutor General has appealed the case in whole to the Supreme Court.

2. Section 109 GPC: "1) Whoever gives, promises or offers a public official a gift or other advantage in order to induce him to take an action or to refrain from an action related to his official duty, shall be imprisoned for up to three years, or, in case of mitigating circumstances, fined. 2) The same penalty shall be ordered if such a measure is resorted to with respect to a foreign public official or an official of a public international organisation in order to obtain or retain business or other improper advantage in the conduct of international business."

that "this wording covers any advantage, and is not limited to pecuniary advantages. The granting of non-pecuniary advantages is not excluded."

So far, most of the cases of domestic corruption have involved a monetary advantage. The current case concerning the corruption of an MP involves both tangible goods and cash payments. The 1986 case also involved other tangible advantages,[3] and in that case, the court accepted that tangible goods constitute bribes. On the other hand, the 2002 District court decision involving an MP states that "the advantage needs to be of a financial nature". This contrasting interpretation has not yet been confirmed or invalidated by the Supreme Court.

With respect to intangible advantages, the Icelandic authorities asserted in Phase 1 that "it is clear that concessions, grants, or other intangibles (such as membership in a club, a sexual relationship, promotion or career advancement of the public official or person related to him/her) would be covered." This interpretation is based solely on prevailing theories[4] and it would appear that the 2002 District court judgement calls this interpretation into question.[5]

Bribery through Intermediaries

Section 109 GPC does not expressly cover the case where a bribe is made through an intermediary and there is no domestic case law confirming that bribery through intermediaries is covered. During Phase 1, the Icelandic authorities indicated that "according to Icelandic criminal law, an act is punishable even if committed through an intermediary. This is held to apply even if nothing is stated to this effect in the criminal provision in question. Although there are no judicial precedents to bear this out, this conclusion cannot be doubted." Up to now, the Icelandic authorities have not been able to provide judicial precedents confirming that offences committed through intermediaries are covered in case of offences similar to bribery.

Moreover, it was evident at the on-site visit that the significance of the role of intermediaries in foreign bribery transactions is not fully appreciated. For instance, some representatives of the private sector and a Member of Parliament did not appear to understand the coverage of the offence concerning intermediaries. In their opinion, acts committed abroad by foreign companies contracted by Icelandic companies would not be covered by the offence of bribery of a foreign public official. In their understanding, only the foreign companies and not the Icelandic companies would be liable for bribery.

Commentary

In light of the absence of case law supporting the view of the Icelandic authorities that bribes through intermediaries would be covered, the lead examiners recommend following up this issue as case law develops to ensure that bribery through intermediaries is covered, as required by the Convention.

3. In this case of passive bribery, the bribe was bottles of liquor and beer, packets of cigarettes and a tin of ham (conviction, 1986). Section 128 GPC on passive bribery deals with "a gift or other advantage to which [the public official] is not entitled".

4. As for example described by Jónatan Þórmundsson, professor in criminal law, University of Iceland, in: Þórmundsson, Jónatan: *Mútur*, Úlfljótur, tímarit laganema: 376-384, 1973.

5. This decision is under appeal.

Definition of "Foreign Public Official"

Reference sources

Article 109 GPC is directed at bribery of "a foreign public official or an official of a public international organisation". These terms are not defined in legislation, but the Icelandic authorities state that the overall effect of applying the domestic definition in light of the Convention would be that the terms would be interpreted in conformity with the Convention.

The Icelandic authorities refer to the explanatory notes to the Bill, which explain that article 109(2) "covers the same officials as the Convention against Bribery." However, secondary sources of law, such as the explanatory notes to Act 147/1998, are not binding on the courts in applying and interpreting the law. Nevertheless, the Icelandic authorities indicate that "such explanatory notes may have great bearing on the interpretation of the Icelandic courts of the respondent legal provisions, and they are frequently referred to in judgements."[6] In Phase 1 the Icelandic authorities referred to the domestic definition of Icelandic public officials[7] and indicated that "the term *foreign public official* within the meaning of section 109(2) must be interpreted likewise."

The Icelandic authorities explain that section 109 GPC also includes *the officials of public international organisations* to dispel doubts about coverage of this category of officials. However, the Convention itself makes this clear. During the on-site visit, the Icelandic authorities indicated that this reference was superfluous. However, the lead examiners consider that the presence of this specificity for officials of international institutions might lead to uncertainty for judges in determining how to apply the term "foreign public official".

Once available, the Icelandic authorities should indicate how case law settles the question of the interface between the definition of domestic public officials and that of the Convention, in particular, how, in practice, the courts resolve any eventual problems of incompatibility between the two definitions.

Content

Since the Phase 1 review, Icelandic judicial practice has addressed one element of the definition of Icelandic public officials. There is some debate concerning whether the bribery of Members of Parliament is covered. One decision of the District Court has involved a Member of Parliament; however, the Court did not resolve the issue and instead determined that the person in question had public official status based on other

6. Apart from the reference made to the Convention in the explanatory notes to the implementing legislation, the Icelandic authorities note that even though provisions of international conventions to which Iceland is a Party are not directly applicable before the domestic courts, Icelandic legal provisions are interpreted in the light of these international obligations and in conformity with them. (Consequently, international conventions are neither binding upon the courts nor do the courts have any obligation to refer to them). They conclude that it is not unusual that in their judgements, the courts refer directly to provisions of international conventions as a basis for their interpretation of Icelandic law. The Icelandic authorities presented supporting case law to this effect to the examining team.

7. The Icelandic authorities explained in Phase 1 that the term "public official" (or "public servant"), within the meaning of section 109(1) GPC, includes "any person engaged in public administration, whether with state or municipal authorities, commissioned or otherwise lawfully instituted in office. The provision furthermore includes various other persons who have been officially granted particular rights or licensed to practice certain occupations that do not come under the definition of public administration." The scope of application of the GPC concerning public officials is not contained in the law, but in the explanatory notes to Chapter XIV of the GPC, dated 1939.

functions (i.e. chairman of a stave church construction committee and chairman of the National Theatre Construction Committee). A judge present at the on-site visit was of the opinion that Members of Parliament are covered, whereas the Prosecutor General felt that this issue could be raised as a defence.

Commentary

The lead examiners believe that there is a lack of certainty regarding the future interpretation of the term "foreign public official" due to such factors as the lack of harmony between the domestic definition and the definition under the Convention, the lack of legal weight of the explanatory notes and the Convention under Icelandic law. The lead examiners therefore recommend that the interpretation of "foreign public official" be followed-up as case law develops in this regard.

Payments to Third Party Beneficiaries

Section 109 GPC does not expressly cover the case where a bribe is given to a third party beneficiary and there is no case law confirming that the offence would apply where the advantage is transmitted directly to a third party, even where the public official agrees that the bribe be directed to a third party. However, Iceland stated during Phase 1 that "although Section 109 is silent with respect to whether the beneficiary could be the public official or a third party, the act is criminal without regard to the ultimate beneficiary." While no judicial precedents confirm this interpretation, Iceland affirms that this is an "accepted view", which need not be codified and refer to legal literature from 1973.

However, the lead examiners noted that section 128 GPC on passive bribery does sanction "a public official who requests, receives or reserves for himself or others, … a gift or other advantage…".[8] The lack of analogous wording in the foreign active bribery offence could support the argument that the offence does not cover transactions involving third party beneficiaries. On the other hand, the Icelandic authorities indicated during the on-site visit that the mention of third party beneficiaries was superfluous in section 128 GPC and added that the discrepancy of language could not be successfully raised as a defence in a case of active bribery.

In support of their interpretation, the Icelandic authorities provide a recent judgement involving embezzlement, in which a person (the chairman and managing director of a law firm) was convicted of an offence committed for the benefit of a third party (the law firm) although the relevant provision did not expressly apply to such transactions.[9]

Commentary

The lead examiners consider that the fact that section 109 GPC does not expressly cover the case where a bribe is given to a third party may legitimately give

8. Section 128 GPC: "A public official who requests, receives or reserves for himself or others, in connection with the performance of his duty, a gift or other advantage to which he is not entitled, shall be imprisoned for up to 6 years, or, in case of mitigating circumstances, fined."

9. Section 247 GPC provides that "(1) Whoever appropriates for himself money or other valuables in his possession but in the ownership of another person, without the act however being in violation of Section 246, shall be imprisoned for up to six years. (2) A person who without authorisation has used money in the ownership of another person for his own benefit shall be punished as provided for in the first paragraph, irrespective of whether he was obliged to keep the funds separated from his own." In the Supreme Court Judgement from 8 May 2002, a chairman and managing director of the law firm was found guilty of embezzlement, by using payments, collected by the law firm on behalf of its clients, for the benefit of the firm. The punishment for this offence, and document forgery, was imprisonment for 15 months.

rise to questions (in particular in comparison to the language used in section 128 GPC concerning passive bribery). It is therefore the opinion of the lead examiners that the language in the two sections should be aligned.

Unconfirmed interpretations of certain elements of the offence

The interpretations proposed by the Icelandic authorities of certain elements of the offence have not yet been confirmed by case law on domestic bribery and cannot be confirmed through case law on similar offences as these issues are specific to bribery. In addition, the Icelandic authorities indicate that "in the light of no practical application of the implementing legislation, it cannot be said that there has been any development by legal science." Consequently, a number of issues explored in the Phase 1 Review have not been explored in Phase 2 and continue to give rise to uncertainty, such as:

- whether it is necessary to identify the foreign public official bribed or intended to be bribed;
- the interpretation of the element "in order to obtain or retain business or other improper advantage in the conduct of international business";
- the distinction between facilitation payments (commentary 9) and advantages of low value (commentary 7)[10]; and
- whether a person is liable if he/she bribed a foreign public official where the law of the state of the foreign public official permitted or required the advantage (commentary 8).[11]

The possible amendment of the elements of the offence

Since Phase 1, Iceland has signed but not ratified the Council of Europe Criminal and Civil Law Conventions on Corruption. The Icelandic authorities indicated during the on-site visit that the drafting of the Bill amending the Icelandic legislation has been delayed due to the 11 September events and the consequent work on anti-terrorism legislation**,** however the Bill should be submitted to Parliament at this session (2002-2003). Thus it is impossible at this stage to know whether section 109 of the GPC will be amended, and if so to what extent.

Commentary

In light of the small number and the nature of the cases on bribery that have been decided by the courts, it is not possible to clearly assess how certain elements of the offence will be interpreted in practice. The lead examiners therefore recommend that case law regarding bribery as it develops be revisited in a general way.

10. During Phase 1, the Icelandic authorities indicated that "there is no explicit exception for small facilitation payments. However, according to Iceland the fact that Section 109(2) of the GPC makes the act punishable of resorting to bribery in relation to a public official or an official of a public international organisation *"in order to obtain or retain business or other improper advantage in the conduct of international business"* would mean that small facilitation payments are probably not criminal."

11. While section 109 GPC on active bribery deals with "a gift or other advantage", section 128 on passive bribery covers only "a gift or other advantage to which [the public official] is not entitled". Then, it would appear that active bribery offence covers both advantages to which the public official is or is not entitled.

Consistency of the Terminology

The nature of the bribe and the definition of public officials

Section 52 of Act No. 75/1981 on Tax on Income and Capital (the Tax Act) as amended by Act No. 95/1998 provides for the non-tax deductibility of bribes. There is a discrepancy between "Payments, gifts or other contributions" in section 52 of the Tax Act and "a gift or other advantage" in section 109 GPC. The fiscal authorities indicate that there is virtually no difference in Icelandic and that the meaning of the two expressions is the same, leading to an impossibility for taxpayers to use this discrepancy to their advantage.

There is a second discrepancy between "persons engaged or elected to discharge an official legislative, judicial or executive function" in section 52 of the Tax Act and "a public official" in section 109 GPC. The tax authorities indicate that the two texts were written at different times by two ministries and that this could explain the difference in phrasing. They indicate that the objective of the enumeration of officials in article 52 is presumably to reiterate that no one shall be excluded (neither elected nor hired public officials) but add that in the criminological interpretation there is no difference in the meaning. The lead examiners are concerned that this would not cover "any person exercising a public function for a foreign country, including for a public agency or public enterprise"; and are concerned that a defendant could use these discrepancies to avoid liability.

The natural person triggering the liability of the legal person

It is unclear what the standard of liability is concerning the natural person triggering the liability of the legal person, as there are discrepancies in the terminology used in the different provisions applicable to cases of bribery of foreign public officials committed by legal persons. Section 19c of the GPC provides that "a legal person can only be made criminally liable if its *officer, employee or other natural person acting on its behalf* committed a criminal and unlawful act (…)". And section 1 of Act 144/1998 on the criminal responsibility of legal persons provides that "a legal person may be fined if its *employee or staff member* has" bribed a foreign public official.[12]

Act 144/1998 seems to be more restrictive than section 19c, as it does not cover "other natural person acting on the legal person's behalf". However, the Icelandic authorities indicate that these two provisions would be applied in conjunction, and the wording "employee or staff member" in Act 144/1998 would therefore cover all natural persons working on behalf of the legal person. The Icelandic authorities add that no discrepancy between the two provisions is intended and state that the provisions of Section 19c GPC are generally applicable, providing a basis for specific provisions on the criminal liability of legal persons, and can not be diverged from unless such divergences are expressly provided for in the specific legislation.

The lead examiners are of the opinion that this discrepancy in terminology concerning the standard of liability for legal persons could create uncertainties for the police, prosecutors and judges, and therefore recommend that this issue be clarified.

12. The Icelandic authorities add that the term "starfsmaður", translated by "employee or staff member", is a general term which has to be interpreted case by case and in conformity with the GPC.

Commentary

The Icelandic authorities are invited to review the provisions dealing with bribery and to consider appropriate changes in order to ensure the full consistency of the terms used in such provisions (e.g. Section 19c of the GPC and Section 1 of Act 144/1998; Section 109 of the GPC and Section 52 of Act 75/1981).

Liability of Legal Persons

Since 1998, the general principles governing criminal liability of legal persons have been laid down in Chapter II A, Sections 19(a-c) GPC.[13] These sections apply to the criminal responsibility of legal persons on account of bribery of Icelandic or foreign public officials introduced by the Act No. 144/1998.[14] At this stage, there has not been a case of domestic bribery in which a legal person has been charged with active bribery. This could be partly due to the recent introduction of the liability of legal persons for bribery acts. As regards the current case of bribery involving an MP, the Prosecutor General has issued an indictment against the managers of a legal person, but not the legal person itself. According to the Icelandic authorities, this is apparently because the Prosecutor General found that there was not sufficient evidence for a ground of action.

Other case law

The criminal liability of legal persons has existed in Iceland for 30 years, but before 1998, it was established in special provisions, as for example in the Customs Law No. 55/1987, article 126(6)[15], the Copyright Act No. 73/1972, article 54 paragraph 3, etc. To date, the criminal liability of legal persons has been applied only in a few cases; however, with one exception, these cases have all involved tax offences.

According to an overview of tax offence cases, published by the Directorate of Tax Investigations in Iceland,[16] there have been 4 recent cases in the District Courts where a legal person was indicted: 1 case in 1999 (conviction, fine ca. 298.000 Euros) and 3 cases in 2001 (one conviction, fine ca. 52.400 Euros). None of the decisions were made by the Supreme Court (which, however, imposed a fine on a legal person for tax offence in 1991).[17] The Icelandic authorities indicate that "the low number of cases in the field of tax offences can be explained by two factors: firstly, the State Internal Revenue Board also decides tax fines through closed administrative procedures in those cases where the claim of fines is implemented by the Directorate of Tax Investigations. Secondly, often the legal person becomes insolvent or bankrupt before a charge is made."

13. Section 19c: "Subject to other provisions in law, a legal person can only be made criminally liable if its officer, employee or other natural person acting on its behalf committed a criminal and unlawful act in the course of its business. Penalties may be imposed even if the identity of that person has not been established. (…)"

14. Act No. 144/1998: "A legal person may be fined if its employee or staff member has, in order to secure or maintain business or other improper advantage for the benefit of the legal person, given, promised or offered a public official a gift or other advantage in order to induce the public official to take a measure or to refrain from taking a measure within the sphere of his or her official duties. This shall also apply to such acts committed with respect to foreign public servants or officials acting for international institutions."

15. Article 126(6) reads as follows: "A legal person or its chief executive can be held responsible for paying *in solidum* a fine due to a violation of this law although a criminal act by an employee of the legal person has not been revealed, provided that the violation has been committed for the benefit of the legal person."

16. homepage www.skattrann.is/main1.htm

17. Cases in the District courts concerning tax offences were 20 in 1999 and 2000, 27 in 2001. There were 9 cases in the Supreme Court concerning tax offences in 2000-2002; none against legal.

The Tax Law contains a special provision to the effect that the legal person may be fined irrespective of whether there is liability of a director of the legal person.[18] The tax authorities indicated that in one case a legal person was sentenced to pay a fine, together with the principal perpetrator, whereas an alleged participant in accounting violations was acquitted. The tax authorities consider that it may conceivably be interpreted that the legal person was sentenced for the accounting violation, even though neither defendant (natural persons) was sentenced. There is no case law where the liability of a legal person has been triggered by acts of a *de facto* officer.

There has been only one case where a legal person has been criminally sanctioned apart from the cases of tax offences. In a 6 April 2002 Supreme Court decision, the Court imposed a fine on a fishing company for exceeding fishing quotas and other offences against the fishery legislation.[19] The criminal liability of the company was based on the grounds that the illegal quota was caught on a ship owned by the company in question, at the initiative of its director, and the fish was the property of the company. Finally, the offences in question were considered to give the company a financial advantage. It is not clear to what extent the rationale for this case could be extended to foreign bribery cases, as the standard of liability under the fisheries act is different.[20]

In the fishery case and two tax cases, the natural persons and the legal person were sanctioned for the same offence and their responsibilities were determined in the same proceedings, as prescribed in section 23(2) of the Code of Criminal Procedure.[21]

The criminal liability of administrative authorities, established in section 19c GPC, has never been applied.

The lead examiners note that section 19c of the GPC on the liability of legal persons provides that a "legal person may be fined (…)" in contrast to section 109 of the GPC concerning natural persons, which states that they shall be sanctioned. The Icelandic authorities indicated that the difference in language is not intended to create the possibility of refraining from ordering fines for cases where such an offence has been established and an indictment has been issued against a legal person. The Icelandic authorities state that on the contrary, this terminology reinforces the notion that there are exceptions to the general principle of non-liability of legal persons.

Commentary

Despite the existence of the criminal liability of legal persons for 30 years in Iceland, the lead examiners take note of the low number of prosecutions

18. Article 107 of the Tax Law states: "A legal person may be fined for violating this act, irrespective of whether the violation may be traced to a punishable act by its leader or an employee of the legal person…". The provision establishing the liability of legal persons for tax offences is thus different from the one for bribery offences.

19. The fine imposed was ISK 500.000, ca. 6000 Euros and the catch (value of which is ISK 3,786,602) was confiscated.

20. Pursuant to section 20a, paragraph 1, of Act No. 38/1990, applied in that case: "Fines may be imposed on both legal entities and individuals. Without prejudice to the provisions of the first paragraph of Article 20, fines may be levied against legal entities, even though the guilt of their representatives or employees or other persons acting on their behalf has not been proven, if the violation has been or could have been to the advantage of the legal entity. In similar instances, fines may also be imposed against legal entities if their representatives or employees or other persons acting on their behalf are guilty of a violation." Therefore, the Icelandic authorities indicate that the result would have probably been the same if the manager had not intervened.

21. In the fishery case, the captain of the vessel and the manager of the company were sanctioned. The principle contained in Section 23(2) of the CCP provides that if more than one person is prosecuted on account of participation in the same criminal act, this shall be done in the same case, unless a different arrangement is deemed more feasible.

involving legal persons. They recommend revisiting this issue within a reasonable period to ascertain whether the foreign bribery offence is effectively applied to legal persons.

Sanctions, Confiscation and Statute of Limitations

Sanctions

The sanctions for the active bribery of a foreign public official are imprisonment of between 30 days and three years, and fines can be imposed jointly with imprisonment if the defendant has "obtained, for himself or others, a financial advantage by his offence, and/or when this has been his design" (section 49(2) GPC).

The only case where there has been a conviction for the active bribery of a domestic public official occurred in 1944 (involving a drunk driver). It is the opinion of the lead examiners that this case took place too long ago for the sanctions ordered to be useful in predicting what the sanctions for the offence of bribing a foreign public official might be.

Determination of the level of the sanction[22]

The Icelandic authorities indicated that the question of whether the bribe has been solicited by the foreign public official is irrelevant in determining whether the act in question is criminal, but believe that it would likely have an impact on the level of the sanction.

Commentary

The limited number of bribery cases in Iceland makes it difficult to assess the implementation of the Convention in practice in respect of the effectiveness of sanctions. The lead examiners suggest that this issue be revisited as case law develops.

Confiscation

In Iceland, confiscation is discretionary pursuant to section 69 GPC, and can be imposed only if requested in the prosecutor's indictment pursuant to sections 116(1)(d) and 117(1) CCP. In case the prosecutor does not request confiscation in its indictment, the Icelandic authorities indicated that the court could however apply section 49(2) GPC to compensate for the absence of confiscation against a natural person. (See above paragraph 120)

Until recently, confiscation was most frequently used in cases of smuggling and drug offences. The only example of confiscation with respect to bribery concerned a passive bribery offence for which the gifts received by a customs official convicted therefore were confiscated. However, the gifts were not confiscated as proceeds of the passive bribery offence, but because they were unlawfully imported goods.[23] It appeared to the examining team that until recently confiscation was not being given enough attention. The Icelandic authorities nevertheless indicated that the policy has changed and

22. It was clarified during the on-site visit that contrary to what is explained in the Phase 1 report, factors enumerated in section 70 GPC do not constitute mitigating circumstances, but factors that the court can take into account to determine the level of the sanction, within the limits paused by the law, against a natural or legal person.

23. The basis for confiscation in this decision of the Supreme Court dated 8 October 1986 was the Liquor Control Act no. 82/1969 and the Customs Law no. 55/1987.

confiscation is now sought whenever possible. For instance, a judgement of the Supreme Court in November 2001 applied confiscation to an offence of money laundering concerning the proceeds of a drug offence.

The Icelandic authorities indicated during the on-site visit that they would probably be able to confiscate the proceeds of an offence of active bribery of a foreign public official pursuant to section 69 paragraph 1 point 3 GPC. Concerning the bribe, the Icelandic authorities indicated that they would be able to confiscate a bribe still in the possession of the briber if it could be identified as such.

The Icelandic authorities indicate that they were able to seize properties, and once judgement passed, to confiscate property through mutual legal assistance. For instance, they have already seized bank accounts linked with a Belgian case of money laundering. Iceland has never received any request for confiscation of gains obtained from an offence under procedure in another country.

The Icelandic authorities indicated that amendments to simplify article 69 of the GPC are under consideration in order to facilitate confiscation from third parties. They expect that the amendments will be passed within the next two sessions of Parliament (2002-2004).

Commentary

The lead examiners note that the Icelandic authorities are considering changes to their legislation on confiscation and consider that these changes should enhance the effectiveness of the regulatory framework.

Limitation period for the enforcement of sanctions

Pursuant to section 83 GPC, a sentence of imprisonment shall lapse within five years if it is for at most one year and within 10 years if it is for over one year and at most four years. The enforcement of a fine shall lapse three years after the date the final judgement was given, or five years if the fine amounts to ISK 60,000 or more; and the enforcement of a sanction of confiscation shall lapse five years after that date.

It is the position of the Icelandic government that it is unlikely that these provisions could provide an obstacle to the effective application of sanctions to the foreign bribery offence as this has not been the situation with other offences.

The Icelandic authorities informed the lead examiners that a convicted person who is sentenced to a term of imprisonment is not necessarily taken into custody at the time the sentence is pronounced, unless the person is already detained. And once the period of imprisonment lapses, Iceland does not have the authority to impose the sentence even if the person evaded capture. A magistrate explained that there has been one case where a convicted person tried to avoid imprisonment by hiding in Canada, but the person came back before the sanction lapsed.

With respect to fines, court**s** order imprisonment as an alternative to a fine in case the fine cannot be enforced. However, the authority to convert fines in this way would not provide a workable alternative in respect of legal persons.

Commentary

Consideration should be given to a change in the legislation to ensure that the fact that the convicted person cannot be found in Iceland will not result in a lapse of the sentence.

Broad Basis of Jurisdiction

During the on-site visit, the Icelandic authorities clarified that contrary to what is stated in the Phase 1 report, sections 4 and 7 GPC on territorial jurisdiction and sections 5 and 8 on nationality based jurisdiction are never applicable to cases of bribery of a foreign public official. Only section 6 on universal jurisdiction is applicable.[24]

Pursuant to section 6 of the GPC, "Penalties shall also be imposed in accordance with Icelandic criminal law on account of the following offences, even if they have been committed outside Icelandic territory and irrespective of the offender's identity: (...) 10. For conduct described in the Convention of 21 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions." Although this establishes a very broad jurisdiction over the offence, the Icelandic authorities state that in practice they would only exercise it if the offender were found in Iceland (including a national). If the offender were not found in Iceland, the Icelandic authorities indicated that they would request his/her extradition if he/she were an Icelandic citizen. Section 6 has never been applied in practice. It should however be noted that the Convention only requires jurisdiction based on nationality and territoriality and the Icelandic jurisdiction is more far reaching.

The Icelandic authorities further indicated that if a case involving a non-Icelander were to occur, despite the applicability of section 6, the preference would be to extradite the person to the country of the perpetration of the offence rather than prosecuting the person in Iceland.

Commentary

In view of the absence of cases, the lead examiners are not in a position to evaluate the application in practice of the universal jurisdiction.

Enforcement

From the three cases where active bribery was prosecuted, only one led to conviction. In a case of passive bribery where it was recognised that the public official received gifts, no one was prosecuted for active bribery.

In the Supreme Court judgement of 1946, a drunk person proposed a bribe to a policeman to let him go free. The court acquitted the person, who denied having offered a bribe, because one of the two arresting policemen could not corroborate the evidence.[25]

In the Supreme Court judgement of 1986 concerning the passive bribery of a customs official, no one was convicted of active bribery as the captain of the vessel "firmly denied having handed the defendant any goods, whether as a gift or by way of a consideration in any form. The relations between him and the two defendants had been strictly limited to what was necessary for customs clearance."

In the current case of bribery involving an MP, the persons charged with active bribery were acquitted. The defendant had given money in cash to the public official in relation to the settlement of bills. The court considered that the payment was made on

24. The representatives of the Ministry of Justice explained that there was no special reason to apply the universal jurisdiction to bribery of foreign public officials. The Icelandic authorities provided for this in order to be sure of effectively implementing the Convention.

25. In the only case of active bribery having led to conviction, the drunk driver having offered a bribe to a policeman (1944) recognised having done so before the court.

account of the functions of the public official as chairman of the national Theatre Construction Committee, but that he did not act in contravention of his official duty by approving the invoice. Therefore the defendant had linked the payment to a lawful act in official capacity. The Icelandic authorities indicate that the judge apparently did not take into account the latest amendments in the GPC (made when the OECD Anti-Bribery Convention was ratified) and seems to have based his judgement on the previous Article. The offence states that the act must be "related to official duty [of the public official]". Instead, the court referred to the offence as previously existing, which stated that the act must be "in contravention of the official duty [of a public official]". The Icelandic authorities further indicated that this has been much debated in Iceland, and a professor in criminal law indicated that the judgement is erroneously based on the old Article. The Prosecutor General has appealed the case in whole to the Supreme Court.

Unconfirmed questions of the practical enforcement of the offence

The Icelandic authorities were not in a position to present cases of the enforcement of offences similar to bribery involving an international element. Only a few points were discussed during the on-site visit.

Investigation techniques available to the law enforcement authorities

The CCP provides generally for a mandatory system of prosecution, since section 111 provides that "every punishable act shall be subject to public indictment, unless a different arrangement is provided for by law". A decision not to prosecute must therefore be legally founded on sections 112 or 113 of the CCP. According to the Icelandic authorities, the prosecutorial authorities decided not to prosecute a case of alleged bribery only once: an investigation that took place in 1997, when a weekly publication alleged that a drug dealer was operating under police protection. However, the Prosecutor General concluded that there was no ground for action due to insufficient evidence.[26]

The CCP Section 87 contains provisions on police investigation measures, including search and seizure and covert measures, such as wire-tapping and acoustic surveillance. Wire-tapping and acoustic surveillance can only be employed after a court order has been obtained and subject to the conditions that a) it is reasonably expected that information of high value for an investigation can be obtained by such means and b) the investigation concerns an offence that may result in a sentence of eight years or more in prison (which excludes bribery), or important public or private interests demand that the measure is taken. The Icelandic authorities are not in a position to present any case where the measures provided for in CCP section 87 have been applied to the offences of theft, embezzlement, fraud, money laundering or other economic crimes. The Icelandic authorities indicate that such measures have essentially been used concerning drug crimes, but could also be used in cases of bribery of a foreign public official if the above mentioned conditions are fulfilled.

The Prosecutor General has issued General Instructions to prosecutors and police on the use of informants, electronic surveillance equipment, decoys and controlled delivery, as well as agents provocateurs. Generally more stringent demands are made for the employment of such measures than other investigative measures, and therefore they can usually only be resorted to when investigating offences of a serious nature.

26. Under Section 112, if the prosecutor, after the investigation, considers that the established facts will not be adequate or likely to secure a conviction, he shall let the matter rest.

It appears from the on-site visit and material provided by the Icelandic authorities that a large range of legal instruments including mutual legal assistance, the money laundering offence, special investigation techniques and confiscation are rarely used other than for drug-related offences. Similarly, resources committed to the fight against drug-related offences have increased in recent years. The Icelandic authorities however indicate that there is a growing trend to use some of these instruments for non drug-related offences.

Immunity from prosecution for Members of Parliament and Ministers

Pursuant to paragraph 49(1) of the Constitution, "no Member of Althingi may be subjected to custody on remand during a session of Althingi without the permission of Althingi, nor may a criminal action be brought against him unless he is caught in the act of committing a crime". However, pursuant to article 14 of the Constitution, Ministers, who are generally also Members of Parliament, may be impeached on account of their official acts. The Icelandic authorities provide that politicians in Iceland are permitted to have business interests, and that there are no special rules regarding their disclosure or regarding conflicts of interest.

No prosecution of foreign legal persons

The Icelandic authorities indicate that if a foreign legal person commits an offence, including the offence of bribing a foreign public official, in Iceland, they would not initiate proceedings against it and would instead surrender the case to the country of nationality of the legal person.

The Icelandic authorities are not in a position to provide a definitive answer to the question of the determination of the nationality of a legal person. They presume that the applicable maxim could be that the 'nationality' of a legal person is determined by the place where its headquarters are.

Mutual legal assistance and legal persons

The Icelandic authorities indicate that there are few examples of MLA requests regarding legal persons. Usually they concern information on companies that are somehow related to companies in other countries that are under police investigation.[27] The Icelandic authorities explained that there are no legal provisions concerning MLA for administrative proceedings and that such requests would have to be solved on a case-by-case basis. At this stage, the Working Group may wish to revisit the issue of whether the practice of deciding to provide mutual legal assistance with respect to requests concerning legal persons from countries where the liability thereof is administrative, on a case-by-case basis rather than pursuant to a prescribed set of rules is adequate.

Commentary

The limited number of bribery cases in Iceland makes it difficult to assess the implementation of the enforcement obligations under the Convention in practice. The lead examiners suggest that this issue be revisited in light of the development of case law.

27. During Phase 1, the Icelandic authorities indicated that as regards non-criminal proceedings against a legal person coming within the scope of the Convention, Iceland could provide legal assistance on the basis of the Lugano Convention of 1988.

Money Laundering Offences are linked to Drug Offences

Iceland recently established the offence of money laundering in its criminal code. The offence of laundering of proceeds of drug offences was introduced in 1993 and was extended to the laundering of the proceeds of any offence in 1998.

Case law

To date, there have been 5 convictions for money laundering in Iceland, all of which were linked to drug offences as a predicate offence.[28] The only case of money laundering that was not linked to a drug offence arose last year, but did not lead to conviction.[29] In addition, section 264(4) GPC on negligent laundering has never been applied. The Icelandic authorities are confident that the awareness of the rationale for the offence of money laundering is growing among enforcement authorities and that consequently the number of cases of money laundering not linked to drug offences is expected to increase.

Predicate offence abroad

The Icelandic authorities stated that the court would generally require a conviction for the predicate offence to confiscate the proceeds where the predicate offence took place abroad. However, the Icelandic authorities are of the view that where the predicate offence took place abroad but there is no conviction due to the death of the defendant for example, they would be in a position to confiscate the proceeds.

Commentary

The lead examiners encourage the Icelandic authorities to increase attention on money laundering linked to forms of criminality other than drug offences, including the bribery of a foreign public official.

International Co-operation

The Icelandic authorities indicate that they have never applied, or received requests, for mutual legal assistance or extradition concerning domestic bribery or similar offences (including money laundering). They further indicate that Iceland received only around 5-10 requests for extradition in the last ten years, and that most of the MLA requests from Iceland are related to the smuggling of drugs to Iceland and similar offences. There are no time limits for Iceland to respond to an extradition or MLA request, but the Icelandic authorities indicate that they always try to reply promptly.

The Icelandic authorities indicate that they would not set conditions others than those set in Articles 1 to 11 of the Extradition of Criminals and other Assistance in Criminal Proceedings Act No. 13/1984 when deciding whether to grant extradition requests in cases of bribery, as permitted by article 11 indent 2 of the law. They add that if they denied a request for extradition on the basis that the request concerned an Icelander, this case would be submitted to the Icelandic prosecutorial authorities.

28. Sanctions applied in the last case (Supreme Court judgement, 8 November 2001, 3 persons convicted) were imprisonment between 14 to 20 months and fines between 5000 to 12000 euros, plus confiscation. However, where the predicate offence is a drug offence imprisonment can be up to 10 years, instead of 2 years for other predicate offences.

29. In this case, a mother was convicted of fraud offence, and her son was acquitted for the linked money laundering offence.

Commentary

In the absence of examples of extradition or mutual legal assistance concerning bribery cases in Iceland, the implementation of the international co-operation obligations under the Convention in practice cannot be assessed. The lead examiners suggest that this issue be reviewed in light of the development of case law.

Recommendations

In conclusion, based on the findings of the Working Group with respect to Iceland's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Iceland. 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 Iceland develop further efforts to raise the level of general awareness of the offence of bribery in international business transactions as well as enhance mechanisms for the detection of bribery offences (Revised Recommendation, Article I).

With respect to the public sector, the Working Group particularly recommends that Iceland:

1. enhance awareness and establish appropriate procedural guidelines and training for the detection of foreign bribery within the agencies responsible for detecting and/or investigating the offences usually related to bribery offences. (Revised Recommendation, Articles I and IV);

2. clarify and publicise the extent of the obligation of all public officials to report bribery offences of which they become aware, and in particular consider introducing a clearer obligation for all tax officials to inform and co-operate with the law enforcement authorities on any suspicion of bribery; (Revised Recommendation, Article I);

3. maintain the efficiency and specialisation of the Unit for investigation and prosecution of serious economic and environmental crimes; (Revised Recommendation, Article I);

With respect to the private sector, the Working Group recommends that Iceland:

4. co-operate with private sector organisations in order to raise awareness of companies, and in particular encourage and promote internal corporate compliance programmes for exporting companies. In addition, guidance by private sector organisations on how to deal with solicitation of bribes would be useful (Revised Recommendation, Articles I and V.C.i and iv);

With respect to accounting and audit profession, the Working Group recommends that Iceland:

5. encourage the accounting and auditing profession to organise special training sessions focussed on bribery and related offences, in the framework of their professional education and training system (Revised Recommendation, Article I);

6. encourage the adoption of a code of ethics by the auditing profession and reflect further on the rules on the independence of auditors; (Revised Recommendation, Article V.B.ii);

7. require auditors to report indications of a possible illegal act of bribery committed by any employee or person acting on behalf of a company to

management and, as appropriate, to corporate monitoring bodies without delay. In addition, the Working Group recommends that Iceland consider requiring auditors to report such indications to the competent authorities; (Revised Recommendation, Article V.B.iii and iv).

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

The Working Group recommends that Iceland consider the following modifications to its legislation by:

8. aligning the language concerning third party beneficiaries in section 109 GPC concerning bribery of a foreign public official with section 128 GPC concerning passive bribery so that third party beneficiaries are clearly covered; (Convention, Article 1);

9. reviewing the provisions dealing with bribery and considering appropriate changes in order to ensure complete consistency in the terms used in such provisions (e.g. Section 19c of the GPC and Section 1 of Act 144/1998 concerning the natural person triggering the liability of legal persons; Section 109 of the GPC and Section 52 of Act 75/1981 concerning the nature of the bribe and the definition of public officials); (Convention, Articles 1 and 2; Revised Recommendation, Article IV).

Follow-up by the Working Group

In light of the small number of cases of domestic bribery and the absence of case law concerning bribery of foreign public officials, it is very difficult to assess how the Icelandic legislation will be applied in practice. The Working Group will therefore revisit the case law regarding bribery in a general way as it develops. (Convention, Articles 1, 3, 5). This concerns in particular:

10. the elements of the offence explored in Phase 1 that are specific to the offence of corruption and whose interpretation cannot be inferred from the application of other similar offences, as well as the coverage of intermediaries and the interpretation of the term “foreign public official”; (Convention, Article 1 and Commentaries 4 to 10 and 12 to 19)

11. the criminal liability of legal persons, to ascertain within a reasonable period whether the foreign bribery offence is effectively applied to legal persons; (Convention, Article 2);

12. the application in practice of the universal jurisdiction and international co-operation obligations under the Convention and the effectiveness of the provisions on confiscation, in particular with respect to the possibilities of confiscation from third parties; (Convention, Articles 3, 4, 9 and 10).

13. the extent to which Icelandic authorities direct more attention on money laundering linked to forms of criminality other than drug offences, including the bribery of a foreign public official. (Convention, Article 7).

Appendix 1

Evaluation of Iceland by the OECD Working Group (October 1999)

Legal Framework

Evaluation of Iceland[1]

General Remarks

The Working Group complimented Iceland for being the first country to have ratified the Convention and for the rapid implementation of the Convention into its legislation. Delegates thanked the Icelandic authorities for their co-operation in the evaluation process.

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

Specific Issues

1. Level of sanctions vis-à-vis legal persons

The Group noted that legal persons are liable of a fine which may be up to 4 millions ISK (the equivalent of approximately 60.000 US dollars). The Icelandic authorities recognised that the level of fines, which had not been increased for the last 15 years, was not sufficiently dissuasive.

The Group noted Iceland's intention to increase the level of fines as soon as possible.[2]

2. Statute of limitations

The Group raised the question of the appropriateness of the periods of limitation provided by section 81 of the GPC. In particular the Group expressed concern that when the offence is only subject to fines (as this is the case for legal persons), criminal liability lapses in two years. Iceland indicates that the provisions of article 81 were enacted with criminal liability of natural persons primarily in mind.

The Group noted that Iceland will give due consideration to an extension of the limitation period for offences committed by legal persons.[3]

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

2. Following the examination of Iceland, section 2 of Law no. 39 came into force (9 May 2000) which deleted section 50 of the General Penal Code effectively removing the maximum limit on fines for legal persons.

3. Following the examination of Iceland, section 5 of Law no. 39 came into force (9 May 2000) which added a new paragraph to section 81 of the General Penal Code increasing the statute of limitations for legal persons to five years.

APPENDIX 2

Principal Legal Provisions

1. A Bill amending the General Penal Code, No. 19, 12 February 1940, as later amended (Bribery of Public Official)

2. Act on Criminal Responsibility of Legal Persons, No. 144/1998

3. Act on Tax on Income and Capital No. 75/1981 - Section 52.

A Bill
Amending the General Penal Code, No. 19, 12 February 1940, as Later Amended
(Bribery of Public Official)

(Submitted to Parliament's 123rd legislative assembly, 1998-1999)

[*Translation from Icelandic*]

Section 1

The following numbered subsection is added to Section 6 of the Code:

For conduct described in the Convention of 21 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions.

Section 2

Section 109 of the Code, as amended by Section 33 of Act No. 82/1998, shall read as follows:

Whoever gives, promises or offers a public official a gift or other advantage in order to induce him to take an action or to refrain from an action related to his official duty, shall be imprisoned for up to three years, or, in case of mitigating circumstances, fined.

The same penalty shall be ordered if such a measure is resorted to with respect to a foreign public official or an official of a public international organisation in order to obtain or retain business or other improper advantage in the conduct of international business.

Section 3

This Act shall enter into effect immediately.

Explanatory Notes to This Bill

I. Introduction

This bill was prepared under the auspices of the Criminal Law Committee at the initiative of the Minister of Justice. With a letter from the Ministry dated 4 February 1998 the Committee was entrusted with preparing a bill making the legal amendments necessary in order to make a ratification possible of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris 17 December 1997.

In order to fulfil the obligations undertaken by the Convention amendments must be made to the General Penal Code, Act No. 19/1940. It is also necessary to provide by law

for liability of legal persons on account of bribery of foreign public officials, and a joint bill is submitted for this purpose.

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was prepared by the OECD at the initiative of the United States Government. Negotiations on the preparation of the Convention were completed 21 November 1997, and the Convention was signed 17 December in that year by all the OECD member States except Australia. The Convention was furthermore signed by the following States that are not members of the OECD: Argentina, Brazil, Bulgaria, Chile and Slovakia. A separate declaration was signed jointly with the Convention, where the States in question undertook to take the necessary measures to enable the Convention to enter into effect prior to the end of 1998. On 2 June 1998 Parliament resolved to authorise the Icelandic Government to ratify the Convention on Iceland's behalf.

Internationally, great emphasis has been placed on solidarity against corruption and organised crime. The OECD Convention against bribery is representative of this endeavour. Work on the preparation of a general criminal law convention against corruption is also in progress under the auspices of the Council of Europe, aiming for its completion in the second half of 1998. Corruption and related criminal activity respects no boundaries, and is, in general, veiled in secrecy. Close international co-operation is important for the eradication of such activity. International solidarity is also important in order to provide for criminalisation of bribery of foreign public officials. Its absence would entail a risk of distorting the competitive position between States that declare such conduct punishable, and States that tolerate inequitable business practices of such nature.

II. The Substance of the Convention Against Bribery

Following the preamble of the Convention against bribery, its central provision is found in Article 1, obligating the States Parties to carry out the necessary measures to establish as criminal offences under their law to offer, promise or give any undue advantage to a foreign public official. In this respect, it is immaterial whether the advantage is of pecuniary or other nature or intended for the official personally or for a third person, provided its aim is to induce the public official to act or refrain from acting in relation to his performance of official duties. The aim must also be to obtain or retain business or other improper advantage in the conduct of international business. It is furthermore provided that complicity in such offence is to constitute a criminal offence, and that the law of a State Party shall provide for criminalisation of an attempt to bribe a foreign public official under the same rules as applicable to an attempt to bribe a public official of the State Party itself.

This description of the act covers any advantage granted a foreign public official without regard to its value, whether or not the granting of the advantage brought the desired result, and without regard to local custom, any tolerance of the relevant administrative authorities with respect to such awards, or whether the advantage was necessary in order to obtain or retain business. The description does not, however, cover minor favours as practised in some countries in order to encourage public officials in the performance of their duties, such as the issue of identification documents or licences. Such favours are generally not granted in the purpose of obtaining or retaining business or any other undue advantage in international business transactions.

In the Convention, the following terms mean as follows:

- The term "foreign public official" refers to any person exercising a legislative, administrative or judicial function in a foreign country, whether appointed or elected. The term also refers to any person exercising a public function for a foreign country, including a public institution or enterprise. Public institution refers to any institution performing a function as provided for by law for public benefit. A public enterprise, on the other hand, refers to any business operation without regard to its legal form, where administrative authorities may exercise significant influence, directly or indirectly. A staff member of such an enterprise will be deemed to exercise a public function, except if the enterprise is active, without any public backing, in the general market, in a manner totally analogous to private business operation. Furthermore, the term "foreign public official" covers any official or staff member working under the auspices of a public international institution. This refers to any institution established by States or governments, irrespective of its organisation or the tasks exercised. Bodies independently established by foreign public institutions are also included.
- The term "foreign country" covers all levels and divisions of government, from the executive government to local authorities. The term is not limited to States, but also covers any organised regions or units abroad, such as self-governing territories.
- "Acting or refraining from acting in relation to the performance of official duties" refers to any utilisation by a public official of his official position, irrespective of whether this comes under the sphere of his duties. Thus, the description is also deemed to cover the act of bribing a public official of high rank in order that he will, by virtue of his office but outside the sphere of its authority, seek to have another public servant enter into a transaction.

According to Article 3 of the Convention the sanctions to be imposed on account of bribery shall be effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to those applying to bribery of the public officials of the State Party itself and shall include, for example, deprivation of liberty for a period long enough to make effective mutual legal assistance and extradition possible. Each State Party shall also take the necessary measures to ensure that bribes to foreign public officials and any gains derived from such bribes, or property corresponding to such gains, can be seized and confiscated, or, alternatively, that fines having comparable effects can be imposed.

Article 2 of the Convention provides that each Party shall take such measures as may be necessary, in accordance with its own legal principles, to make legal persons liable for payment of bribery to a foreign public official. This does not involve an obligation to provide by law for criminal liability of legal persons, if such rules are not included in the law of a Party. If so a State Party shall, however, ensure that legal persons are subject to effective, proportionate and dissuasive sanctions, including monetary sanctions, cf. Article 3, paragraph 2.

According to Article 10 bribery of a foreign public official shall be among extraditable offences under the law of a State Party and any extradition agreements between them. A Party may regard the Convention as a legal basis for extradition with respect to such offences, if the Party sets the condition of the existence of a treaty. A Party shall also take the measures necessary to ensure that it can either extradite or prosecute its own nationals on account of bribery of a foreign public official. A Party

shall submit a case to its competent authorities for prosecution, if it refuses a request for extradition solely on the ground that it concerns its own national.

Article 4 of the Convention contains provisions in further detail on criminal jurisdiction, providing that a Party having jurisdiction to prosecute its own nationals on account of offences committed abroad shall take such measures as may be necessary in order to establish its jurisdiction over the bribery of a foreign public official according to the same principles. Each State Party shall also examine whether its current basis for jurisdiction is effective in the fight against bribery of foreign public officials, and, if not, take appropriate remedial steps.

Convention also contains provisions in further detail on procedure in cases of bribery, time limitations, mutual legal assistance, and monitoring of its implementation.

III. Legal Amendments by Reason of Ratification of the Convention

There is no generally applicable statute on bribery to be found in the General Penal Code. Nevertheless it is deemed essential, under some circumstances, to prevent that people are offered advantages for taking an action or refraining from taking an action. It is important in public administration that law is observed and the correct procedures employed. For this reason Section 109 of the Code provides for criminal sanctions for bribing a public official (active bribery), and according to Section 128 of the Code the public official himself may also be punished on account of bribery (passive bribery).

The parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions have undertaken to make it a punishable offence in their national legislation to offer, promise or give a foreign public official any undue advantages. On the other hand the Convention does not apply to the conduct of the public official, in soliciting or accepting a bribe.

According to Section 109 of the General Penal Code a person who promises or offers a public servant a gift or other advantage in order to induce him, contrary to his official duty, to take an action or refrain from an action, shall be imprisoned for up to three years, or in the case of mitigating circumstances, imprisoned for up to one year or fined. The scope of the provision is limited to domestic public officials, and consequently the act of bribing a foreign public official would not be punishable under the law now in effect. It is necessary in order to fulfil the obligations undertaken by the Convention against Bribery to provide expressly for the criminality of bribing foreign public officials. As the Convention is not limited to the public officials of foreign states it should also be provided clearly by statute that this also applies to the officials of public international institutions.

It is an element of the offence as defined in Section 109 of the Code that the conduct of an official, in acting or refraining from an action, is contrary to his official duty. This means that the act of paying a public official for taking an action, or refraining from an action, outside the scope of his duties, is probably not criminal. In this respect the description in the Convention is of a wider scope, as its Article 1, paragraph 4 (c) declares that to "act or refrain from acting in relation to the performance of official duties" includes any use of the official's position, whether or not it is within his authorised competence. In adapting criminal law to the Convention against Bribery, the alternative of providing for heavier penalties in cases involving bribery of foreign public officials, than those of domestic public officials, is not deemed worthy of consideration. Therefore it is considered necessary to amend Section 109 of the General Penal Code so that the

description of the criminal act is the same, irrespective of whether the public official in question is Icelandic or foreign.

In the Convention, the parties undertake to make it a criminal act in their national legislation to grant any benefits in the purpose of acquiring or retaining business or other improper advantage in the conduct of international business. On the other hand Section 109 of the General Penal Code does not limit its sphere of application to business. The present Bill does not propose that criminal liability be carried any farther than required by the Convention. Thus, it is proposed that bribery of foreign public officials will be a criminal act when the purpose is to facilitate business, while such payments to domestic public officials will remain criminal, irrespective of this purpose.

Articles 2 and 3 of the Convention require that legal persons are made responsible for the payment of bribes to foreign public officials; however, there are no provisions in the law now in effect that establish such responsibility. The present Bill does not propose the inclusion of a statute to this effect in the General Penal Code, and the Code does not have a provision establishing criminal responsibility on the part of legal persons. Instead, a separate Bill is submitted jointly with this Bill, on the Criminal Responsibility of Legal Persons on Account of Bribery of Public Officials. Despite the fact that the Convention does not require the parties to it to enact provisions on criminal liability, this is deemed desirable and best suited to achieve the aims of the Convention.

According to Article 10 paragraph 3 of the Convention the parties are required either to permit extradition their own nationals, or to indict them on account of bribery of foreign public officials. According to Section 2 of the Act on Extradition and Other Assistance in Criminal Matters, No. 13/1984, extradition of Icelandic nationals is prohibited. It is consequently necessary to provide in the General Penal Code for the possibility of prosecuting a person in Iceland even if his offence was committed outside the Icelandic criminal jurisdiction. This arrangement would be in the best conformity with Article 4 of the Convention, which requires the parties to amend their legislation so that their rules on jurisdiction are conducive to success in the struggle against bribery of foreign public officials. It is important in this context to take note of the fact that the offences coming within the scope of the Convention must reasonably be expected to be committed in the country of the public official in question, and therefore outside Icelandic criminal jurisdiction.

Notes on the Individual Sections of the Bill

On Section 1

This proposes that Icelandic criminal jurisdiction be extended so as to cover any conduct defined in the Convention against Bribery, even if the offence is committed outside Icelandic territory and irrespective of the offender's identity.

On Section 2

It is proposed here that some amendments be made to Section 109 of the General Penal Code to conform to the Convention against Bribery.

In the first paragraph it is proposed that the Section's definition of the act be changed, requiring the aim of the gift or other advantage to be to induce the public servant to act or to refrain from an action related to his official duty. The scope of this description is more extensive than that of Section 109 at present, in that a violation of the provision must involve that the public official act or refrain from acting, in contravention of his official duty. Thus, it will be a criminal act to give some advantage to a public servant in order

that he use his position to influence the outcome of a matter, even if that matter does not come under his authority. It is completely irrelevant as regards the criminality of the act if, in conferring the advantage in question, the aim is to secure some ministration to which the perpetrator is entitled, because it is generally impossible to state that such an act did not affect the outcome of the matter at all. It is considered desirable to try to prevent any kind of bribery of public officials. The term "public official" is understood in the traditional sense.

The second paragraph proposes that resorting to gifts or other advantages in relation to a foreign public official or an official of a foreign public institution is also made a criminal act. The provision covers the same officials as the Convention against Bribery. On the other hand the advantage conferred must aim at acquiring or retaining business or other improper gain in the conduct of international business, which requirement is not to be found in the first paragraph.

On Section 3

This Section does not require explanation.

Act on Criminal Responsibility of Legal Persons, No. 144/1998

[*Translation from Icelandic*]

Section 1

A legal person may be fined if its employee or staff member has, in order to secure or maintain business or other improper gain for the benefit of the legal person, given, promised or offered a public servant a gift or other advantage in order to induce the public servant to take a measure or to refrain from taking a measure within the sphere of his or her public duties. This shall also apply to such acts committed with respect to a foreign public official or an official of a public international organisation.

Section 2

This Act shall enter into effect immediately.

Act on Tax on Income and Capital
No. 75/1981

[*Translation from Icelandic*]

Non-operating expenses

Section 52

The following items can not be included among operating expenses under Section 31, or as deductible from taxable income in any manner:

1. [Gifts, except gifts in kind to employees or customers on particular occasions, provided their value does not surpass the value of such gifts generally.][1)]

2. Fines and financial sanctions of any description originating in punishable offences committed by a taxable party, including the value of confiscated property or substituted amounts. Furthermore costs of any description incurred in the acquisition of unlawful confiscated gains or related to punishable offences.

3. Returns from, and interest on, a person's contribution to business operation or independent employment, irrespective of whether the owner is personally liable for the operation or this takes place with the unlimited liability of joint owners, cf., also, Section 2, the second paragraph.

[4. Payments made on account of ….[2)] financial lease of passenger automobiles for fewer than nine persons in excess of depreciation calculated in accordance with the provisions of this Act when added to computed interest on the depreciation base, less depreciation in earlier years. The Director of Internal Revenue shall issue rules on the calculation of depreciation and interest in such cases.][3)]

[5. Cost of the operation of passenger automobiles provided in business operation to managing directors or other staff members of comparable rank for their private use, except to the extent the benefit of the use of such automobile has been declared as income in accordance with the assessment rules of the Director of Internal Revenue with the person possessing it for private use.][4)]

[6. Cost of payments, gifts or other contributions which are unlawful under Section 109 of the General Penal Code, No. 19/1940, to persons engaged or elected to discharge an official legislative, judicial or executive function in Iceland, in other states, or with international organisations or institutions to which national states, governments or international institutions are parties.][5)]

[1)]*Act No. 101/1995, Section 1.* [2)]*Act No. 149/2000, Section 6.* [3)]*Act No. 2/1988, Section 3.* [4)]*Act No. 97/1988, Section 4.* [5)]*Act No. 95/1998, Section 7.*

APPENDIX 3

Suggested Further Reading

1. OECD Phase 1 report, Review of Implementation of the Convention and 1997 Recommendation (October 1999):
   English: http://www.oecd.org/pdf/M00007000/M00007834.pdf ;
   French: http://www.oecd.org/pdf/M00027000/M00027861.pdf

2. The website of the Icelandic Ministry of Justice provides

Excerpts from the General Penal Code, No. 19/1940, with subsequent amendments,
Act on Criminal Responsibility of Legal Persons, No. 144/1998, and
Code of Criminal Procedure, No. 19/1991
http://government.is/interpro/dkm/dkm.nsf/pages/eng_penal_code

- General Penal Code No. 19/1940: General Part (Chapters I-IX, Sections 1-85), sections 109, 141, 155 and 247
- Section 1 of Act on Criminal Responsibility of Legal Persons, No. 144/1998
- Code of Criminal Procedure No. 19/1991: Sections 66, 67, 78, 111 to 113, 116 and 117.

3. GRECO Evaluation Report on Iceland (first round). Adopted by GRECO at its 6th Plenary Meeting, Strasbourg, 10-14 September 2001
   English: http://www.greco.coe.int/evaluations/cycle1/GrecoEval1ReportIcelandE.pdf
   French: http://www.greco.coe.int/evaluations/cycle1/GrecoEval1ReportIcelandF.pdf

   GRECO Compliance report on Iceland (first round) Adopted by GRECO at its 15th Plenary Meeting, Strasbourg, 13-17 October 2003.
   English: http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2003)9E-Iceland.pdf
   French: http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2003)9F-Iceland.pdf

4. FATF Reports: extracts of the FATF Annual reports 2000-2001, 1998-1999, and 1993-1994

- http://www1.oecd.org/fatf/FATDocs_fr.htm#Annua

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

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