



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWEDEN

June 2012

This Phase 3 Report on Sweden by the OECD Working Group on Bribery evaluates and makes recommendations on Sweden's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 15 June 2012.

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EXECUTIVE SUMMARY

1. The Phase 3 Report on Sweden by the OECD Working Group on Bribery evaluates and makes recommendations on Sweden's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related instruments. The Report focuses on developments since Sweden's Phase 2 Review in February 2005, taking into account Sweden's Phase 2 Written Follow-Up Review in October 2007. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 review. The Working Group notes that Sweden has not had a single prosecution of foreign bribery for more than 8 years and has never imposed liability on a company since the entry into force of the Convention. In view of several allegations reported by the media involving Swedish companies, the size of many Swedish companies, their international scope and sectors of business, including defence, telecommunications and energy, the Working Group believes that the absence of cases over this period signals that something is not working in Sweden's framework for detecting, investigating and prosecuting foreign bribery.

2. The Working Group recommends that Sweden amend its framework on "corporate fines" to ensure that companies are held liable for foreign bribery, including when committed through lower-level employees, intermediaries, subsidiaries, and third-party agents who were directed or authorised to bribe by the highest level of managerial authority. As a matter of priority, the Working Group also recommends that Sweden make greater efforts to diligently investigate potential links between Swedish companies and allegations of the bribery of foreign public officials perpetrated on behalf of foreign subsidiaries, including by non-Swedish nationals; and take appropriate steps to be able to sanction Swedish companies for foreign bribery offences committed by them abroad.

3. As a matter of priority, the Working Group also recommends that Sweden increase substantially the awareness of the public-at-large of the risks of Swedish companies bribing foreign public officials abroad, and the negative impact of such bribery on Sweden and globally, to increase public support in Sweden for investigating and prosecuting foreign bribery cases. Sweden must also ensure that adequate resources are available, and investigators in the newly established National Anti-Corruption Police Unit receive adequate specialised training, for investigating such cases. In addition, the Working Group recommends that Sweden take urgent measures to improve its detection of foreign bribery through its anti-money laundering system. The Working Group further recommends an increase in the maximum level of fines for companies, currently set at a maximum of SEK 10 million (approximately EUR 1.1 million), which is insufficient to be "effective, proportionate, and dissuasive".

4. The Working Group acknowledges progress by Sweden in certain areas, such as the important efforts by the Tax Administration to detect and report suspicions. Moreover, Sweden has assisted other Parties to the Anti-Bribery Convention in their investigations of foreign bribery allegations. Most importantly, a new law will come into force on 1 July 2012, which amends the foreign bribery offence as well as establishes a new offence of negligent financing of bribery. In January 2012, the National Anti-Corruption Police Unit was created to support the National Anti-Corruption Unit with corruption

investigations, including foreign bribery. Sweden invites the lead examiners to return for a further on-site visit in two years to assess the effectiveness of these new initiatives along with steps taken to address the key recommendations made by the Working Group in this report.

5. The Report and the recommendations, which reflect the findings of experts from Brazil and Iceland, were adopted by the OECD Working Group on Bribery on 15 June 2012. The Working Group recommended a Phase 3bis evaluation, the time and scope of which will be decided at a one-year written follow-up report. In addition, the Group recommends a six-month written follow-up report concerning recommendations: 1, 3(a), 3(b), 3(d), 4(a), 4(c), 4(d), and 6. This report is based on the laws, regulations and other materials submitted by Sweden and information obtained by the lead examiners during their three-day, on site visit to Stockholm from 13 to 15 February 2012, during which the examiners met with representatives of Sweden's public administration, private sector and civil society.

A. INTRODUCTION

1. The On-Site Visit

1. On 13-15 February 2012, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (WGB) visited Stockholm as part of the Phase 3 evaluation of Sweden's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related anti-bribery instruments. The 39 States that make up the WGB were represented at the on-site by lead examiners from Brazil and Iceland. The lead examiners were supported by members of the OECD Secretariat.¹

2. The purpose of the on-site visit was to meet with the main stakeholders in Sweden's efforts to combat the bribery of foreign public officials in international business transactions. The on-site visit focused on practical steps taken by Sweden to implement and enforce the Anti-Bribery Convention, as well as the 2009 Recommendation for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

3. Prior to, during and following the on-site visit, the Swedish authorities provided responses to significant requests for information from the evaluation team, including jurisprudence, legislation, and questions about enforcement practices. Prior to the on-site visit, Sweden responded to the standard questionnaire and a supplementary questionnaire with country-specific questions (Phase 3 Questionnaire), which enabled the team to prepare and focus on the most important issues regarding implementation and enforcement during the visit.

4. The evaluation team held various meetings during the on-site visit with representatives from law enforcement, key government ministries and agencies, the private sector and civil society.² Notably, there was excellent representation from non-government sectors, including nine major companies from Sweden's most important industries, of which one was state-owned and one partially state-owned, three representatives of the accounting and auditing profession, five legal practitioners, two major non-governmental organisations (NGOs) active in the field of anti-corruption, an academic, a trade unionist, and an author/journalist.

2. Summary of the Monitoring Steps Leading to Phase 3

5. Sweden has already undergone a number of monitoring steps leading up to Phase 3 according to the regular monitoring procedure that applies to all Parties to the Convention as follows: 1) Phase 1 (October 1999); as well as Phase 2 (February 2005) and Phase 2 Written Follow-Up Report (October 2007). As of Sweden's Phase 2 Written Follow-Up Review, Sweden had implemented all of the WGB's recommendations in Phase 2 except the following recommendations, which were only partially

¹ Brazil was represented by Ms. Izabela Moreira Correa, Secretariat of Corruption Prevention and Strategic Information, Brazilian Office of the Comptroller General; and Mr. Marcello Paranhos De Oliveira Miller, Federal Prosecutor, Federal Prosecution Service. Iceland was represented by Mr. Helgi Magnus Gunnarsson, Deputy Director of Public Prosecutions; and Ms. Inga Oskarsdottir, Legal Expert, Ministry of Interior. The OECD Secretariat was represented by Ms. Christine Uriarte, Counsellor, Anti-Corruption Division; and Mr. Chiawen Kiew, Anti-Corruption Policy Analyst.

² See Annex 2 for a list of participants.

implemented: 9(b), 9(c), and 12(a). In addition, the following recommendations had not been implemented: 5(a), 5(b), 8, 10, 12(c).³

3. Outline of the Report

6. This report is structured as follows. Part B examines Sweden's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts, weaknesses identified in previous evaluations and new issues, including those arising from amendments to the current legislative framework. Part C sets out the WGB's recommendations and issues for follow-up.

4. Sweden's Economic Background

7. Sweden is the largest Scandinavian country, and is the 19th largest economy by gross domestic product among the 40 member countries in the WGB. Sweden's largest industries include motor vehicles, telecommunications, pharmaceuticals, industrial machines, chemical goods, precision equipments, home goods and appliances, forestry, iron and steel. Swedish defence companies account for around 1 percent of total global arms exports, and Swedish defence firms export to approximately 35-40 countries around the world with 30% of its exports to Asia and more than 50% to other European countries. However, defence equipment accounted for 1 percent of Swedish exports in 2011. Sweden has a vibrant business community: according to Swedish authorities, Sweden is the home to more large multinational corporations per capita than any other country. Although most companies are privately owned, the Swedish government remains the largest company owner and employer in Sweden.

8. Sweden's economy is heavily reliant on exports and has increasingly exported to emerging markets. Approximately half of Sweden's GDP is attributable to exports, and over 50% of its exports are in the engineering, telecommunications, automotive and pharmaceutical industries. Sweden's largest trade partners are Germany, the United States, and Norway, but exports to emerging markets, predominantly China, have increased since 2008. Exports to emerging markets accounted for around 10% of total exports in 2011 (China 3,3%, Russia 2,2%). Sweden ranks 14th among all countries in outward foreign direct investment (FDI), an increasing share of which is directed towards emerging economies.

9. Sweden perennially enjoys a high ranking on the Corruption Perceptions Index (CPI). It ranked 4th on the 2011 and 2012 versions of the CPI.

5. Cases Involving Bribery of Foreign Public Officials

10. Since the implementation of the Convention, Sweden has successfully prosecuted one case involving the bribery of foreign public officials. That case, which pre-dated the Phase 2 evaluation, resulted in the conviction of two Swedish nationals for bribery of World Bank officials in order to receive consultancy contracts on World Bank-funded projects. The case was referred to Swedish authorities by the World Bank after its own investigation.

a) Terminated Investigations for Foreign Bribery

11. Although Sweden has been made aware of allegations of foreign bribery, none of these have resulted in prosecutions, convictions, or sanctions since Phase 2. During the on-site, the evaluation team discussed several of the terminated investigations and pre-investigations at length, many of which took

³ See the table in Annex 1 for the list of fully, partially and unimplemented Phase 2 recommendations, at the time of Sweden's Phase 2 Written Follow-Up Report.

place in the late 1990s or early 2000s. Because some of these investigations will be referred to later in the report, the following is a brief, anonymised summary of terminated investigations or pre-investigations, and one case (Case #10) that involves one ongoing investigation:⁴

Case #1: In 2001, Swedish authorities closed an investigation into allegations that a foreign government official had been receiving payments from a joint venture between the Swedish company and a company from a third country. According to Swedish authorities, they were not able to establish dual criminality for the purpose of applying nationality jurisdiction, due to information that was received from an advisor to the Supreme Court of the foreign public official's country. After the on-site, Swedish authorities provided that they were unable to establish territorial jurisdiction as well. The Swedish authorities explain that they interviewed representatives of the company.

Case #2: A Swedish company allegedly paid bribes in connection with several tender bids in a foreign country. After making enquiries in Sweden, Swedish authorities concluded that there was no evidence that offences had been perpetrated and therefore there was no need to open an investigation. The Swedish authorities provide that an investigation in the relevant country came to the same conclusion. The Swedish authorities do not have information about whether investigative steps were taken in Sweden to establish territorial jurisdiction.

Case #3: Five Swedish nationals and one national from another country were accused of bribery in connection with a company providing equipment in a project run by an international organisation. For several years, authorities from two other countries had been investigating the case and requested that Swedish authorities open an investigation into the matter. The statute of limitations at the time prevented an investigation on the allegations of active bribery. Although Swedish authorities attempted to investigate a crime of complicity to grave disloyalty to a principal, they determined that the investigation and the facts did not sufficiently support the allegations. The Swedish authorities provide that the investigation of a related case in another country resulted in a conviction of breach of trust of the public official in that country.

Case #4: Allegations that an employee of a Swedish company together with the representatives of other companies in a consortium used an agent or consultant, to promise or offer a bribe or other improper reward to officials in a foreign country in connection with a public works project. An investigation was performed in cooperation with law enforcement authorities in two other countries. Swedish authorities terminated the investigation in 2004. According to the memo of termination by Swedish authorities, there was insufficient proof to substantiate allegations.

Case #5: A partly Swedish consortium allegedly paid bribes to an adviser of a minister in a foreign country, to ensure that a public contract would not be terminated. According to the Swedish company, an internal investigation found that the consulting contract with the foreign official was concluded by an employee of the joint venture partner without the knowledge of the Swedish company. According to Swedish authorities, the National Anti-Corruption Unit (NACU) of Sweden opened an investigation in 2007, but determined in June 2009 that there was insufficient evidence to pursue an investigation due to lack of evidence that the Swedish company was involved in the payments and a "deficiency in the law of intermediaries".

Case #6: Allegations were made that a Swedish company paid bribes to officials in a foreign country to influence a purchase of goods manufactured by a joint venture of the Swedish company. Swedish authorities opened an investigation, but closed the investigation in June 2009 due to lack

⁴ Some of the information below was provided orally by the Swedish authorities well after the on-site visit.

of evidence that the Swedish company was involved in the payments and a “deficiency in the law of intermediaries”.

Case #7: It was alleged that three Swedish nationals conspired to transfer funds to a Swiss bank account in order to bribe officials in an international organisation in an effort to influence their vote. After having interrogated the three individuals as suspected persons, reviewing accounting information, examining documentation and holding hearings with the three individuals, Swedish authorities closed the investigation in July 2001 because of an inability to verify the ultimate recipient of the transactions and the circumstances in connection with the payments. The Swedish authorities confirm that there were no findings regarding offering or promising bribes in this case.

Case #8: Allegations that two Swedish senior executives of a large multinational company that is incorporated in a third country agreed to pay bribes to a foreign official. After an investigation, the company fired the two executives and concluded that the company had been involved in corruption in the foreign country. In 2011, after receiving information from the relevant foreign country and the company, the Swedish authorities decided not to open an investigation for lack of jurisdiction over the company. Although the company is incorporated in a third country, its senior management is entirely comprised of Swedish nationals, and the beneficial owners are also Swedish.

Case #9: A Swedish-owned company in a foreign country was alleged to have paid bribes to officials in that country in connection with the expansion of a public works project. In connection with the allegations, the Swedish-owned company closed down its local office because the office did not comply with its compliance standards. The Swedish-owned company also fired around half a dozen of its executives in the foreign country and its regional CEO. In December 2007, after receiving information from the foreign country and the company, the NACU decided not to start an investigation in Sweden due to lack of jurisdiction. The Swedish authorities cannot confirm the extensiveness of the investigation in Sweden of the parent company, and confirmed that they did not investigate whether books and records offences were committed by the Swedish parent company in this case.

Case #10: A Swedish company is alleged to have given pecuniary benefits to the head of an agency controlled by the government in a foreign country as well as three officials in that country. The Swedish company conducted an internal investigation, and the results of the internal investigation were passed on to Swedish authorities. Swedish authorities found insufficient evidence to support allegations that the head of the agency received a bribe. The investigation regarding allegations of bribery relating to the three officials is ongoing.

b) Ongoing Oil-for Food Cases

12. Swedish enforcement authorities are actively pursuing two cases in connection with the Oil-for-Food Programme in Iraq. First, Swedish authorities are prosecuting two executives in a Swedish vehicle manufacturing company for allegedly paying SEK 29 million (approximately EUR 3 283 million) through intermediaries to win contracts for 145 wheel loaders and 43 road graders in violation of the UN’s Oil-for-Food Programme. On 4 April 2012, two former executives of Volvo were convicted for violations of international sanctions for having offered SEK 24 million (EUR 2,7 million) in kickbacks to the Saddam Hussein regime in order to secure contracts for the sale of wheel loaders and road graders. The court imposed suspended sentences and fined the two former executives EUR 13 600 and EUR 6 900. According to media sources, Swedish authorities are not pursuing a corporate fine against Volvo because of the fines imposed by US authorities.⁵ Swedish authorities are also investigating four executives of a Swedish

⁵ 4 April 2012, Volvo executives convicted for Saddam-era bribes, The Local (<http://m.thelocal.se/40098/20120404/>).

manufacturing company for payments made in the early 2000s to win contracts in violation of the UN's Oil-for-Food Programme. Such payments were allegedly made through a foreign intermediary. This investigation is expected to be concluded after the summer 2012.

6. Amendments to Sweden's Bribery Framework

13. In March 2009, the Swedish Government established a Committee of Inquiry to review the bribery offences in the Penal Code. The Committee of Inquiry was formed due to a perception, partly by the business community, that the bribery provisions were difficult to understand because they were scattered in different provisions of the Penal Code. The Committee was led by the former Head of the Supreme Court, and consisted of 15 experts, including a representative of the Ministry of Justice, and the Director of the Swedish NACU. In addition to reviewing the Penal Code bribery provisions, the Terms of Reference for the Committee included coordinating efforts of the business sector to create a code of conduct. However, the Terms of Reference did not expressly include issues regarding corporate liability for the foreign bribery offence, the level of sanctions for the offence, or the application of nationality jurisdiction to legal persons. As a result, these issues have not been formally considered by the Swedish government since Phase 2, although many expected the Committee would develop a system of corporate liability similar to that of the UK Bribery Act. In the opinion of a leading NGO on anti-corruption in Sweden, the Committee of Inquiry, and resulting proposed amendments, can only be viewed as a starting point for modernising the anti-corruption legislative framework in Sweden, because they did not consider the issue of corporate liability for corruption offences.

14. The Committee of Inquiry issued a report that recommended substantial amendments to the Penal Code provisions on bribery, including the bribery of foreign public officials. A Bill based on the proposals in the report was presented to Parliament on 15 March 2012. Parliament passed the Bill in May 2012, meaning that the new law will enter into force on 1 July 2012. These amendments are discussed extensively in this report because many elements of the amendments are held out by Sweden as means to correct some of the legislative weaknesses identified in Phase 2. In addition, the private sector code of conduct that has been developed, first as a coordinated effort by the Committee of Inquiry and the private sector, and thereafter by the private sector solely as a private sector initiative, is discussed extensively in this report, where relevant, due to its expected impact on the prevention and detection, and potentially investigation and prosecution of foreign bribery. The code of conduct is expected to be published in June.

7. Significant Issues

15. This report raises a number of significant issues regarding Sweden's implementation of the Anti-Bribery Convention and related anti-bribery instruments, and enforcement of Sweden's foreign bribery offence. These issues all relate to the absence of a single foreign bribery prosecution in Sweden since the conviction in January 2004 (before the Phase 2 on-site visit in February 2005) of two Swedish nationals for the bribery of officials of the World Bank in 1998.⁶ The lead examiners consider that the absence of foreign bribery prosecutions in more than 8 years, in view of the size of many Swedish companies, the number of allegations against Swedish companies, their international scope, and sectors of business, including defence, telecommunications, construction and energy, signals that something is not working in Sweden's framework for detecting, investigating and prosecuting the bribery of foreign public officials. These potential areas of deficiency are discussed throughout this report. The lead examiners also believe that at this stage it is not possible to assess the impact of the amendments to the Penal Code, or very recent increase in resources for investigating and prosecuting foreign bribery cases. The lead examiners therefore welcome the invitation by the Swedish authorities during the on-site visit to return to Sweden after two years once these initiatives have had a chance to show improvements.

⁶ More information about this case is provided in the Phase 2 Report on Sweden: <http://www.oecd.org/dataoecd/20/8/35394676.pdf>

Commentary

The lead examiners recommend a Phase 3bis evaluation for the following principal reasons: 1) new bribery legislation will enter into force on 1 July 2012, 2) the inability to assess at this stage the impact of the new legislation, and the very recent increase of law enforcement resources; 3) the absence of a single prosecution of foreign bribery in Sweden for more than 8 years despite several allegations involving major Swedish companies; and 4) the potential reasons for the absence of prosecutions, which are discussed in detail throughout this report. The time and scope of the Phase 3bis evaluation will be decided at a one-year written follow-up. In addition, the Working Group recommends a six-month written follow-up report concerning certain key recommendations. The lead examiners welcome that Sweden recognises the need for a further on-site visit.

B. IMPLEMENTATION AND APPLICATION BY SWEDEN OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

16. This part of the report considers the approach of Sweden to key Group-wide cross-cutting issues identified by the WGB for the evaluation of all Parties subject to Phase 3. Where applicable, consideration is also given to vertical (country-specific) issues arising from progress made by Sweden on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Sweden.

1. Foreign Bribery Offence

17. Sweden's foreign bribery offence was evaluated in Phases 1 and 2 and found to be generally compliant with the Convention. As discussed above, Sweden has since undertaken a review of its foreign bribery offence by convening a Committee of Inquiry, which issued a report in June 2010 that formed the basis for amendments to Sweden's bribery offences, including foreign bribery, which will come into force on 1 July 2012.

18. In June 2010, the Committee of Inquiry issued a report addressing the bribery offences in the Penal Code. After a period of consultation, a bill was drafted based on the Committee's findings and the outcome of the consultation process, which was submitted to the Parliament for consideration on 15 March 2012. The bill was passed in May 2012 and will enter into force on 1 July 2012. The bill introduces two new offences and re-organises all bribery-related offences by placing them in five sections within Chapter 10 of the Swedish Penal Code: passive bribery (Section 5(a)); active bribery (Section 5(b)); gross bribery (Section 5(c)); trading in influence (Section 5(d)); and negligent financing of bribery (Section 5(e)).

a) *New Bribery Offences (Sections 5(a), 5(b), and 5(c))*

19. Section 5(a), the passive bribery offence, provides that "[a]nyone who is employed or performs a function and receives, agrees to receive or requests an undue advantage for the performance of his or her employment or function shall be sentenced for taking a bribe to a fine or imprisonment for at most two years." Section 5(b) is the active bribery offence. It provides that "[a]nyone who gives, promises or offers an undue advantage to a person mentioned in section 5(a), and under circumstances described therein, shall be sentenced for giving a bribe to a fine or imprisonment for at most two years."

20. Swedish authorities explained at the on-site visit that the new text of the offences covers a broader range of public officials and private individuals than the previous legislation. While the previous legislation specifically defined the classes of persons who were covered,⁷ the new legislation broadly prohibits bribery to “anyone who is employed or performs a function”. Swedish authorities thus stated that individuals who “owe a duty to a constituency” but are not employed would also be covered. Swedish authorities added that the phrase “for the performance of his or her employment function” also covers the employee’s non-performance of duties within his or her scope of responsibility. Swedish authorities further noted that the new bribery offence contains a specific provision applying to contestants and officials in sports and other competitions.

21. The active foreign bribery offence in section 5(b) criminalises active bribery “in the circumstances described” in the passive bribery offence in section 5(b). The Swedish authorities explain that “in the circumstances described” refers to the performance of the official’s “employment or function”, and consequently prosecutors would not need to show that the foreign public official received the offer, promise or actual bribe, or requested the bribe. However, in view of the potentially confusing language, the lead examiners believe it is important for Sweden to develop supporting case practice.

22. Section 5(c) retains the offence of gross bribery, which also existed in Sweden’s previous legislation. As in the previous legislation, gross bribery carries a sentence of between six months and six years, while simple bribery carries a sentence of up to two years or a fine. The new legislation, however, provides factors to determine whether an offence is “gross bribery”, such as “whether the offence constituted a misuse of or an infringement of a function entailing particular responsibility, involved a substantial amount of money or formed part of criminal activities carried out systematically or on a large scale or whether the offence was otherwise of a particularly dangerous nature”. Ministry of Justice officials stated that each factor could independently contribute to a finding that misconduct constituted gross bribery; for instance, gross bribery could entail a small bribe to an official with significant responsibilities. They also explained that “a substantial amount of money” could refer either to the amount of the bribe or the relative amount of gain that was expected from the bribe.

b) Trading in Influence and Negligent Financing of Bribery⁸

23. The amendments contain two new offences: trading in influence and negligent financing of bribery. The trading in influence statute criminalises the receipt of an undue advantage for the purpose of influencing a third person (e.g. a foreign public official) in connection with the exercise of public authority or a public procurement. It also makes it an offence to bribe a person to influence a third party (e.g. a foreign public official) in connection with the exercise of public authority or a public procurement. An offence to this effect was suggested by the Committee of Inquiry in order to make it possible for Sweden to

⁷ The categories of “employees” covered by Chapter 20, Section 2 are:

1. a member of a directorate, administration, board, committee or other such agency belonging to the State, a municipality, county council, association of local authorities; 2. a person who exercises an assignment regulated by statute; 3. a member of the armed forces under the Act on Disciplinary Offences by Members of the Armed Forces, etc. (1986:644), or other person performing an official duty prescribed by Law; 4. a person who, without holding an appointment or assignment as aforesaid, exercises public authority; 5. a person who, in case other than stated in 1-4, by reason of a position of trust has been given the task of a) managing another’s legal or financial affairs, b) conduct a scientific investigation, c) independently handling an assignment requiring qualified technical knowledge or d) exercising supervision over the management of such affairs or assignment referred to in a, b or c; 6. a minister of a foreign state, member of the legislative assembly of a foreign state or a member of a body of a foreign state which corresponds to those referred to in 1; 7. a person who, without holding an employment or assignment as aforesaid, exercises public authority in a foreign state or a foreign assignment as arbitrator; 8. a member of supervisory body, governing body or parliamentary assembly of a public international or supranational organisation of which Sweden is a member; and 9. a judge or official of an international court whose jurisdiction is accepted by Sweden.

⁸ This offence is discussed further in B. 2. c).

withdraw its reservation in respect of Article 12 of the Council of Europe’s Criminal Law Convention on Corruption.

24. The new negligent financing of bribery provision makes it criminal for “a commercial organisation [to] provide[] financial or other assets to anyone representing it in a certain matter and which thereby through gross negligence furthers the offences of giving a bribe, gross giving of a bribe or trading in influence in that matter.” Accordingly, an employee or agent acting on behalf of a company could be prosecuted for providing money or other assets in a grossly negligent manner to a third-party, which is then used to facilitate bribery. In addition, the company could be fined as well. Swedish authorities stated that the offence is intended to provide a “strong incentive” for due diligence on the part of Swedish companies and also a tool for prosecutors against companies that escape sanction through the use of intermediaries. They also assert that, under the provision, the company may be fined regardless of whether money or assets were ultimately handed to a foreign public official.

25. Although the new provision refers to “a commercial organisation”,⁹ Swedish officials explained that a company could not be held criminally liable, and the criminal offence would apply only to employees or individuals associated with the company. In order for corporate fines to be imposed, Ministry of Justice officials stated that it is necessary for someone within the commercial organisation to have acted grossly negligently, although it is not necessary to have convicted that individual.¹⁰ According to Swedish officials, the standard of gross negligence is used throughout Swedish criminal law, but the preparatory works of the bill would further elaborate on the standard. Swedish officials cited the example of failing to take risk mitigation measures in a country that is known to be rife with corruption. A company’s procedures and policies would also be relevant in determining whether there was gross negligence.

26. Although the negligent financing offence would appear to cover straightforward situations in which a high level manager in a Swedish company through gross negligence provides financing to a local intermediary to bribe a foreign public official on behalf of the Swedish company, it is unclear whether more complicated scenarios, which often prevail in corruption schemes, would be covered. First, Section 5(e) criminalises negligent financing to “anyone representing it *in a certain matter*” who thereby facilitates bribery “in that matter”. It is thus unclear whether the provision would cover bribery by third parties whose actions fall outside their scope of engagement but nonetheless benefit the company. Because the third party must facilitate bribery in the “matter” for which he or she was engaged, this formulation appears not to cover situations where the third party commits bribery outside the technical scope of his engagement for the benefit of the company. Furthermore, as discussed in greater detail below, the application of Section 5(e) to legal persons may be limited if a parent company through gross negligence provides the financing for bribery to be committed by a foreign subsidiary on behalf of the foreign subsidiary itself. The offence may also not cover situations where the foreign subsidiary bribes on behalf of the Swedish company with a bribe financed by the foreign subsidiary. The Swedish authorities explained that the terminology “in a certain matter” was chosen to ensure that the negligent financing offence does not apply where a director of a Swedish company authorises a payment to an intermediary in a foreign country, and the intermediary uses the funds to bribe on behalf of another company.

c) *Outstanding Phase 2 Recommendations and Follow-Up*

27. In addition to the issues raised by the new legislation, the WGB made a number of recommendations during the Phase 2 evaluation regarding the existing foreign bribery offence. This section discusses these recommendations in light of the new legislation.

⁹ According to Swedish authorities, the word “commercial organisation” is interchangeable with the term “entrepreneur”, which is used in the provision of the Penal Code imposing corporate fines.

¹⁰ The standard of corporate liability is further discussed in B. 2.

(i) *Definition of Foreign Public Official*

28. In Phase 2, Sweden was recommended to ensure that its foreign bribery offence covered bribes to members of international organisations of which Sweden was not a member (Phase 2 Report, commentary after para. 158; Recommendation 8). Sweden has not amended its current legislation to address this Recommendation, but states that the new legislation will address this recommendation because the new offence covers anyone who “performs a function” without regard to the individual’s association with a particular body or organisation. The new offence thus appears to cover all the categories of foreign public officials required under the Convention. The Ministry of Justice also stated that the definition of “performs a function” includes any person who owes a duty to a constituency. Officials from the Ministry of Justice further noted that the new offence would cover bribery to individuals within the sporting and gaming sector, who may not necessarily owe a duty to any constituency.

(ii) *Distinction between Aggravated and Simple Bribery*

29. In Phase 2, the WGB recommended follow-up on guidelines to distinguish between simple and aggravated or “gross” bribery (Phase 2 Report, para. 232(a)). Swedish authorities have not issued guidelines on the distinction, and the issue has not yet been addressed in a foreign bribery case in Sweden; although Swedish authorities at the on-site stated that prosecutors would have no difficulty in determining whether a case was simple or aggravated. In the context of domestic bribery, two recent cases have addressed the issue. The first case concerned domestic, private bribery in the amount of SEK 40 000 (approx. EUR 4 529). The court explained “aggravating” factors include the size of the bribe, whether the recipient of the bribe exercised public authority, acted in conflict with his or her duties, or caused severe damage. The court concluded that misconduct amounted to simple bribery in that case.¹¹ In the second case, the same Court of Appeal found the misconduct to be “gross” bribery because the case involved a matter of road safety, the bribery had been systematic, and the total amount of bribes (e.g. SEK 168 000, or approx. EUR 19 022) had been large.¹² The bribe recipient was sentenced to prison for eight months.

30. Despite these decisions, the evaluation team is concerned that the distinction between simple and gross bribery is unclear, which may impact the approach taken by Swedish investigators and prosecutors. The difference between aggravated and simple bribery goes beyond the penalties that may be imposed. First, “extended confiscation” of the proceeds may only be imposed in cases of gross bribery.¹³ In addition, the statute of limitations for simple bribery is 5 years, while that of gross bribery is 10 years. Therefore, investigation of bribes beyond 5 years may be foreclosed if prosecutors or investigators determine that misconduct constitutes simple bribery.¹⁴

31. Although Swedish authorities at the on-site visit stated that foreign bribery investigations would “in all likelihood” be considered gross bribery at the investigatory stage, the lack of written or formal guidance is concerning when considering the number of Swedish agencies involved in foreign bribery detection and the lack of coordination among Swedish agencies in foreign bribery-related investigations. [See further discussion on the statute of limitations in B 6 d)]

11 The Court of Appeal’s sentence dated 16.09.2011 in case B 2778-11.

12 The Court of Appeal’s sentence dated 29.06.2010 in case B 4800-09.

13 Penal Code, Chapter 36, Section 1b.

14 Penal Code, Chapter 35, Sections 1(2), 1(3).

32. As described in above, the legislation goes some way in providing factors to be considered in distinguishing simple and gross bribery.¹⁵ These factors go beyond simply the amount of money involved, but may also implicate the level of responsibility of the bribe recipient and the danger to the general public as a result of the bribery. The lead examiners believe that these factors will be useful to Swedish authorities, but cannot assess whether they are adequate until they have been used in practice.

(iii) *Definition of “Bribe”*

33. In Phase 2, the WGB recommended follow-up on whether the term “bribes” under the offence were limited to “a promise of economic value”. There are two cases since Phase 2 from the Supreme Court of Sweden discussing the definition of “bribe” in the domestic bribery context. In those cases, the Supreme Court noted that a “bribe” should be determined with reference to whether the benefit is intended to influence the recipient’s duties, the value and the nature of the benefit in relation to the receiver’s position, and other considerable circumstances in the actual case. According to those decisions, the definition of the term “bribe” also depends on contemporary practice and public opinion.¹⁶ In addition, the preparatory works of the bribery offence clarify that “bribes” may include non-pecuniary rewards, such as credentials and recommendations (SOU 1974:37, p. 141). It appears thus that the term “bribe” may be broader than economic benefits.

34. Finally, the current bill criminalises the receipt or provision of an “undue advantage”, rather than a “bribe”. This change was recommended by the Committee of Inquiry, which suggested that the legislation explain that “a prerequisite for the offence of bribery is that the action influences the exercise of public authority or a public procurement or the recipient’s way of performing his or her duties or commission”. This recommendation would be rendered moot under the legislation.

(iv) *Notion of “Impropriety”*

35. Phase 2 also recommended following developments in the case law regarding whether a breach of an administrative rule is required to establish “impropriety of the advantage” under Sweden’s foreign bribery offence (Follow-up Issue, 13(a)). Since Phase 2, no case has shed light on this issue, but Commentaries to the Penal Code appear to indicate that a violation of an administrative rule is not required.¹⁷ Swedish authorities at the on-site further confirmed that the violation of an administrative rule is not required to establish “impropriety of the advantage”.

Commentary

The lead examiners note that Sweden has made significant efforts to improve its legislative framework to fight bribery through the amendments to the bribery offences. In particular, the lead examiners note that the offence of negligent financing of bribery will be useful to Swedish prosecutors in prosecuting natural persons for foreign bribery committed through intermediaries in certain circumstances. However, the lead examiners would like to raise certain issues. First, the language for the active bribery offence might not clearly convey that the recipient of the bribe does not have to receive an offer, promise or actual bribe, or request a

¹⁵ The proposed legislation provides that “in assessing whether the offence is gross, special attention shall be given to whether the offence constituted a misuse of or an infringement on a function entailing particular responsibility, involved a substantial amount of money or formed part of criminal activities carried out systematically or on a large scale or whether the offence was otherwise of a particularly dangerous nature.”

¹⁶ NJA 2009 page 751 and NJA 2008 page 705

¹⁷ The Commentaries provide that “liability for active bribery is established even if the act of active bribery has no other intention than to encourage the person being offered the bribe to do their duty” (Phase 2, para. 173).

bribe for the completion of the crime. In addition, the offence for negligent financing of bribery does not appear to cover instances where the third party acts outside the scope of engagement but for the benefit of the company. In addition, although the offence of negligent financing would appear to cover straightforward bribery situations involving an intermediary, the more complicated scenarios, such as where financing is provided by a foreign subsidiary, or it is provided by the Swedish parent company, but the bribery is done on behalf of the foreign subsidiary, do not appear covered.

Moreover, the lead examiners are concerned that the distinction between simple and gross bribery remains unclear. Although the new legislation provides additional factors to consider, it is not possible to determine whether these factors provide sufficient guidance until they are applied in practice. The lead examiners accordingly recommend that the further on-site visit to Sweden in two years include a major focus on implementation of the new legislation, to ensure that in practice it fully implements Article 1 of the Anti-Bribery Convention. In particular, the assessment at the on-site visit should cover the issues raised in the foregoing paragraph.

2. Responsibility of Legal Persons

36. Since the entry into force of the Convention, Swedish authorities have not successfully sanctioned any legal persons for foreign bribery. In light of the extensive allegations that have surfaced in the media, the dearth of enforcement actions and sanctions against legal persons, intensifies concerns that the framework for sanctioning legal persons in Sweden for foreign bribery offences may be inadequate as a practical matter. This concern is further exacerbated by the number of investigations for foreign bribery terminated by Swedish authorities.

37. As discussed in several of the following sections, the reasons for this lack of enforcement against legal persons for foreign bribery offences are manifold and systematic. Symptoms of the problem can be seen in the framework for imposing liability on legal persons, the low level of sanctions applicable to legal persons, the lack of confiscation against legal persons, and the lack of effective nationality jurisdiction for legal persons. This section will primarily address whether the framework for imposing corporate liability complies with the standards in Article 2 and Annex I of the 2009 Recommendations. Later sections in this report address other deficiencies.

a) Background Concerning Liability of Legal Persons in Sweden

38. In Phase 2, the WGB recommended follow-up on “whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been proceeded against, or has not been convicted and/or sanctioned” (Phase 2 Report, paras. 184-190).

39. Annex I of the 2009 Recommendations provides that liability of legal persons should not be restricted “to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted”. In addition, Annex I explains that the level of authority within the company who triggers liability should be flexible, and at least cover situations in which a manager authorizes or directs a lower-level employee to bribe, or fails to prevent a lower level person from bribing a foreign public official. Finally, Annex I requires that “a legal person cannot avoid responsibility by using intermediaries, including related persons, to offer, promise or give a bribe to a foreign public official on its behalf”.

40. In Sweden, “corporate fines” may be imposed on legal persons in specific circumstances. Chapter 36, Section 7 of the Penal Code states, in relevant part, that an “entrepreneur . . . shall be ordered to pay a corporate fine” where “the entrepreneur has not done what could reasonably be required of him for

prevention of the crime” or if the crime was committed by either (i) “a person who has a leading position based on a power of representation of the entrepreneur or an authority to take decisions on behalf of the entrepreneur” or (ii) a person who has a special responsibility of supervision or control of the business”. The corporate fines provision was amended after the Working Group’s Phase 2 evaluation, and thus this evaluation will be the first opportunity for the Working Group to consider the new provision. The Swedish authorities confirmed that a conviction of the natural person who perpetrated the offence is not needed to impose a “corporate fine” on a legal person.

41. While the corporate fine provision appears to cover some of the standards recommended in Annex I, in practice the provision cannot effectively be applied to a legal person for *mens rea* offences. Furthermore, application of the fine is tied to the requirement that an offence is committed by a natural person. Sweden explains that a corporate fine “is normally but not necessarily” imposed by the Court in the same proceedings in which the individual(s) are tried, and “[a] basic provision for corporate fines is that a crime has been committed by a natural person.” The Swedish authorities have not provided examples of cases where corporate fines have been imposed in practice to companies without prosecuting the individual perpetrator(s) in the same proceedings for *mens rea* offences.

42. Since Phase 2, over 800 Swedish companies have been fined in total over SEK 84 million (EUR 9,5 million) under Chapter 36, Section 7, mostly in cases involving violations of the Swedish Environmental Code or of occupational safety laws. However, no corporate fines have been imposed for foreign bribery. Swedish authorities have pursued corporate fines in two cases for domestic bribery, but neither of those cases was successful. The lack of enforcement actions raises concerns that legal and procedural obstacles persist to prevent Swedish authorities from successfully imposing liability on legal persons.

b) Liability of Legal Persons for Mens Rea Offences

43. Sweden’s framework for imposing sanctions on corporations for *mens rea* offences (such as bribery of foreign public officials) appears to allow corporations to escape liability through the use of intermediaries, subsidiaries, or non-Swedish employees. Under Swedish law, and as Swedish authorities repeatedly confirmed at the on-site visit, it is not possible to aggregate the intent across several individuals within the company to establish the *mens rea* of the company. Swedish prosecutors must locate the required intent within one individual in order to establish corporate liability. Swedish authorities were unable to identify or provide statistics on convictions of legal persons for *mens rea* offences where a corresponding natural person was not convicted. Despite the high number of corporate fines imposed since Phase 2, the vast majority of these cases involve violations of the Environmental Code or of occupational safety laws and injuries, which do not require a showing of *mens rea*.

44. Given the requirement under Swedish law to locate *mens rea* in one individual of the company, it is unsurprising that foreign bribery investigations by Swedish authorities are centred around the status and actions of particular individuals. The focus of Swedish authorities on the individual rather than the corporate entity is concerning because it has led to terminations of several investigations. For instance, in a specific case, Swedish investigators looked into possible bribery by a foreign subsidiary of a major Swedish company in order to win substantial infrastructure contracts in a foreign country. Based on its own internal investigation, the Swedish-owned company fired several of its executives in the foreign country and admitted that its actions failed to “comply with its standards of transparency”. Despite the involvement of a Swedish-owned company in a foreign country, Swedish authorities concluded that alleged misconduct constituted an act of “domestic bribery” because the alleged individual perpetrators were not Swedish nationals. Swedish authorities thus terminated the investigation for lack of nationality jurisdiction. While this issue will be addressed in greater detail later [see discussion in B 5. b) (ii)], it appears that Swedish

authorities, as a result of the Swedish framework on corporate fines, did not actively seek to establish territorial jurisdiction over *the company*.

45. Because of these weaknesses, terminated investigations into suspected foreign bribery by Swedish companies reveal a well-worn template: A Swedish company allegedly pays bribes through a third party agent or a foreign subsidiary headed and staffed with non-Swedish nationals. By acting through non-Swedish nationals, and separate legal entities, Swedish companies are not in practice subject to “corporate fines” by Swedish authorities. Swedish authorities at the on-site visit agreed that they encountered problems in prosecuting legal persons where an intermediary was used, including establishing that a bribe was ultimately paid to a government official. In one terminated investigation Swedish authorities looked into a Swedish company for an alleged bribe to a foreign public official. Swedish authorities eventually terminated the part of the investigation into the bribery allegations because of an inability to establish that a bribe had been ultimately paid to the government official due to problems of mutual legal assistance in the case stemming from the regime of the relevant country. According to Swedish authorities, these special circumstances made it impossible to continue the investigation. In another case, regarding suspected bribes to officials in an international organisation, Swedish authorities conducted interviews of the three key suspects and analysed book-keeping records, concluding that “there are on the whole very strong reasons to suspect” that money had been paid to the international officials “with the intent of influencing” those officials. Yet, Swedish authorities terminated that case because there was insufficient evidence to identify the recipients of the payments and the circumstances in connection with the payments.

46. The framework for imposing “corporate fines” thus leaves open a loophole for Swedish companies to evade liability through the use of intermediaries, including through foreign subsidiaries where the natural person who perpetrates the offence is not a Swedish national.¹⁸

c) Application of Negligent Financing Offence to Legal Persons¹⁹

47. Swedish authorities have high expectations that the new offence of “negligent financing of bribery” will address the difficulties in cases involving intermediaries. For reasons explained below, the evaluation team believes that follow up is necessary. As explained earlier, the new offence would make it a crime for “a commercial organisation [to] provide[] financial or other assets to anyone representing it in a certain matter and which thereby through gross negligence furthers the offences of giving a bribe, gross giving of a bribe or trading in influence . . . in that matter.” Swedish authorities explain that because that the new offence requires only a showing of gross negligence in the financing of the bribe, it will not be necessary for Swedish authorities to trace that bribes were ultimately paid to government officials.²⁰ The evaluation team, however, is concerned because the offence does not appear to address the principal issues facing Swedish prosecutors: the necessity to identify “gross negligence” within an individual representing the company, and the potential loophole when the negligent financing offence is perpetrated abroad by a non-Swedish national. In addition, the lead examiners are not sure why the new offence would not continue to necessitate proving that a bribe was offered, promised or given to a foreign public official.

¹⁸ According to the Penal Code, nationality jurisdiction may also be established where the offence is committed by a Swedish resident or a Scandinavian citizen.

¹⁹ See also discussion on negligent financing offence at B. 1. b).

²⁰ Upon passage of the bill, and well after the on-site visit, the Swedish authorities reported in writing that, under the preparatory works to the negligent financing offence, a foreign subsidiary or a non-Swedish national could be the “individual” that represents the company. Swedish authorities also noted that, according to the preparatory works, the representative of the company need not be convicted in order to establish liability of the company for negligent financing. The evaluation team, however, was not provided with the preparatory works to perform an independent assessment of these statements.

48. This issue may be particularly acute in cases involving intermediaries because the intent to commit bribery in such cases is often spread across several individuals or several entities. For instance, in two investigations of a major Swedish manufacturing firm in connection with sales to two foreign governments, Swedish authorities were forced to terminate the investigations after 2.5 years due to “the deficiency in the law concerning intermediaries”. Swedish authorities explained that because the bribery was executed through a joint venture between the Swedish company and a company from a third country, it was not possible to establish the necessary *mens rea* of the Swedish company. They commented that had the offence of negligent financing been in place at the time of the investigation concerning the Swedish defence company, Swedish authorities would have been able to proceed with the prosecution of the defence company, and that this was one of the reasons why the negligent financing offence has been introduced. Following the on-site visit, the Swedish authorities stated that the offence of negligent financing would not have made any difference in pursuing this case because the necessary *mens rea* was not established anywhere outside Sweden. The lead examiners are confused by this statement, which appears to negate the whole purpose of the negligent financing offence, which they thought was precisely to eliminate the need to establish that someone in Sweden or a Swedish national outside Sweden directed or authorised a third party to bribe a foreign public official, rather than simply needing to prove that a Swedish company negligently financed the bribery of a foreign public official.

49. Moreover, the evaluation team is also concerned that for the negligent financing offence to apply, the bribery that it finances must be committed by someone representing a Swedish company, and in practice may exclude a foreign subsidiary. In addition, the financing must be negligently provided by a Swedish company, not a foreign subsidiary. Thus, companies with affiliates abroad should be able to avoid the application of the new negligent financing offence relatively easily through careful planning.

50. While the Committee of Inquiry considered whether to revise the framework for liability of legal persons in its findings, it ultimately decided against this since it would require considerations beyond the bribery offences. Swedish authorities at the on-site visit indicated that there are currently no plans to revisit the issue of liability of legal persons in the near future.

Commentary

The lead examiners consider that the current system of “corporate fines” for the bribery of foreign public officials is ineffective. Swedish companies may evade “corporate fines” simply by using intermediaries, foreign subsidiaries, or non-Swedish employees abroad. The long list of terminated investigations of legal persons reveals the unfortunate trend that Swedish authorities are unable to sanction companies for foreign bribery where intermediaries are involved. Furthermore, the lack of any corporate sanctions for mens rea offences without the conviction of a natural person also indicates that the framework for corporate sanctions is unworkable to effectively sanction Swedish companies for foreign bribery.

Although the negligent financing offence may provide a measure of assistance to prosecutors in limited circumstances, the lead examiners are not convinced that it effectively closes the loopholes within the framework of “corporate fines”. Because the imposition of “corporate fines” continues to depend on identifying that an individual representing the company possesses the requisite intent, Swedish prosecutors will continue to focus almost exclusively on the actions of individual natural persons at the expense of investigating the role played by the legal person.

The lead examiners therefore recommend that Sweden amend its framework on “corporate fines” for foreign bribery offences to ensure that, in accordance with the Good Practice Guidance in Annex 1 to the 2009 Anti-Bribery Recommendation, legal persons are held liable

for foreign bribery committed through lower-level employees, intermediaries, subsidiaries, or third-party agents in the circumstances outlined therein, and that legal persons may in practice be held liable even where individuals are not prosecuted or convicted. The lead examiners also recommend follow-up on the application of the offence of negligent financing to legal persons.

3. Sanctions

51. In Phase 2, the WGB had expressed the difficulty of determining whether sanctions in Sweden for foreign bribery were adequate owing to the lack of enforcement actions. The WGB also recommended follow-up on the level of sanctions for foreign bribery cases. In particular, the Phase 2 Report noted the low level of maximum fines that may be imposed on legal persons (e.g. at the time SEK 3 million (EUR 340 000)) was noted (Phase 2, para. 189).

52. The lack of enforcement actions continues to make it difficult to determine whether sanctions for foreign bribery are adequate. However, it seems clear that the available sanctions for legal persons are inadequate, especially considering exclusion is not applied in practice for legal persons and confiscation from legal persons is not imposed in practice.

a) Sanctions for Natural Persons

53. Under Sweden's foreign bribery offence, natural persons may be sentenced to a fine or imprisonment up to two years (Chapter 17, Section 7) for simple bribery. Natural persons may be sentenced to a fine or imprisonment between six months up to six years for gross bribery. Natural persons may not be sanctioned with both a fine and imprisonment. The new legislation does not change the level of sanctions (Chapter 10, Section 5(b)).

54. The evaluation team is concerned about the level of sanctions imposed on natural persons for foreign bribery. Sweden has only had one enforcement action for foreign bribery, the World Bank case, which involved two consultants who made payments to two officials of the World Bank in order to win contracts in connection with projects in Ethiopia, Kenya, and Sri Lanka. One of the consultants was sentenced to 1 year and the second consultant was sentenced to 1.5 years of imprisonment. Swedish authorities did not impose debarment from government contracting, even though the funds for procurement were provided by the Swedish International Development Cooperation Agency (Sida). Recently, Sweden imposed suspended sentences and a total of approximately EUR 20 000 in fines on two former executives of Volvo for violations of international sanctions on Iraq. The Volvo executives are alleged to have offered over SEK 24 million (EUR 2,7 million) in bribes in order to secure contracts. Although not strictly a foreign bribery case, this recent decision may reflect the low level of sanctions that Swedish authorities impose in such cases. Sweden explains that, due to the length of time since the commission of the crime and the imposition of the sentence, the court concluded that imprisonment could not be imposed.²¹ The Working Group might consider as a horizontal issue whether the adequacy of imprisonment terms should be assessed taking into consideration the specific legal and social framework of the evaluated country, as well as its overall sentencing objectives for natural persons.

55. Where jurisdiction is established over a foreign bribery case based on nationality, the sanction imposed by Swedish authorities may not be "more severe than the severest punishment provided for the crime under the law in the place where it was committed". As discussed below, Swedish prosecutors have experienced difficulty in receiving mutual legal assistance to establish dual criminality for prosecutions

21 The Swedish authorities explained that the delay in prosecuting the case was due to the time taken to obtain information from the United Nations about the allegations in the 2005 Final Report of the Independent Inquiry Committee on the Management of the UN Oil For Food Programme.

based on nationality jurisdiction. Given this difficulty, the lead examiners are concerned whether Swedish prosecutors will be able to prove that the sanctions imposed are less severe than the punishment in the jurisdiction where the crime was committed (Penal Code, Chapter 2, Section 2).

Commentary

There are insufficient enforcement actions to determine whether sanctions on natural persons for foreign bribery are “effective, proportionate and dissuasive”, including in cases where sanctions must be less severe than those in the jurisdiction where the crime was committed. The lead examiners therefore recommend following-up the application of sanctions to natural persons as practice develops.

b) Sanctions for Legal Persons

56. Since Phase 2, Sweden has raised the level of “corporate fines” that may be imposed on legal persons. At the time of Phase 2, the maximum fine range for legal person was from SEK 10 000 to SEK 3 million (EUR 340 000).²² The WGB thus recommended that Sweden increase the amount of available sanctions. Following amendments in 2006, the range of available fines for legal persons is SEK 5000 to SEK 10 million (EUR 1,1 million).

57. Even though the level of sanctions has increased, it is still clearly far too low to be effective and dissuasive, in the context of Sweden’s economy. Article 3 of the Convention provides that penalties for foreign bribery must be “effective, proportionate, and dissuasive” (Article 3(2)). The available fines are particularly low especially when considering that confiscation is rarely imposed on legal persons in bribery cases. Swedish authorities repeatedly cited that reputational harm has a strong deterrent effect within Swedish society that outweighs monetary sanctions.

58. It should also be noted that exclusion from government contracting is rarely applied in practice to legal persons.

59. Swedish authorities regularly stated that Sweden has the highest number of multi-national corporations per capita. Given the size and importance of Swedish multinationals in international business, and the fact that the level of sanctions are inadequate to prevent Swedish companies from engaging in bribery, the low level of sanctions may not provide an incentive for Swedish companies to invest in compliance regimes, which may be costly. Balancing the low ceiling of sanctions for legal persons and the probable high value of the contracts that may be obtained by bribing, could lead companies to incorporate the cost of the sanction merely as a cost of doing business.

Commentary

The level of “corporate fines” available for legal persons is insufficient to be “effective proportionate, and dissuasive” under the Convention, especially when considering that confiscation is rarely applied to legal persons. The lead examiners recommend that Sweden increase the fine for legal persons for foreign bribery offence, in light of the size and importance of many Swedish companies in international business transactions, the location of their international operations, and the business sectors in which they are involved.

²² 1 EUR = approx. 8.83210 SEK. The conversion of Swedish krona (SEK) into Euros (EUR) throughout this document is based on the exchange rate on 30 March 2012.

4. Confiscation of the Bribe and the Proceeds of Bribery

60. In Phase 2 (Recommendation 9(b)), the WGB recommended that Sweden broaden the grounds for confiscation of criminal proceeds, and draw the attention of the investigating, prosecutorial and judicial authorities to the importance of imposing confiscation on the bribers. The WGB also recommended follow up on the application of confiscation measures to the foreign bribery offence. In particular, the WGB recommended that Sweden ensure that confiscation was applied in practice against legal persons as a sanction for bribery of a foreign public official.

61. Chapter 36, Section 1, the general confiscation provision in the Penal Code, provides that “the proceeds of a crime are to be declared forfeited” unless “manifestly unreasonable”. In Phase 2, Swedish authorities doubted whether this provision could be applied to recover proceeds from bribery (Phase 2, para. 198). Swedish authorities explained that the links between the proceeds as a result of bribery and the act of bribery are too tenuous to qualify for confiscation under this provision. This provision thus has limited application in foreign bribery cases. In fact, there is no known case where a Swedish court has issued an order for confiscation of the proceeds of bribery obtained by the briber. In Sweden’s only successful prosecution for foreign bribery, the World Bank case, prosecutors did not seek confiscation from the two consultants, and it is unclear why confiscation was not sought in that case.

62. Since Phase 2, however, Sweden has amended its legislative framework for confiscation. In 2008, Sweden amended its Penal Code to allow for “extended confiscation”, in addition to general confiscation. The new provision provides for recovery of proceeds of criminal “activities”, consequently allowing for recovery beyond the proceeds of a specific crime. Sweden also amended the Penal Code to expand the basis for freezing assets. Despite these improvements, Sweden has not applied confiscation, extended or otherwise, for foreign bribery, whether for natural or legal persons.

a) “Extended Confiscation”

63. In 2008, Sweden enacted an “extended confiscation” provision which allowed for the confiscation of property that is “more probably . . . than not” the proceeds of criminal activities (Swedish Penal Code, Chapter 36, Section 1(b)). Confiscation under this provision is available for natural persons convicted of crimes that prescribe a maximum sentence of six years or more. Legal persons may be subject to extended confiscation provided that a representative of the legal person received property that he or she “knew or had reasonable grounds to suspect” was connected with criminal activities (Swedish Penal Code, Chapter 36, Section 5(b)). Swedish authorities explain that the extended confiscation provision allows Swedish authorities to recover property beyond the proceeds of the specific crime. According to Swedish authorities, under the provision, not only the assets associated with the specific crime may be confiscated, but also additional assets which the court determines are the proceeds of other crimes.

64. It remains to be seen whether extended confiscation may be effectively applied to recover proceeds from foreign bribery in practice. Since it was enacted four years ago, extended confiscation has never been applied to either the domestic or foreign bribery context. Moreover, the application of extended confiscation is limited only to situations where a person is convicted of a crime that prescribes a maximum sentence of six years or more. This restriction thereby excludes extended confiscation for the simple bribery offence. Finally, extended confiscation may not be applied to a legal person without a prior conviction of a natural person. However, general confiscation may be applied to a legal person without a prior conviction, although the Swedish authorities have not done so in a foreign bribery case.

b) Freezing of Assets

65. Sweden has also broadened the availability of asset freezing. Chapter 26, Section 3 of the Swedish Code of Judicial Procedure enables prosecutors, and in urgent cases, the police, to freeze property in danger of being hidden or transferred out of the jurisdiction in view of possible later confiscation pending a court decision.

c) Confiscation against Legal Persons

66. Chapter 36, Section 4 of the Penal Code provides for confiscation from an “entrepreneur” of “financial advantages” derived from a crime committed “in the course of business”(Penal Code, Chapter 36, Section 4). Unlike the general confiscation provision in Chapter 36, Section 1, this provision allows for the confiscation of financial advantages outside of a profit, such as a reduction in taxes or a gain in market share. Confiscation does not apply, however, in cases where it would be “unreasonable”. In determining whether confiscation is unreasonable, Swedish authorities consider *inter alia* whether the legal person had an obligation to pay another sum corresponding to the financial gain.

67. To this date, Sweden has never confiscated proceeds from a legal person in a bribery case, whether domestic or foreign, in accordance with Chapter 36, Section 4 of the Penal Code. In general, it appears that confiscation from legal persons for economic crimes is almost never used. The Economic Crimes Authority (ECA) reported that since 2009, confiscation has only been applied once in 2010 on a bankrupt company. The ECA did not indicate the underlying offence in this case.

68. The lack of confiscation against legal persons for economic crimes is concerning. Coupled with the low level of “corporate fines”, the absence of confiscation significantly decreases the deterrent effect for companies engaging in bribery. The absence of confiscation appears to be linked to the generally low level of enforcement against legal persons for bribery offences. The lack of confiscation from legal persons reinforces the lead examiners’ conclusion that confiscation for legal persons is in practice available only upon the conviction of a natural person.

d) Awareness-Raising of Confiscation among Law Enforcement Authorities

69. In Phase 2, the WGB recommended that Sweden draw the attention of the investigating, prosecutorial and judicial authorities to the importance of imposing confiscation. In response, Sweden implemented a steering and monitoring model beginning in March 2011 to oversee that confiscation is ordered in appropriate cases. Under the model, six prosecutorial divisions (including the NACU) report on a monthly basis to the Director of Prosecution regarding concluded cases and their efforts to further confiscation. The goal of the monitoring model is to achieve confiscation in 450 cases, whether from natural or legal persons, across the six prosecutorial divisions. In the past year, the six prosecutorial divisions have achieved successful confiscation orders in 372 cases, with the vast majority attributable to confiscation in environmental crimes. However, as mentioned earlier confiscation in bribery cases remains low, and there have been no confiscations in foreign bribery cases.

Commentary

The lead examiners note that Sweden has made legislative and practical developments toward improving the level of confiscation for foreign bribery. Although the initial results appear to be promising, the lead examiners have concerns about the practical application of confiscation in foreign bribery cases. Regarding “extended confiscation”, it is unclear the extent to which the new provision may be applied in practice to further recover proceeds from bribery. In addition, confiscation has never been applied to legal persons for foreign bribery. The overarching

issue, however, appears to be the lack of enforcement actions generally for foreign bribery, thereby eliminating the opportunity to seek confiscation.

The lead examiners therefore recommend that the WGB follow up on the application of confiscation, including “extended confiscation”, in foreign bribery cases.

5. Jurisdiction

70. During the on-site visit, comments were made by representatives of two different law enforcement bodies to the effect that it is preferable that the bribery of foreign public officials is investigated and prosecuted in the jurisdiction where it occurs, due to the availability of evidence, and that Sweden would take adequate measures to support such investigations. It is the opinion of the lead examiners that this approach has had a serious impact on Sweden’s implementation in practice of the Anti-Bribery Convention, including the continued lack of nationality jurisdiction over foreign bribery acts by Swedish legal persons abroad, and a demonstrated low level of effort made to establish a territorial link between Swedish companies and foreign bribery allegedly committed abroad on their behalf. The lead examiners note that following the on-site visit, the Swedish authorities stated that it “could” be preferable for foreign bribery cases to be prosecuted by the foreign jurisdiction.

a) Territorial Jurisdiction

71. During the on-site visit, the evaluation team discussed in great depth three investigations of the bribery of foreign public officials that had been terminated by the Swedish authorities. The investigation in the first case was essentially terminated because it was not possible to establish nationality jurisdiction over the alleged Swedish perpetrators, due to a lack of dual criminality which is further discussed below. In the second and third cases, the investigations were terminated because it was not possible to establish nationality jurisdiction over the alleged natural perpetrators.

72. In the discussions on all three cases, it did not appear that the Swedish law enforcement authorities actively sought to establish territorial jurisdiction over the alleged offences. Instead, it appeared that in all three cases, the priority was to determine whether the perpetrators were Swedish for the purpose of determining whether nationality jurisdiction could be established. However, a prosecutor from the NACU stated that it is not difficult to establish territorial jurisdiction in Sweden, and that, for instance, a letter from one country to another that passes through Swedish mail should be sufficient for this purpose.

73. The lead examiners’ overall assessment of these cases is that the Swedish authorities are unlikely to seek a territorial link between the acts of a Swedish company representative in Sweden and the bribery of a foreign public official abroad by a non-Swedish national, including where the bribery is perpetrated abroad by a representative of a foreign subsidiary. The lead examiners did not obtain any information that indicated that concrete efforts had been taken by the Swedish authorities in any of these cases to discover whether someone in the Swedish company had directed, authorised or failed to prevent the act of bribery that took place abroad.

74. The lead examiners do not consider that the failure to seek a territorial link in these cases is the result of a defect in the Swedish law; instead it appears to be an issue of enforcement. On the other hand, at least with respect to one of the terminated investigations, the Swedish authorities believe that the new offence of “negligent financing of bribery” [discussed above in Part B 1. b)] will enable Sweden to prosecute cases in the future where a leading person in the parent company provides, through “gross negligence”, financing for the bribe paid to a foreign public official. The lead examiners are of the view that this new offence will be an important tool for establishing territorial jurisdiction in the limited circumstances it covers (i.e. the Swedish company provides the financing for the bribe, and the bribe is

offered, promised or given by a person representing the Swedish company). However, it is unclear whether it will compensate for the lack of efforts to establish a territorial link in cases where the bribe is conveyed by a non-Swedish national representing a foreign subsidiary, or the bribe is financed by the foreign subsidiary.

b) Nationality Jurisdiction

(i) Dual Criminality Requirement

75. In Phase 2, the WGB recommended following up the requirement of dual criminality for establishing nationality jurisdiction, including the need to obtain information through mutual legal assistance (MLA) for this purpose. This issue was identified for follow-up because in Sweden it is normally necessary to obtain MLA from the foreign public official's country in order to prove dual criminality, since the testimony of an expert on the foreign country's penal law or a translation of the foreign law is not sufficient proof of dual criminality. Moreover, the commentaries on the relevant provision in the Penal Code (Chapter 17, Section 7) state that factors, such as the local customs and practice in the foreign country in dealing with the offence in question, may be taken into account in determining whether dual criminality exists.

76. In the responses to the Phase 3 Questionnaire, Sweden states that dual criminality is still a necessary condition to prosecute foreign bribery on the basis of nationality jurisdiction, and explains that the investigation of one allegation of foreign bribery was terminated due to a lack of MLA from the foreign public official's country, which made it impossible for Sweden to prove the dual criminality necessary to establish nationality jurisdiction over the acts. Moreover, the amendments to the Penal Code provisions on bribery do not include changes to the dual criminality requirement. The Swedish authorities clarify that dual criminality must be established in order to apply nationality jurisdiction to all offences in the Penal Code, except for certain crimes, such as: hijacking, maritime or aircraft sabotage, airport sabotage, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or a false or careless statement before an international court.²³

77. Sweden states in the responses to the Phase 3 Questionnaire that "even if an act is subject to criminal responsibility according to the law in the country of concern, the provision might not be enforced by the authorities". This statement appears to relate to the commentary on Chapter 17, Section 7, cited above. In addition, the Swedish Prosecution Authority explained that for dual criminality to apply the relevant statute of limitations must not have expired in the foreign country and the sanctions for the offence in Sweden must not exceed those in the foreign country. The Swedish Prosecution Authority was not sure whether defences in the foreign country would be taken into account in proving dual criminality.

78. During the on-site visit, the representative of the Swedish Prosecution Authority stated that it would not be necessary to obtain MLA to prove dual criminality, as it would be sufficient to obtain a photo-copy of the law, including through the relevant embassy or a legal practitioner in the foreign country. Following the on-site visit, the Swedish authorities clarified that there are no formal rules on the form of evidence needed to prove dual criminality. However, in practice, the Swedish authorities first ask the foreign country for information. There is not any case law on this issue.

(ii) Foreign Bribery Perpetrated by Legal Persons Abroad

79. In Phase 2, the WGB recommended follow-up of the application of sanctions to Swedish legal persons for the foreign bribery offence where the offence takes place abroad and is perpetrated by a non-

²³ Swedish Penal Code, Chapter 2, Section 3.

Swedish natural person. This issue has already been explored above [see under b) i)] in relation to what is considered by the lead examiners as inadequate efforts by Swedish law enforcement to seek a territorial link between the acts of a Swedish company representative in Sweden and the bribery of a foreign public official abroad by a non-Swedish national, including where the bribery is perpetrated abroad by a representative of a foreign subsidiary. In this part of the report, the lead examiners explore efforts by Sweden to establish nationality jurisdiction over a Swedish legal person, for the bribery of a foreign public official perpetrated on its behalf abroad by a non-Swedish natural person.

80. As has been seen in the discussion on the liability of legal persons (see above under B. 2), under the Penal Code, there is no liability of legal persons for the bribery of foreign public officials. Instead, corporate fines may be imposed on a legal person in the circumstances set out in Chapter 36, Section 7, of the Penal Code, and application of a fine under this provision is dependent on the identification of a specific individual or individuals in the company for foreign bribery. In addition, in practice it appears that corporate fines have always been imposed by the Court in the same proceedings in which the individual(s) are tried. Thus, as stated by the Swedish authorities in their responses to the Phase 3 Questionnaire:

The Swedish system for liability of legal persons is a special legal effect of crime (corporate fines). A basic provision for corporate fines is that a crime has been committed by a natural person. There is no special regulation on jurisdiction regarding corporate fines.

81. As a result of this legal framework, it is not possible to establish nationality jurisdiction over the acts of a legal person. Since the imposition of fines on a legal person is a special legal effect of the crime committed by a natural person, the required intent must be located within one individual in order to apply corporate liability (see above under B. 2). This means that jurisdiction must be established over the acts of the natural person, and if the offence takes place wholly abroad, since it can only be established over a natural person who is a Swedish national, it is not possible to impose corporate fines on the legal person.

82. Since the Terms of Reference for the Committee of Inquiry to review the bribery offences in the Penal Code did not include the issue of nationality jurisdiction over legal persons, this situation will not be changed by the amendments to the Penal Code.

Commentary

It is the view of the lead examiners that the Swedish law enforcement authorities need to make much greater efforts to find territorial links between representatives of Swedish companies, and the bribery of foreign public officials abroad by representatives of foreign subsidiaries. As a result, in practice there is potentially a significant lacuna in Sweden's implementation of the Anti-Bribery Convention when a representative in Sweden of a Swedish company directs, authorizes or fails to prevent the bribery of a foreign public official abroad by a non-Swedish national, including on behalf of a foreign subsidiary. This situation is exacerbated by the absence of nationality jurisdiction for the acts of legal persons abroad. Moreover, the lead examiners consider that it remains unclear how strictly dual criminality would be interpreted and the evidentiary requirements for proving its existence, in order to establish nationality jurisdiction over individual perpetrators. The lead examiners therefore recommend that Sweden take the following steps as a matter of priority:

a) Take steps to diligently investigate potential territorial links between Swedish legal persons and allegations of the bribery of foreign public officials perpetrated abroad on behalf of foreign subsidiaries, including by non-Swedish nationals;

b) Take urgent measures to be able to sanction Swedish legal persons for foreign bribery offences committed by them abroad, including when the foreign bribery offence is perpetrated abroad through an intermediary who is not a Swedish national;

c) Issue guidance to the prosecution authorities on the legal and evidentiary requirements for dual criminality in order to establish nationality jurisdiction over cases of foreign bribery that take place abroad, and clarify in the guidance that dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute ; and

d) Take appropriate measures to ensure that dual criminality for the purpose of applying nationality jurisdiction can be established regardless if the statute of limitations in the foreign jurisdiction has expired, or the level of sanctions for bribery is lower in the foreign jurisdiction.

6. Investigation and Prosecution of the Foreign Bribery Offence

83. The focus during the three-day on site visit in Stockholm was on the reasons for only one prosecution of foreign bribery so far by the Swedish authorities since the foreign bribery offence came into force in July 1999, and not a single prosecution since 2004. The lead examiners narrowed down their concerns in this area into two main themes: 1) the level of resources for investigating and prosecuting foreign bribery offences in Sweden, taking into account recent increases; and 2) the mitigation of the rule of mandatory prosecution for foreign bribery cases, and the role of the “public interest” in decision-making in this regard. They also considered the application in practice of the statute of limitations, given that the period had reportedly expired for two investigations.

84. A view on the low enforcement rate that emerged from the side of the Swedish authorities was that because Sweden is a very open and just society with very low levels of corruption within Sweden, it can be assumed that Swedish companies conduct their affairs in a similar manner abroad. All the Swedish multinational companies that participated in the on-site visit declared that they have a zero-tolerance policy to foreign bribery [also see above under B. 9 b)], and, the Swedish authorities pointed out in relation to the low enforcement level that on the basis of what emerged during the on-site visit, it can be assumed that these policies are effectively and strictly enforced. NACU conceded that some Swedish enterprises might behave differently abroad, and for this reason it is important that the Sweden has in place adequate resources and laws to address situations when Swedish companies engage in illicit activities abroad. The representative of NACU also stated that the Swedish people believe that they are not corrupt, and that Transparency International’s Corruption Perceptions Index indicates that Sweden is much less corrupt than other countries. He added that Sweden is a very open society. Moreover, the Swedish system is very transparent, and there is comparatively less foreign bribery involving Swedish companies.

85. The lead examiners note that in virtually every panel discussion at the on-site visit the participants expressed the view that Sweden is not a corrupt society. The Swedish authorities strongly countered the assumption that there should be more cases of foreign bribery that have been detected, investigated and prosecuted, commensurate with the size and nature of the Swedish economy. An academic stated that the Swedish people perceive Sweden as a low corruption country, and are reluctant to discuss corruption issues because they do not want to undermine this perception. A writer/journalist discussed how difficult it is to convince his editor to run stories about corruption allegations involving Swedish companies abroad, because he believes that readers would not find this topic interesting. He also explained that there is still a lingering belief in Swedish society that it would be naive to think that Swedish companies can do business in certain foreign markets without bribing.

86. The lead examiners are concerned that the public perception may have had a significant impact on the priority that law enforcement in Sweden has given to allegations of foreign bribery, with the result that enforcement has not been pro-active. The Swedish authorities counter that the concerns of the lead examiners are not justified, considering the significant increase in awareness in recent years that foreign bribery is a punishable crime, which has led to a significant increase in investigative and prosecution resources. The issue of public awareness is discussed further in the section of this report on public awareness [see B. 12 a)], and includes a Commentary.

a) *Mitigation of Rule of Mandatory Prosecution*

87. Chapter 20, Section 6 of the Code of Judicial Procedure establishes the principle of mandatory prosecution.²⁴ Chapter 17, Section 17 of the Penal Code provides an exception to this rule for certain bribery prosecutions, including the bribery of certain foreign public officials (*e.g.* bribery of a person who is not an employee of a foreign State or foreign local authority in situations covered by items 1-4 of Chapter 20, Section 2).²⁵ In summary, cases of bribery that come within this exception can only be prosecuted “if the crime is reported for prosecution by the employer or principal of the person exposed to the bribery or if prosecution is called for in the public interest”.

88. In Phase 2 (Recommendation 10), the WGB recommended that Sweden issue guidelines to prosecutors clarifying that prosecution of foreign bribery is always required in the “public interest”, subject only to the normal exceptions under the Code of Judicial Procedure, and take effective measures to bring these guidelines to the attention of all prosecutors. Sweden had not implemented this recommendation at the time of its Phase 2 Written Follow-Up Report, and in the responses to the Phase 3 Questionnaire, the Swedish authorities informed that the recommendation has still not been implemented because all cases of bribery are investigated by the NACU, and all the prosecutors in NACU possess special skills on anti-corruption law. The amendments to the Penal Code would abolish the requirement that prosecution may only be initiated if the crime has been reported for prosecution by the employer or client, but maintains the requirement that prosecution is in the “public interest”.

89. During the on-site visit, NACU and the Swedish Prosecution Authority stated that prosecution of cases of foreign bribery would always be considered in the “public interest”. However, the reality is that to date, a number of allegations in the media involving major Swedish companies have either not been investigated, or the investigations have been terminated. Moreover, it is not always possible to adequately verify the reasons for terminating or not investigating these cases, because, as explained by the Swedish authorities in writing following the on-site visit, “as a result of the prosecutorial way of working, many decisions and considerations are not documented in a written form”. Following these explanations, when commenting on the first draft of this Report the Swedish authorities stated that all prosecutors’ cases have been entered in a computer system (CABRA) since 2007, and that to terminate a case reasons must be submitted into the system. In the absence of reasons for a termination, the case would remain open. In addition, terminated cases are regularly reviewed. The lead examiners consider that recording their reasons would be an important way to safeguard prosecutorial independence, because it could be verified that political factors did not influence their decision-making.

90. The Swedish Prosecution Authority explained that the national economic interest had not influenced investigations and prosecutions of allegations of foreign bribery by Swedish companies and individuals. The lead examiners believe that it is of the utmost importance that assertions of this kind by the Swedish authorities can be verified. For instance, one investigation that has been terminated has been

24 Chapter 20, section 6 of the Code of Judicial Procedure states that “unless otherwise prescribed, prosecutors must prosecute offences falling within the domain of public prosecution”.

25 The exception to the rule of mandatory prosecution is discussed on pp. 54-56 of the Phase 3 Report on Sweden.

the subject of a book, in which information is proffered about the significant economic interest that the Swedish government had in the company that was the subject of the investigation.

Commentary

The lead examiners recommend that Sweden implement the Phase 2 Recommendation to issue guidelines to prosecutors clarifying that it is always in the “public interest” to prosecute cases of foreign bribery, subject to the normal exceptions under the Code of Judicial Procedure, and that investigations and prosecutions of foreign bribery 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. The lead examiners also recommend that Sweden take appropriate steps to ensure that all prosecutors are aware of the requirement to record their reasons for terminating investigations of the bribery of foreign public officials in the computer system (CABRA).

b) Level of Prosecution Resources

91. The Phase 2 report recommends that the WGB follow up “the system for assigning cases and allocating resources in prosecutions and investigations of foreign bribery”. Although the level of resources for investigating and prosecuting cases of foreign bribery appeared satisfactory at the time of the Phase 2 evaluation, the WGB was concerned that the long term adequacy of the resources would be tested when more allegations come to light, including cases necessitating complex financial analysis, and the sharing of resources between NACU and the ECA. In addition, the lead examiners were aware that the lead prosecutor in one of the investigations that had been terminated publicly stated he had a very low level of resources to conduct the investigation.²⁶

92. In the responses to the Phase 3 Questionnaire, the Swedish authorities explain that since Phase 2, significantly more resources have been provided to NACU. In 2005, NACU consisted of five public prosecutors and one forensic accountant. During 2010 to 2012 the budget for NACU was increased by approximately 30 percent, and in 2012, NACU will consist of seven prosecutors, three forensic accountants and three assistants.²⁷ At the time of the Phase 2 on-site visit, NACU consisted of five prosecutors and one specialised forensic accountant. In 2012, NACU’s budget is SEK 13.5 million (approximately EUR 1,5 million). Funds are not earmarked specifically for foreign bribery cases. In comparison, ECA has a budget of SEK 438 million (approximately EUR 49,6 million), but ECA is responsible for prosecuting a wide range of economic crimes, including fraud, embezzlement and tax crimes. ECA prosecutes corruption cases, including the bribery of foreign public officials, only when another economic crime, such as tax evasion, is also involved, and bribery is not the major crime. Where bribery is the major crime, the case is handled by NACU and NACPU, which might also investigate tax evasion, if necessary. It is also possible for ECA, NACU and NACPU to perform a joint investigation.

93. The lead examiners questioned during the on-site visit whether a budget of EUR 1.35 million for 2012 would be sufficient, given the high level of resources needed for even one complicated corruption case per year. Not only did the amount of the budget appear extremely low on its face, the lead examiners were aware of reports that at least one major investigation had been terminated by NACU, at least in part due to insufficient resources; although at a time when the resources were at least 30 percent lower than in 2012. In addition, a representative of NACU informed the evaluation team that NACU is presently

²⁶ “Gripen – The Secret Deals” (Uppdrag granskning, svt.se): http://svt.se/2.101059/1.1447173/gripen_-_the_secret_deals

²⁷ NACU’s budget was SEK 10.2 million in 2010 (approximately EUR 1,1 million), SEK 12.5 million in 2011 (approximately EUR 1,4 million) and SEK 13.5 million in 2012 (approximately EUR 1,3 million).

handling a domestic bribery case that is “at least” as large as the foreign bribery case that had been dropped, which would appear to the lead examiners to significantly limit funds available for foreign bribery prosecutions.

94. NACU’s representative stated that it has the resources to handle one large, complicated foreign bribery case per year. The representative of the Swedish Prosecution Authority stated that it has a large enough budget (approximately SEK 540 million (EUR 61 million)) to give funds to NACU where needed to prosecute foreign bribery cases. In fact, the Swedish Prosecution Authority was created in part to help deal with resource issues. According to the Swedish Prosecution Authority, assessments of NACU’s resources are conducted in three-year cycles, and if something unforeseeable comes up during the interim, it can always get permission from the Swedish Prosecution Authority to obtain more funds.

c) *Level of Police Resources*

95. Sweden states in its responses to the Phase 3 Questionnaire that on the recommendation of the Prosecutor General, the National Bureau of Investigation set up a national police group of approximately 30 persons to support NACU, and that the group would commence work in January 2012. At the on-site visit, the evaluation team learned that the National Anti-Corruption Police Unit (NACPU) was established in part because of the low level of police resources available to investigate a complicated foreign bribery case that had been terminated approximately three years earlier. According to a writer/journalist who participated in the civil society panel, obtaining resources for establishing NACPU was not an easy matter, and was raised in Parliament, in response to an intervention by the Chancellor of Justice. Representatives from NACU stated that the Prosecutor General and the Director of NACU also made official complaints about the resource level. The annual budget for NACPU is SEK 30 million (approximately EUR 3.4 million). In June 2011, the Chancellor of Justice stated that creation of NACPU would provide for adequate resources for investigating corruption and full compliance with Sweden’s international commitments.

96. The Swedish authorities explain that NACPU consists of investigators and police officers with solid and vast experience in economic crime investigations, as well as civilian investigators with experience from the Swedish Tax Authority. NACPU’s priorities will be established in consultation with NACU, and its responsibility will cover the whole of Sweden.

97. At the on-site visit, the representative of the newly established NACPU explained that NACPU is building up resources and intelligence for investigating corruption cases, but was not able to provide information on how expertise will be developed specifically for investigating cases of the bribery of foreign public officials. The representative of NACU stated that it is necessary to build up NACPU’s competence for dealing with foreign bribery cases. During the civil society panel, a lawyer representing the private bar, and a writer/journalist emphasised the need to ensure that NACPU’s investigators have the requisite expertise and receive adequate training on foreign bribery.

98. Following the on-site visit, the Swedish authorities explained that shortly after NACPU was established in January 2012, the staff received one week of specialised training on corruption (domestic and foreign) by NACU, the Tax Authority, the Swedish Competition Authority, the Swedish Anti-Corruption Initiative, the Swedish National Audit Office, the Legal, Financial and Administrative Services Agency (which coordinates the public procurement framework), the FIU, the Swedish Interpol section, and the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM).

Commentary

The lead examiners note that despite a 30 percent increase in resources for NACU, the successful prosecution of large complicated foreign bribery cases might necessitate obtaining additional resources from the Prosecution Authority, which according to the Swedish authorities, would be provided if necessary. Furthermore, although it is very positive that a new police unit – NACPU – was established in January 2012 to support NACU, it is essential that the Unit’s investigators receive adequate specialised training and development on foreign bribery. The lead examiners therefore recommend that Sweden take the following steps as a matter of priority:

a) Ensure that adequate resources are available for prosecuting cases of the bribery of foreign public officials, especially given that inadequate resources already played a role in the termination of one major case, and NACU’s budget must also cover the expenses of domestic bribery prosecutions; and

b) Ensure that the investigators at NACPU receive adequate specialized training on investigating cases of foreign bribery.

d) Statute of Limitations

99. Pursuant to Chapter 35, Section 1 of the Penal Code, for the offence of simple bribery of a foreign public official, the suspect must be remanded in custody or have received a notice of prosecution within five years of the completion of the offence. For the offence of aggravated foreign bribery, the suspect must be remanded in custody or have received a notice of prosecution within ten years of the completion of the offence. Regardless if a suspect is remanded in custody or received the notice of prosecution within the prescribed time-limit, no sanction may be imposed 15 years after completion of the offence for simple foreign bribery, and 30 years after completion of the offence for aggravated foreign bribery.

100. The Swedish authorities stated that one investigation of foreign bribery has been terminated due to the expiration of the statute of limitations, and another one has been partly terminated. Based on the dates of completion of the alleged offences, it appeared to the lead examiners that the operative statute of limitations for these cases had been five years. Both of the alleged bribery acts occurred before the introduction of the aggravated foreign bribery offence in 2004, which has a statute of limitations of ten years. However, the allegations in this case are very significant, involving substantial contracts of considerable value. Moreover, during the on-site visit, the lead examiners were not able to clarify whether at the investigation stage it is the practice in Sweden to calculate the statute of limitations based on the lower five-year period for simple foreign bribery. Following the on-site visit, the Swedish authorities clarified that the issue of whether a crime is to be treated as aggravated or simple is an evidentiary question addressed during an investigation. A major NGO in the field of anti-corruption stated that the statute of limitations for the foreign bribery offence should be assessed, as it would appear that in practice it is not sufficient.

Commentary

Due to the termination of two foreign bribery investigations as a result of the expiry of the statute of limitations when it was 5 years for aggravated bribery, the lead examiners recommend that Sweden use appropriate measures to ensure that Swedish prosecutors and investigators, as a rule, consider the bribery of foreign public officials as aggravated bribery for the purpose of applying the statute of limitations of 10 years.

7. Money Laundering

a) *Concept of “Universal Applicability”*

101. In Phase 2, the WGB recommended following-up whether and when the offences that cover the concept of money laundering apply where the predicate offence occurs abroad. The Swedish authorities stated in Phase 2 that the principle of “universal applicability” ensures that “money receiving” offences apply regardless if the predicate offence is a crime in the country where it takes place. The test is whether the predicate offence amounts to an offence to which the principle of “universal applicability” applies under Swedish law. According to the principle, for certain crimes, including the bribery of a foreign public official, acts committed in a foreign country constitute a crime in Sweden irrespective of whether the conduct is criminalised in the foreign country. However, in Phase 2 the Swedish authorities were not able to provide cases confirming the operation of “universal applicability” in money laundering cases. In Phase 3, the Swedish authorities are still not able to provide cases in which the principle of “universal applicability” has been applied to money laundering offences. However, they have explained that it is explicitly stated in the preparatory works to the relevant legislation (Bill 1995/96:49) that the money laundering receiving offences apply even if the predicate offence was committed outside Sweden.

b) *Detection of Foreign Bribery by the FIU*

102. During the on-site visit, the evaluation team got the impression that Sweden’s financial intelligence unit (FIU) – National Criminal Intelligence Service Financial Unit (NFIS), which is part of the National Police – has not so far provided information to the law enforcement authorities about suspicions of money laundering where foreign bribery is the predicate offence. The representative of NACU also stated that he does not think that a foreign bribery case has originated from the FIU. He added that information from the FIU about suspicious transactions would not include information about foreign bribery if it were the predicate offence.

103. The representative of the FIU stated that it receives requests a few times a year from the law enforcement authorities regarding bribery investigations, but does not know whether requests have been received specifically about foreign bribery. A representative of a financial institution who met with the lead examiners, as well as a representative of Swedfund, a Swedish state-owned development finance institution, said they have reported cases to the FIU of suspected money laundering where foreign bribery was the predicate offence. The financial institution does not use “special scenarios” to assist in the detection of money laundering where foreign bribery is the predicate offence.

c) *Self-Laundering*

104. Following the on-site visit, the Report of the Commission of Inquiry on Money Laundering was issued, which contains several proposals for improving Sweden’s anti-money laundering system, including by criminalising self-laundering; although keeping in mind Swedish penal principles concerning concurrent offences. According to the representative of the FIU, the proposals should go forward to the Government in mid-2014. The representative of NACU emphasised that Sweden is trying to build a new money laundering system.

Commentary

The lead examiners acknowledge that Sweden is taking concrete steps to improve its anti-money laundering (AML) system, and that if and when the proposals in the Report of the Commission of Inquiry on Money Laundering are put into effect, Sweden should be better positioned to detect the bribery of foreign public officials through its AML system. However, the proposals are not expected to go to the Government until mid-2014, and in the meantime,

the AML system does not appear to be generating any investigations into foreign bribery, even though, financial institutions say that they have been reporting relevant suspicious transactions. The lead examiners therefore recommend that Sweden take the following urgent measures to improve the detection of foreign bribery through its AML system as follows:

- a) Increase awareness in the FIU concerning the kinds of transactions that could potentially involve the laundering of the proceeds of the bribery of foreign public officials;*
- b) Encourage financial institutions to develop money laundering typologies and provide training on the laundering of the proceeds of foreign bribery; and*
- c) Ensure that NACU and where relevant the ECA provide feedback to the FIU when reports from the FIU have led to foreign bribery investigations.*

8. Accounting Requirements and External Audit

105. In Phase 2 (Recommendation 5), the WGB recommended that Sweden consider requiring auditors to report indications of possible bribery regardless of (i) who within the company structure perpetrated the offence, (ii) whether the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, and (iii) whether the offence is considered of minor significance.

106. As noted in the Phase 1 review of Sweden, the Bookkeeper Act contains accounting obligations, including the requirement to maintain accounting records with information about the course of operations and business transactions recorded in a chronological and systematic manner. In addition, under the Companies Act, all companies are required to have an external auditor, who shall render an audit report to the general meeting of shareholders for each financial year.

107. Sweden also has false accounting offences relevant to foreign bribery. Under Chapter 11, Section 5 of the Penal Code, a person is subject to up to 2 years imprisonment for a “bookkeeping crime”, which involves the intentional or careless neglect of the bookkeeping obligations under the Bookkeeping Act, the Foundation Act or the Act on Securing Pension Commitments. The term of imprisonment can be increased to up to 4 years where the crime is “gross”. Sweden has not prosecuted any case for false accounting related to foreign bribery misconduct.

108. In April 2010, Sweden enacted legislation to require auditors to report possible illegal acts of bribery regardless of who within the company perpetrated the offence. The new provision states that an auditor shall notify the board of directors if “some person within the scope of the company’s operations” has committed bribery.²⁸ Four weeks after notification to the board of directors, the auditor is required to make a report to the police or prosecutor providing the factual basis for his or her suspicions.²⁹ The auditor is then required to consider whether he or she should resign from his post. The new law came into effect on 1 November 2010.

109. Sweden has not reformed its laws to address the WGB’s recommendations that Sweden ensure auditors are required to report bribery in instances where “the economic damage from the suspected crime has been compensated and other prejudicial effect of the action have been remedied” and in instances “the offence is considered of minor significance” (Phase 2, Recommendations 5(a), 5(b)). The Government of

28 Swedish Companies Act, Chapter 9, Section 42.

29 Swedish Companies Act, Chapter 9, Section 44.

Sweden recommended to the Parliament that Sweden's auditing requirements were adequate in these respects, and the Parliament agreed.

110. Accountants and auditors agreed with this assessment. At the on-site visit, they explained that the exception for reporting suspicions where the economic damage has been remedied is essentially inapplicable to foreign bribery cases. Accountants and auditors explained that in order to remedy the misconduct, it would be necessary to reverse all the effects of the crime, including non-economic effects. Because corruption undermines the public trust in the government, a briber would be unable to remedy the harm caused by his or her misconduct. Accountants and auditors further explained that bribery would likely never be considered a minor offence and should always be reported.

111. According to the Swedish authorities, , the auditors that participated in the on-site visit clarified following the on-site visit that they had reported collectively approximately 5 to 10 suspected irregularities to client companies. It is not known whether any of these reported irregularities involved the bribery of foreign public officials. Sweden also clarified following the on-site visit that they have not detected or investigated any cases of accounting violations related to the bribery of foreign public officials.

Commentary

The lead examiners note that the Swedish authorities have not detected or investigated any cases of accounting violations related to foreign bribery. They also note that overall the auditing profession has reported extremely few accounting irregularities even internally. The lead examiners therefore recommend that Sweden urgently take concrete steps to raise the awareness in the accounting and auditing profession of the need to diligently report possible acts of foreign bribery according to the established legal system of reporting bookkeeping irregularities. The lead examiners also recommend that Sweden pro-actively detect and investigate potential accounting violations related to foreign bribery.

9. Internal Controls, Ethics, and Compliance Programmes and Measures

a) Awareness of Enterprises of the Risks of Foreign Bribery

112. It was the general consensus of the business organisations and companies that participated in the private sector panels that the level of awareness in Sweden of the risks of the bribery of foreign public officials has substantially increased over the last ten years. The representatives of the private sector also felt that it is easier now for companies to discuss corruption issues in Sweden. The private sector participants, who all represented multinational enterprises, and included one Swedish state-owned enterprise and one partially state-owned enterprise, attributed this progress to the following factors:

1. Risk of enforcement actions under the United States Foreign Corrupt Practices Act (FCPA) and the new United Kingdom Bribery Act;
2. Media reports about allegations of foreign bribery concerning Swedish companies;
3. Media reports about Swedish domestic bribery cases;
4. The Business Anti-Corruption Portal;³⁰ and

30 The Business Anti-Corruption Portal (<http://www.business-anti-corruption.com/>) is an initiative of the following agencies: Austrian Development Agency; United Kingdom Department for Business, Innovation and Skills; German Federal Ministry for Economic Cooperation and Development; Ministry of Foreign Affairs of Denmark;

5. Awareness-raising by the Swedish Export Credits Guarantee Board (EKN) and the Swedish Trade Council.

113. Although SMEs did not participate in the on-site visit, the business organisations that represent them stated that SMEs also generally have a higher awareness of foreign bribery risks today compared to ten years ago. They attributed this progress to the need for SMEs to participate in the global economy to be successful. They also said that as SMEs want to be suppliers to large companies, they learn from the large companies that they must abide by rules prohibiting foreign bribery. One business organisation acknowledged that there is more pressure on SMEs to bribe foreign public officials than large companies, and said that if faced with solicitation by a foreign public official, an SME might turn to the Swedish embassy in the foreign country or the business organisation for advice. Two MNEs stated that they do not believe that Swedish SMEs have the resources to establish effective controls to prevent and detect foreign bribery.

b) *Measures taken by Swedish Companies to Prevent and Detect Foreign Bribery*

114. A leading NGO on anti-corruption in Sweden stated that the number of Swedish companies with codes of conduct and codes of ethics is steadily increasing. This observation was substantiated in the meeting at the on-site visit with private sector representatives who unanimously stated that their companies had strict guidelines prohibiting bribery and channels for reporting wrongdoing. Since SMEs did not attend the meetings, it was not possible to verify the kinds of controls that they are putting in place to prevent and detect bribery.

115. Virtually all the companies that participated in the on-site visit stated that they face very challenging situations abroad involving bribery solicitations. Four of the companies have detected through their internal systems, the bribery of foreign public officials. One company detected seven foreign bribery incidents in 2011, which resulted in five related terminations of local employees. A second company has detected “a couple” of foreign bribery incidents, a third company has detected “fewer than five”, and a fourth company has detected “cases”, but was not sure of the number. A fifth company has seen “about 25 foreign bribery cases from abroad”, which were discovered through internal audits, and many of the bribe payments were concealed as commission payments. Representatives of the accounting and auditing profession have detected suspicious payments from Swedish parent companies to foreign subsidiaries, and commented that the further away from headquarters, the poorer the controls.

116. In preparing for the on-site visit, the evaluation team reviewed the codes of conduct/ethics of sixteen of Sweden’s largest companies³¹ in the following sectors: automotive, retailing, construction, industrial equipment, steel, pulp and paper, and energy. Of these companies, six had been involved in allegations of foreign bribery in media reports. All the companies have comprehensive codes and most of these codes apply to suppliers; however, not one refers specifically to the bribery of foreign public officials, and four do not refer to corruption at all.

c) *Anti-Corruption Code under Development*

117. The Commission of Inquiry established by the Swedish government in March 2009 to review the bribery offences in the Penal Code was also tasked with coordinating the development of a code for self-regulation on bribery related matters in the business community. This task was to be carried out in close

Norwegian Ministry of Foreign Affairs; Ministry for Foreign Affairs of Sweden; and Ministry of Foreign Affairs of The Netherlands.

31 The codes of conduct/ethics of these companies were found on the Internet, and it is possible that some of them have been updated but are not available to the public on the Internet.

cooperation with the business sector. The Report of the Commission of Inquiry, presented in June 2010, proposes that the code address elements including the following: 1) guidance on how gifts, rewards and other benefits in business can be used to promote a company's business activities; and 2) guidance on what constitutes an acceptable benefit, what could constitute a forbidden benefit and how companies should act in order to not violate generally accepted business practices in the business community. The Report of the Commission of Inquiry states that the proposed guidance would serve as a safe harbour for companies suspected of bribery. The proposed code would apply to all companies with a statutory duty to keep accounts under the Accounting Act or the Foreign Branches Act, and would incorporate standards developed by international organisations such as Transparency International and the OECD. The Report of the Commission of Inquiry also states that the code will be an important "source of law" for the courts and others who apply the new Penal Code provisions. According to the Ministry of Justice, the proposed code is meant to respond to a request for guidance from the private sector on how to comply with the Penal Code prohibitions against bribery.

118. On completion of the Committee of Inquiry's consultation process, the task of finalising the code for self-regulation was delegated to the private sector, and according to the Ministry of Justice, the initiative is now led entirely by the private sector. The Ministry of Justice informed the evaluation team that the private sector has made some "minor adjustments" to the Commission of Inquiry's proposals, and intends to launch the code when the amendments to the Penal Code on the bribery offences are passed. The Ministry of Justice also clarified that the code would not be binding on companies.

119. According to a survey by KPMG and Delphi,³² 91 percent of the Swedish business community is aware of the proposed code. Of this 91 percent, 20 percent of companies said they will undertake to review their codes of conduct due to the new anti-corruption code. The survey comments that the reception of the private sector to the proposed code is "at best lukewarm", as companies would prefer to simply fulfil the requirements of the Penal Code. According to a Swedish NGO working in the field of anti-corruption, the proposed code has not had much of a "reception" in the private sector, and most know about it. A major business association said that there is likely a lot of knowledge about the existence of the proposed code, but not its contents.

120. One of the major business organisations with which the evaluation team met has been consulted on the development of the proposed code. However, at least one major accounting and auditing group has not been involved, as well as a major Swedish NGO in the anti-corruption field. Moreover, the private sector participants had varying impressions about the legal significance of the code in relation to the Penal Code's bribery offences, including the offence of the bribery of foreign public officials. One large MNE is aware that the proposed Penal Code provisions do not refer to the code, and thinks that this is not good. On the other hand, a state-owned company believes that the proposed Penal Code provisions provide a safe harbour for complying with the code.

121. The proposed code has not been translated into English, but the Swedish authorities provided the evaluation team with an English translation of the specific provisions that they felt were most relevant to foreign bribery. In summary, they translated three provisions, which provide the following guidance:

1. Article 3 states that the Code also applies to companies' affiliates abroad;
2. Article 9 recommends due diligence of agents and other business partners; and

32 The 2010 KPMG/Delphi survey, entitled, "Codes of Conduct in the Swedish Business Sector", can be downloaded here: http://www.kpmg.com/SE/sv/kunskap-utbildning/nyheter-publikationer/Publikationer-2011/Documents/Codes_of_conduct.pdf

3. Article 10 provides guidance on fees and compensation to agents and other business partners.

122. Without a translation of the complete proposed code, it is difficult to assess whether the code includes all the elements recommended in the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. For instance, it is not known whether the proposed code refers specifically to controls for preventing and detecting the bribery of foreign public officials. It is also not known whether the proposed code addresses issues such as reporting channels, and incentives for the observance of the code, as well as the need to provide guidance and advice to, where appropriate, business partners, on complying with the code. Moreover, although Article 3 of the proposed code states that it also applies to companies' affiliates abroad, the OECD Good Practice Guidance recommends that ethics and compliance programmes or measures for preventing and detecting foreign bribery also apply, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors, representatives, suppliers, consortia, and joint venture partners.

Commentary

The lead examiners believe that the initiative for developing a code for self-regulation on bribery related matters in the business community, which is now led solely by the private sector, could have a positive impact on the prevention and detection of foreign bribery by Swedish companies. However, it is not clear that the proposed code addresses the bribery of foreign public officials specifically, or that it captures the standards in the OECD Good Practice Guidance. The lead examiners also observed at the on-site visit significant confusion amongst private sector representatives about the legal consequences of the proposed code, including whether the amendments to the Penal Code provide a safe harbour for complying with the code. The lead examiners therefore recommend that Sweden take appropriate steps to:

a) Continue encouraging the private sector, including SMEs, to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the OECD Good Practice Guidance; and

b) Raise awareness of the new offence of bribery, which includes foreign bribery and negligent financing of bribery, and clarify for the private sector the legal consequences of the proposed code, including that the amendments to the Penal Code do not provide a safe harbour for complying with the code.

10. Tax Measures for Combating Bribery

a) Information Sharing Domestically

123. Representatives of the Swedish Tax Administration explained at the on-site visit that tax authorities have an obligation to report suspicions of bribery to the law enforcement authorities that they detect in the course of performing their duties. They also stated that they would report foreign bribery suspicions to NACU, and if tax evasion were also involved they would report them to the ECA. At the on-site visit, a representative of the Tax Administration said it detects around two to four cases of possible bribery a year, which normally involve companies. Following the on-site visit, the Swedish authorities stated that from the records kept by the Swedish Tax Administration, it is not possible to distinguish between reports of the bribery of foreign and domestic public officials, but that the number of cases reported is very small. They added that once the Tax Administration has reported the suspicion, it is the responsibility of NACU or ECA to find out whether a crime has been committed.

124. The Tax Administration representatives were not aware of any instance in which NACU or the ECA had come to them seeking information about a tax payer that they were investigating for the bribery of a foreign public official; although they concede that the law enforcement authorities might have gone to local tax offices. Following the on-site visit, the Swedish authorities stated that records are not kept showing whether, in specific cases, NACU or ECA has sought information from local tax offices.

125. The Tax Administration is automatically informed by the Swedish courts of a conviction of the bribery of a foreign public official. Following the conviction of two individuals of foreign bribery in 2004, the Tax Administration reviewed the relevant tax returns to determine if they had attempted to obtain tax deductions for the costs of the bribes. However, in the absence of practice, it is difficult to assess whether the Court would automatically inform the Tax Administration of instances where “corporate fines” are imposed on legal persons for foreign bribery.

126. The Swedish authorities explain that, according to tax legislation, the Tax Administration may retroactively refuse a tax deduction for individuals and legal persons up to six years after it has been claimed, if the deduction was admitted by the Tax Administration due to misleading information in the tax return. The period cannot be extended where a deduction was taken for a bribe to a foreign public official unless a tax crime was also involved. The lead examiners note that the retroactive period is substantially shorter than the statute of limitation for aggravated foreign bribery, which is 10 years after completion of the offence.³³

b) Information Sharing Internationally

127. In 2011, the Protocol that amends the Convention on Mutual Administrative Assistance in Tax Matters came into force in Sweden. Article 22.3 of the amended Convention states that tax “information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use”. Similarly, Article 16.2 of the European Union Directive on Administrative Cooperation in the Field of Taxation, which came into force on 11 May 2011, states that information and documents received in accordance with the Directive may be used for other purposes than for the administration and enforcement of taxes covered by the Directive if the Member State providing the information grants permission. An EU Member State providing such information is obliged to grant this permission if it could use the information for similar purposes domestically.³⁴

Commentary

The lead examiners consider the automatic reporting by the Swedish courts of foreign bribery convictions to the Tax Administration a good practice, which they recommend following up to see if it also works when “corporate fines” are applied to legal persons. In addition, the lead examiners recommend following up whether in practice the six-year period within which tax deductions for payments constituting bribes to foreign public officials may be retroactively denied is effective, particularly in view of the ten-year statute of limitations for aggravated foreign bribery.

11. International Cooperation

a) Providing MLA for Proceedings against Legal Persons

128. In the Phase 2 Report, the WGB recommended following-up the effectiveness in practice of Sweden’s provision of MLA for non-criminal proceedings against legal persons brought by other Parties to

33 See the discussion on the operation of the statute of limitations at B. 6. d).

34 Except for automatic exchange, Member States of the EU must comply with this Directive from 1 January 2012.

the Convention. Given that Sweden does not have criminal liability for legal persons, but instead “corporate fines” are imposed on legal persons as a special legal effect of a crime committed by a natural person, the evaluation team also looked at whether in practice Sweden could provide effective MLA for criminal proceedings against legal persons.

129. At the on-site visit, the representative of NACU stated that in practice Sweden has provided MLA for criminal proceedings against legal proceedings without a treaty, but for non-criminal proceedings against a legal person, a treaty is necessary, due to a requirement in the International Legal Assistance in Criminal Matters Act (2000:562) (MLA Act). According to the Ministry of Justice, the Anti-Bribery Convention would be considered a treaty for this purpose. The Swedish authorities also provided statistics showing that in the last five years, MLA has been provided for proceedings against legal persons (criminal and non-criminal proceedings) where no MLA was requested for associated natural persons as follows: 8 cases in 2011, 1 case in 2010, 2 cases in 2009, 1 case in 2008, and 0 cases in 2007.

Commentary

The lead examiners consider that Sweden has demonstrated that it is able to provide MLA for both criminal and non-criminal proceedings against legal persons brought by other Parties to the Convention.

b) Grounds for Denying MLA

130. During the on-site visit, the evaluation team reviewed in particular the following ground for denying MLA under the MLA Act, which they considered potentially very broad and vague: “the circumstances are such that the request should not be granted”.

131. The NACU representative explained that this ground for denial would include factors such as the expiration of the statute of limitations in Sweden for the relevant offence. He also stated that the preparatory work on this provision in the MLA Act states that this ground should be narrowly interpreted.

132. Following the on-site visit, the Swedish authorities further provided that the purpose of this ground for denial is to not over-burden the MLA system by including a ground for refusal “that can be applied when none of the existing grounds for refusal are applicable, but when the request for MLA, taking all the circumstances into consideration, for certain reasons, should not be executed.” The Swedish authorities emphasise that this ground of refusal should be exercised in a “restrictive manner”, and to the knowledge of the Ministry of Affairs, it has only been used once to date, and in that case MLA was refused due to the application of the principle of *res judicata*.

Commentary

The lead examiners recommend following-up whether in practice the application of the ground for denying MLA when “circumstances are such that the request should not be granted” is an impediment to the provision of prompt and effective MLA to other Parties to the Anti-Bribery Convention for proceedings within the scope of the Convention.

c) Cooperation outside Scope of Formal MLA

133. NACU has assisted law enforcement authorities of another Party to the Convention in an investigation of foreign bribery allegations involving companies from both countries. In relation to the same allegations, NACU has also offered to provide assistance to two other Parties to the Convention, in which the cases are alleged to have occurred.

Commentary

The lead examiners view as good practice Sweden's efforts to assist other Parties to the Convention in their investigations of foreign bribery allegations outside the scope of formal MLA.

12. Public Awareness and the Reporting of Foreign Bribery

a) Public Awareness

134. Awareness in the private sector of the risks of foreign bribery for Swedish companies has been addressed in Part B 9 b) of this Report, and the views of the law enforcement authorities in Part B 6. This part of the report therefore focuses on the awareness of civil society and the public-at-large.

135. One representative of the legal profession stated that ten years ago Swedish society thought that Swedish companies do not get involved in corruption, but now there is growing awareness. Another representative of the legal profession stated that fifteen years ago it was considered perfectly acceptable to bribe a foreign public official. He also felt that Sweden's ranking on global corruption perception indices is slightly misguided, and should be somewhat lower. Both representatives believed that awareness has increased in Sweden primarily due to the FCPA and the United Kingdom Bribery Act, and a representative of a major Swedish anti-corruption NGO agreed with this view.

136. An academic spoke about how Sweden perceives itself as a low corruption country and that there may be a reluctance to disclose corruption for fear of undermining this perception. A representative of an NGO active in the field of anti-corruption, and a representative of the media felt that the media in Sweden is not interested in talking about foreign bribery involving Swedish companies.

137. The representative of a major Swedish anti-corruption NGO stated that providing information to the public on corruption and fighting corruption has not been a priority for the Swedish government.

Commentary

The lead examiners recommend that Sweden take concrete and meaningful steps to examine how it could increase the awareness of Swedish society-at-large of the importance of combating the bribery of foreign public officials by Swedish businesses.

b) Whistle-blowing

138. At the on-site visit, representatives of the private sector, including two MNEs and a Swedish state-owned company spoke about Swedish society's dislike of the concept of whistle-blowing, and the resulting low level of whistle-blowing in Sweden. These companies also spoke about the distrust of whistleblower channels in many countries in which they have subsidiaries. The representative of a major Swedish anti-corruption NGO stated that increased protections for whistleblowers in Sweden is important, and should be decided upon urgently.

139. In reviewing the codes of ethics/conduct of sixteen major Swedish companies, the lead examiners observed that nine of the codes provide reporting channels, the majority of which include a channel for anonymous reporting, and only three mention whistleblower protections explicitly. In addition, those that refer explicitly to protections describe their availability in terms that could in fact discourage whistle-blowing. For instance, one code states: "Persons reporting violations in good faith will not be subject to retaliation". Another code states: "No-one shall ever be discriminated against or punished for reporting in

good faith”. The third code states: “Retaliation against any employee who in good faith reports a concern to the company about illegal or unethical conduct will not be tolerated and subject to disciplinary action”.

140. The lead examiners note that international standards on whistle-blowing, including those in the OECD 2009 Recommendation, do not require protections for whistleblowers who do not report in good faith. They believe that the concept of “good faith” might be open to different interpretations, which might in some cases impede the reporting of suspected acts of foreign bribery, especially in countries where whistle-blowing is still not socially accepted. The lead examiners believe that this is a horizontal issue that potentially affects many Parties to the Anti-Bribery Convention.

Commentary

The lead examiners recommend following-up whether employees of Swedish companies report suspected cases of foreign bribery through whistleblower channels, and whether these reports lead to investigations and prosecutions.

13. Public Advantages

a) Official Development Assistance Funded Public Procurement

(i) Anti-Bribery Clauses in Standard Contracts

141. At the time of Sweden’s Phase 2 Written Follow-Up Report, it had not implemented the recommendation that the Sida and Swedfund review the standard contracts that they use with their clients in order to ensure that they specifically prohibit the bribery of foreign public officials related to the contracts (Recommendation 4(a)). The WGB recommended this review to Sida because in Phase 2 its bilateral funding contract did not contain specific clauses prohibiting the bribery of foreign public officials in relation to the contract, but stated that a contract could be terminated if the consultant/contractor had engaged in “corrupt or fraudulent practices” in competing for or in executing the contract. The WGB recommended this review to Swedfund because its “Subscription and Shareholders’ Agreement” and “Loan Agreement” did not prohibit the bribery of foreign public officials related to the contracts (Recommendation 4(b)).

142. Sweden provides that Sida’s Standard Conditions for Consultancy Services have not been revised since 2002, but a revision is planned for 2012, during which the WGB’s recommendation will be considered again to see if the clause can be improved.

143. Sweden provides that Swedfund’s standard loan and subscription and shareholders’ agreements contain provisions that specifically prohibit the bribery of foreign public officials. However, the text of the relevant provisions does not prohibit foreign bribery related to the contracts; instead they contain a declaration that corruption has not been committed in the past in connection with the Project.

(ii) Sida’s Recent Efforts to Boost Anti-Corruption Prevention and Detection

144. Since the convictions for the bribery of a World Bank official in 2004, involving Sida funds, Sida has taken a number of measures to improve the prevention and detection of corruption, including foreign bribery. Highlights include the following: 1) the Director General’s office has two advisors to deal with corruption cases;³⁵ 2) two additional full-time people work with methods development regarding anti-

35 The Swedish authorities explain that very soon the function will be strengthened by two additional posts, including legal and auditing competence.

corruption and advise operational and field staff on strategic anti-corruption efforts in partner countries; 3) almost all Sida staff have been trained on anti-corruption and audit-related issues, and a further special effort in this regard is being undertaken in 2011-2012; and 4) a whistleblower function, which allows anonymous reporting, was set up in March 2012, and is available on Sida's external home page for staff and the public.

Commentary

The lead examiners acknowledge Sida's recent efforts to boost anti-corruption prevention and detection. The lead examiners urge Sweden to implement as soon as possible, the outstanding Phase 2 recommendation to review the standard contracts that Sida and Swedfund use with their clients in order to ensure that they specifically prohibit the bribery of foreign public officials related to the contracts.

b) Officially Supported Export Credits

(i) Swedish Export Credit Corporation (SEK)

145. The SEK representative who participated in the on-site visit explained that SEK's procedures do not include instructions to contact the law enforcement authorities if it finds a media report with allegations of foreign bribery involving an applicant or contractor. Nevertheless, the SEK representative believed that "serious" instances of foreign bribery would be reported to the law enforcement authorities. In addition, SEK does not have procedures on what to do if it discovers that an applicant or contractor is under investigation for foreign bribery. However, it is the policy of SEK not to contract with a company if any corruption is involved in the transaction.

146. Following the on-site visit, the Swedish authorities further explained that the SEK Code of Conduct states that each employee has a duty to inform about indications of corruption, and that SEK will investigate such indications and contact the appropriate authority "if relevant". Furthermore, any suspicion of corruption leads to enhanced due diligence and proper measures to prevent corruption in any deal. Enhanced due diligence is applied whenever foreign public officials are involved in a deal.

147. SEK and EKN have access to public international debarment lists, but they are not permitted to have databases on companies and individuals convicted of foreign bribery. The Ministry of Justice confirmed that SEK and EKN are also not informed when "corporate fines" are imposed by the courts.

148. SEK has many kinds of loan agreements – some agreements contain an anti-corruption clause, but the clause might not refer specifically to the bribery of foreign public officials. SEK states that any deal that entails a risk for corruption will include proper anti-corruption clauses. In addition, SEK informs companies about its anti-corruption policy on its website, but it does not say anything specific about foreign bribery. SEK's website states that SEK credit will be cancelled if corruption is revealed in the export transaction. At the on-site visit, the representative of SEK stated it had detected two cases of foreign bribery through due diligence procedures. The lead examiners were not able to confirm if these cases were known to NACU through other sources. SEK explained that NACU did not contact SEK to request information about either of these cases. Following the on-site visit, SEK stated that it has not detected any cases of foreign bribery through its due diligence procedures.

(ii) Swedish Export Credits Guarantee Board (EKN)

149. According to the Export Credit Group's 2010 Survey on Sweden, EKN will promptly inform the Swedish law enforcement authorities if it finds "credible" evidence at any time that bribery was involved in the export transaction. EKN's Board of Directors decides whether the evidence is "credible". During the

on-site visit, the EKN representative explained further that, before going to the law enforcement authorities, EKN would need “quite strong” evidence, which would be assessed by EKN’s lawyers.

150. If EKN had knowledge that an applicant or contractor had been convicted of foreign bribery, it would conduct enhanced due diligence and have a dialogue with the company. Enhanced due diligence would involve ensuring that the company has in place adequate compliance measures.

151. At the on-site visit, EKN stated that in a “couple” of instances it had “indications” that a client company was involved in foreign bribery, and in one of these cases the indications were “serious”. NACU did not contact EKN about either of these cases. In addition, export guarantees were approved for the company which had serious indications after EKN assured itself that the company had taken “radical” compliance measures.

152. Following the on-site visit, the Swedish authorities explained that in one of the above-mentioned instances EKN had concerns about the level of agent commissions, and carried out enhanced due diligence, which did not give reason to suspect any irregularities. In the other instance the applicant appeared on the World Bank debarment list. EKN therefore carried out enhanced due diligence to ensure that the applicant had established adequate compliance measures, and was satisfied with the company’s responses. Since there was no reason to believe that foreign bribery had taken place in either of these cases, reports were not made to NACU.

153. The Swedish authorities also confirm that an EKN guarantee always includes an anti-corruption clause that specifically refers to the bribery of foreign public officials. In addition, EKN’s website provides specific information on foreign bribery.

Commentary

The lead examiners recommend that Sweden take appropriate steps to enhance the capacities of SEK and EKN to prevent and detect the bribery of foreign public officials as follows:

a) Establish a channel that enables SEK and EKN to obtain prompt information about convictions of individuals and the imposition of “corporate fines” for foreign bribery in Swedish courts; and

b) Establish effective channels of communication between SEK/EKN and NACU, to ensure that SEK and EKN report suspicions of foreign bribery without delay to NACU, and to ensure that NACU routinely consult SEK and EKN when investigating allegations of foreign bribery in which official export credit guarantees are involved, as appropriate.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

The Working Group on Bribery commends the Swedish authorities for their high level of cooperation and transparency throughout the Phase 3 process. The Working Group notes that Sweden has very recently taken two important steps to improve compliance with the Anti-Bribery Convention. On 1 July 2012, a new law will come into force, which amends the foreign bribery offence as well as establishes a new offence of the negligent financing of bribery. In January 2012, the National Anti-Corruption Police Unit (NACPU) was created to support the National Anti Corruption Unit (NACU) with corruption investigations, including foreign bribery. The Swedish authorities recognise that it is not possible for the Working Group to assess the effectiveness of these initiatives at such an early stage, and therefore invite the lead examiners to return for a further on-site visit in two years.

The Working Group recommends a Phase 3bis evaluation for the following principal reasons: 1) the absence of a single prosecution of foreign bribery in Sweden for more than 8 years despite several allegations involving major Swedish companies; 2) the potential reasons for the absence of prosecutions, which are discussed in detail throughout this report; 3) new bribery legislation will enter into force on 1 July 2012; and 4) the inability to assess at this stage the impact of amendments to the Penal Code, and the very recent increase of law enforcement resources. The Working Group recommends a Phase 3bis evaluation, the time and scope of which will be decided at a one year written follow-up report. In addition, the Group recommends a six-month written follow-up report concerning Recommendations 1, 3(a), 3(b), 3(d), 4(a), 4(c), 4(d), and 6.

Sweden has now fully implemented the following Phase 2 recommendations that remained outstanding in Phase 2: 5(a) and (b) on reporting by auditors; 8 on the scope of the definition of “foreign public official”; and 12(a) on broadening the grounds for confiscation. However the following recommendations remain unimplemented: 10 on prosecutorial discretion; and 12(c) on the standard contracts of the Swedish International Development Cooperation Agency (Sida). Recommendations 9(b) and (c) on confiscation and corporate fines respectively remain partially implemented.

In addition, based on the findings in this report on the implementation by Sweden of the Anti-Bribery Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below.

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. The Working Group recommends that Sweden amend its framework on “corporate fines” for foreign bribery offences to ensure that, in accordance with the Good Practice Guidance in Annex I to the 2009 Recommendation, legal persons are held liable for foreign bribery committed through lower-level employees, intermediaries, subsidiaries, or third-party agents in the circumstances outlined therein, and that legal persons may in practice be held liable for foreign bribery even when individual

perpetrators are not prosecuted or convicted. (Convention, Article 2, 2009 Recommendation, para. IV, and Annex I, para. B)

2. The Working Group recommends that Sweden increase the maximum level of fines for legal persons for the foreign bribery offence, in light of the size and importance of many Swedish companies active in international business, the location of their foreign operations, and the business sectors in which they are involved. (Convention, Articles 3.1 and 3.2)
3. Regarding cases of the bribery of foreign public officials involving Swedish nationals or legal persons that take place outside Sweden, the Working Group recommends that Sweden as a matter of priority:
 - a) Take steps to diligently investigate potential territorial links between Swedish legal persons and allegations of the bribery of foreign public officials perpetrated abroad on behalf of foreign subsidiaries, including by non-Swedish nationals;
 - b) Take urgent measures to be able to sanction Swedish legal persons for foreign bribery offences committed by them abroad, including when the foreign bribery offence is perpetrated abroad through an intermediary who is not a Swedish national;
 - c) Issue guidance to the prosecution authorities on the legal and evidentiary requirements for dual criminality in order to establish nationality jurisdiction over cases of foreign bribery that take place abroad, and clarify in the guidance that dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute; and
 - d) Take appropriate measures to ensure that dual criminality for the purpose of applying nationality jurisdiction can be established regardless if the statute of limitations in the foreign jurisdiction has expired, or the level of sanctions for bribery is lower in the foreign jurisdiction. (Convention, Articles 4.1, 4.2 and 4.4)
4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Sweden:
 - a) As recommended already in Phase 2, issue guidelines to prosecutors clarifying that it is always in the “public interest” to prosecute cases of foreign bribery, subject to the normal exceptions under the Code of Judicial Procedure, and that investigations and prosecutions of foreign bribery 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;
 - b) Take appropriate steps to ensure that all prosecutors are aware of the requirement to record their reasons for terminating investigations of the bribery of foreign public officials in the computer system (CABRA);
 - c) Ensure as a matter of priority that adequate resources are available for prosecuting cases of the bribery of foreign public officials;
 - d) Ensure as a matter of priority that the investigators at NACPU receive adequate specialized training on investigating cases of foreign bribery; and
 - e) Ensure that the statute of limitations applied to foreign bribery cases, including at the investigative stage, is as a rule the ten-year period for aggravated foreign bribery; and
 - f) Proactively detect and investigate potential accounting violations related to foreign bribery. (Convention, Articles 5 and 6, and Commentary 27)
5. The Working Group recommends that Sweden take the following urgent measures to improve the detection of foreign bribery through its anti-money laundering system as follows:
 - a) Increase awareness in the FIU concerning the kinds of transactions that could potentially involve the laundering of the proceeds of the bribery of foreign public officials;
 - b) Encourage financial institutions to develop money laundering typologies and provide training on the laundering of the proceeds of foreign bribery; and

- c) Ensure that NACU and where relevant the Economic Crimes Authority (ECA) provide feedback to the FIU when reports from the FIU have led to foreign bribery investigations. (Convention, Article 7)

Recommendations for ensuring effective prevention and detection of foreign bribery

6. The lead examiners recommend that Sweden take concrete and meaningful steps to examine how it could increase the awareness of Swedish society-at-large of the importance of combating the bribery of foreign public officials by Swedish businesses.
7. Regarding efforts by Sweden to encourage companies to adopt adequate internal controls, ethics and compliance programmes or measures, the Working Group recommends that Sweden take appropriate steps to:
 - a) Continue encouraging the private sector, including SMEs, to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the OECD Good Practice Guidance; and
 - b) Raise awareness in the private sector of the new offence of bribery, which includes foreign bribery and negligent financing of bribery, and clarify for the private sector the legal consequences of the proposed code for self-regulation on bribery related matters in the business community, including that the amendments to the Penal Code do not provide a safe harbour for complying with the code; and
 - c) Urgently take concrete steps to raise awareness in the accounting and auditing profession of the need to diligently report possible acts of foreign bribery according to the established legal system for reporting bookkeeping irregularities. (2009 Recommendation, para. X.C, and Annex II)
8. Regarding the role of official development assistance funded procurement and officially supported export credits in preventing and detecting foreign bribery, the Working Group recommends that Sweden:
 - a) Implement as soon as possible the outstanding Phase 2 recommendation to review the standard contracts that Sida and Swedfund use with their clients in order to ensure that they specifically prohibit the bribery of foreign public officials related to the contracts;
 - b) Establish a channel that enables the Swedish Export Credit Corporation (SEK) and the Exports Credits Guarantee Board (EKN) to obtain prompt information about convictions of individuals and the imposition of “corporate fines” for foreign bribery in Swedish courts; and
 - c) Establish effective channels of communication between SEK/EKN and NACU, to ensure that SEK and EKN report suspicions of foreign bribery without delay to NACU, and to ensure that NACU routinely consult SEK and EKN when investigating allegations of foreign bribery in which official export credit guarantees are involved, as appropriate. (Convention, Article 3.4, 2009 Recommendation, paras. III. vii), XI and XII)

2. Follow-up by the Working Group

9. The Working Group will follow-up the issues below as jurisprudence and practice develop on the implementation of the foreign bribery offence in Sweden:
 - a) Application of the new foreign bribery offence and the offence of negligent financing of bribery once they come into force, to assess whether they effectively apply to situations including the following: the foreign public official has not requested or received the bribe or an offer or promise of a bribe; instances where a third party acts outside the scope of engagement but for the benefit of the company; complicated case scenarios involving intermediaries and/or

foreign subsidiaries; and regarding the distinction between simple and aggravated foreign bribery;

- b) Application of the new offence of negligent financing of bribery to legal persons;
- c) Application of sanctions for foreign bribery to natural persons;
- d) Application of confiscation, including “extended confiscation”;
- e) Whether the automatic reporting to the Tax Administration by Swedish courts of foreign bribery convictions will also apply where “corporate fines” are imposed on legal persons;
- f) Whether in practice the six-year period within which tax deductions for payments constituting bribes to foreign public officials may be retroactively denied is effective, particularly in view of the ten-year statute of limitations for aggravated foreign bribery; and
- g) Whether in practice the application of the ground for denying mutual legal assistance (MLA) when “circumstances are such that the request should not be granted” is an impediment to the provision of prompt and effective MLA to other Parties to the Anti-Bribery Convention for proceedings within the scope of the Convention;
- h) Whether employees of Swedish companies report suspected cases of foreign bribery through whistleblower channels, and whether these reports lead to investigations and prosecutions.

**ANNEX 1 PREVIOUS WORKING GROUP RECOMMENDATIONS TO SWEDEN AND
WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION**

2005 Phase 2 Recommendations and Assessment of Their Implementation in 2007

Recommendations in Phase 2		<i>Written follow-up</i> *
<i>Recommendations concerning Awareness-Raising, Prevention and Detection of Bribery of Foreign Public Officials</i>		
1	With respect to general measures to raise awareness of, to prevent and to detect bribery of foreign public officials, the Working Group recommends that Sweden: (a) continue efforts to make Swedish companies more aware of their exposure to solicitations of bribery by foreign public officials (Revised Recommendation I); (b) raise the awareness of the offence of bribery of a foreign public official among public officials, particularly those of the Swedish Export Credit Guarantees Board, the Swedish Export Credit Corporation and the National Board for Public Procurement (Revised Recommendations I and II.v).	Fully implemented
2	With respect to the prevention and detection of bribery of foreign public officials in the arms export sector, the Working Group recommends that Sweden encourage the Swedish defence industry to develop strong anti-corruption measures, and ensure that the decision-making bodies for providing licenses for exporting military equipment and dual-use goods consider whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country (Revised Recommendations I and II.v).	Fully implemented
3	With respect to the role of Swedish foreign representations, including embassy personnel, in preventing and detecting bribery of foreign public officials, the Working Group recommends that Sweden take further measures to increase the awareness of foreign representations of corruption issues and of the steps that should be taken where credible allegations arise that a Swedish company or individual has bribed, or taken steps to bribe, a foreign public official, including encouraging the reporting of such allegations to the competent authorities in Sweden (Revised Recommendation I).	Fully implemented
4	With respect to the prevention and detection of bribery of foreign public officials in official development assistance (ODA), the Working Group recommends that: (a) the Anticorruption Regulation of May, 2001 of the Swedish International Development Agency should be amended to clarify that "corruption" includes the bribery of foreign public officials and that the identification of loss or damage is not necessary to report suspicions of bribery of foreign public officials, and	Fully implemented

* This column sets out the Working Group's findings on Sweden's 21 September 2005 *Sweden Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations*.

Recommendations in Phase 2		<i>Written follow-up</i> *
	(b) the competent authorities in ODA take steps to ensure an effective system for reporting suspicions of bribery of foreign public officials to law enforcement authorities in Sweden and/or abroad (Revised Recommendation I).	
5	<p>With respect to the prevention and detection of bribery of foreign public officials through accounting and auditing, the Working Group recommends that Sweden should:</p> <p>(a) require an auditor to report indications of a possible illegal act of bribery to the board of directors of the audited entity regardless of who within the company structure perpetrated the offence (Revised Recommendation V.B.(iii)); and</p> <p>(b) consider requiring the auditor to report indications of a possible illegal act of bribery to the competent authorities regardless of (i) who within the company structure perpetrated the offence, (ii) whether the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, and (iii) whether the offence is considered of minor significance (Revised Recommendation V.B.(iv)).</p>	Not implemented
6	<p>With respect to the prevention and detection of bribery of foreign public officials through antimoney laundering measures, the Working Group recommends that Sweden analyse the reasons for the low number of investigations and prosecutions compared to the number of suspicious transaction reports, with a view to increasing the effectiveness of the money laundering reporting system for the purpose of detecting and preventing the offence of bribing a foreign public official (Convention, Article 7; Revised Recommendation I).</p>	Fully implemented
<i>Recommendations Pertaining to Investigations of Bribery of Foreign Public Officials</i>		
7	<p>With respect to investigations of bribery of foreign public officials, the Working Group encourages Sweden to spontaneously share information regarding cases of bribery of foreign public officials with authorities in other countries, when such information might assist the receiving authority in initiating or carrying out an investigation, prosecution or judicial proceeding or lead to a request for mutual legal assistance (Revised Recommendations I, II.vii and VII.i).</p>	Fully implemented
<i>Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials</i>		
8	<p>With respect to the offence of bribing a foreign public official, the Working Group recommends that Sweden ensure that the notion of a foreign public official in Chapter 20, section 2 of the Penal Code covers all officials and agents, including those elected, of a public international organisation of which Sweden is not a member (Convention, Article 1(4)).</p>	Not implemented
9	<p>With respect to the liability of and sanctions for legal persons for bribery of foreign public officials, the Working Group:</p> <p>(a) urges the Swedish government to complete as a matter of priority, its proposal for reforming the system of liability of legal persons, and recommends that this reform (i) review whether there are any legal or practical obstacles to imposing</p>	Fully implemented

Recommendations in Phase 2		<i>Written follow-up*</i>
	<p>corporate fines, and (ii) increase the maximum fine for bribery of foreign public officials to an appropriate level, given the size and global importance of Swedish companies;</p> <p>(b) recommends that Sweden ensure that confiscation of the bribe and the proceeds of bribery shall be applied in practice against legal persons as a sanction for bribery of a foreign public official; and</p> <p>(c) recommends that Sweden draw to the attention of investigating, prosecutorial and judicial authorities (i) the mandatory nature of corporate fines and (ii) the application of corporate fines to intentional crimes (Convention, Articles 2 and 3(2)).</p>	<p>Partially implemented</p> <p>Partially implemented</p>
10	<p>With respect to the reversal of the rule of mandatory prosecution for the prosecution of bribery of a foreign public official, the Working Group recommends that Sweden issue guidelines to prosecutors clarifying that prosecution of bribery of foreign public officials is always required in the public interest subject only to the normal exceptions under Chapter 20, section 7 of the Code of Judicial Procedure, and take effective measures to bring these guidelines to the attention of all prosecutors (Convention, Article 5).</p>	<p>Not Implemented</p>
11	<p>With respect to a decision of whether to prosecute a case of bribery of a foreign public official committed outside of Sweden, the Working Group recommends that Sweden consider the appropriateness of the requirement of government authorisations to prosecute such cases. Sweden is invited to compile relevant information to assist the Working Group in monitoring this issue (Convention, Article 5).</p>	<p>Fully implemented</p>
12	<p>With respect to sanctions for bribery of foreign public officials, the Working Group:</p> <p>(a) encourages the Swedish authorities to pursue their work in order to broaden the grounds for the confiscation of criminal proceeds, and recommends that Sweden draw the attention of the investigating, prosecutorial and judicial authorities to the importance of imposing confiscation on the bribers (Convention, Article 3(3));</p> <p>(b) recommends that Sweden devise procedures to verify whether a participant in public procurement has been convicted of bribery of foreign public officials, and consider debarring legal persons subject to corporate fines for bribery of foreign public officials from participating in public procurement (Convention, Article 3(4); Revised Recommendations II.v and VI.ii); and</p> <p>(c) recommends that the Swedish International Development Cooperation Agency (Sida) and Swedfund review the standard contracts that they use with their clients in order to ensure that they contain provisions that specifically prohibit the bribery of foreign public officials related to the contracts (Convention, Article 3(4); Revised Recommendation II.v and VI.iii).</p>	<p>Partially Implemented</p> <p>Fully implemented</p> <p>Not Implemented</p>

Follow-up by the Working Group

The Working Group will follow-up the following issues once there has been sufficient practice:

- (a) The operation of the offence of bribery of foreign public officials, including (i) the criteria for determining when bribery is aggravated or simple, (ii) the operation of certain elements of the offence of bribery of foreign public officials, including the notion of “impropriety” (Convention, Article 1);
- (b) Whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been proceeded against, or has not been convicted and/or sanctioned (Convention, Article 2);
- (c) The level of sanctions and application of confiscation measures to offence of bribery of foreign public officials (Convention, Article 3);
- (d) The application of nationality jurisdiction to the offence of bribing a foreign public official, in particular:
 - i. the requirement of dual criminality and the obtaining of information through mutual legal assistance and other channels to establish dual criminality (Convention, Article 4(2)); and
 - ii. the application of sanctions to Swedish legal persons for the offence of bribery of foreign public officials where the offence takes place abroad and is perpetrated by a non-Swedish natural person¹⁰³ (Convention, Article 2);
- (e) The system for assigning cases and allocating resources in prosecutions and investigations of bribery of foreign public officials (Convention, Article 5);
- (f) Whether and when the offences that cover the concept of money laundering apply where the predicate offence occurs abroad (Convention, Article 7); and
- (g) The effectiveness in practice of mutual legal assistance for non-criminal proceedings against legal persons brought by other parties to the Convention (Convention, Article 9; Revised Recommendation II.vii).

ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

Government Ministries and Bodies

- Ministry of Foreign Affairs
- Prosecutor General's Office, Swedish Prosecution Authority
- National Anti-Corruption Unit, Swedish Prosecution Authority
- Export Credit Guarantee Board (EKN)
- Swedish International Development Authority (SIDA)
- Swedish Tax Administration
- Ministry of Justice
- Economic Crimes Authority
- National Police Board
- Swedish Competition Authority
- National Council for Crime Prevention
- Export Credit Corporation
- Swedfund

ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AML	Anti-Money Laundering
CEO	Chief Executive Officer
CPI	Transparency International Corruption Perceptions Index
ECA	Economic Crimes Authority
EKN	Export Credits Guarantee Board
EUR	Euro
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FIU	Financial Intelligence Unit
GDP	Gross Domestic Product
MLA	Mutual Legal Assistance
MNE	Multinational Enterprises
NACU	National Anti-Corruption Unit
NACPU	National Anti-Corruption Police Unit
NFIS	National Criminal Intelligence Service Financial Unit
NGO	Non-Governmental Organisation
SEK	Swedish Export Credit Corporation
SEK	Swedish Krona
SME	Small-and-Medium Enterprises
SIDA	Swedish International Development Cooperation Agency
UN	United Nations
WGB	OECD Working Group on Bribery in International Business Transactions

ANNEX 4 SUMMARY OF SWEDISH FOREIGN BRIBERY ENFORCEMENT ACTIONS

1. The World Bank Case (2004)

A consultant in the construction industry and an accountant of his company were convicted of bribery, in connection with payments to two officials of the World Bank in order to cause contracts to be awarded to the consultants in connection with projects in Ethiopia, Kenya, and Sri Lanka. The accountant was also convicted of false accounting. The consultant was sentenced to one year of imprisonment, and the accountant was sentenced to one and one-half years of imprisonment. Both convictions and sentences were affirmed on appeal.

