

Briefing by Susan Hawley, The Corner House, February 2006.

**OECD Working Group on Bribery:
Its comments and recommendations on public procurement and
bribery of foreign officials
(extracts from Phase 2 country reports)**

Introduction

Exclusion or disqualification from public procurement is an extremely effective sanction against crimes committed by or for the benefit of companies. Because of this, exclusion or disqualification from public procurement is envisaged and recommended both in the commentaries on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and in the 1997 Revised Recommendations for Combating Bribery.

The OECD Convention itself states, at Article 3, that “*each party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign official*”. The commentaries to the Convention state suggest that such civil or administrative sanctions are, among others: “*exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities*”.

The 1997 Revised Recommendations also state that “*Member countries’ laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Members’ national laws*”.

The OECD Working Group on Bribery has, since 2002, been conducting peer reviews of all OECD Member States looking in detail at how they are implementing both the Convention and the Recommendations. So far, the final review reports of 21 countries have been published,¹ with the follow-up reports of two – Germany and the US – also now in the public domain. Not all of the Phase 2 reports have looked in detail at exclusion from public procurement as a sanction, but many have, and in recent reports, the issue of disqualification from public procurement has featured more prominently.

This briefing compiles the comments and recommendations made by the OECD Working Group on Bribery Phase 2 reports published so far on exclusion from public procurement. The Corner House believes that these recommendations and comments may provide a useful background and context for considerations on how the UK (and other EU countries) should implement article 45 of the EU Procurement Directive 2004/18/EC.

The sections most relevant to the considerations of the Working Group established to look at guidance of article 45 in the UK context are underlined in the following

¹ Australia, Belgium, Bulgaria, Canada, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Korea, Luxembourg, Mexico, Norway, Slovak Republic, Sweden, Switzerland, United Kingdom, United States.

extracts. In addition, it is worth noting the following points that come out from reading the extracts:

- **Recommendations to exclude or disqualify.** In a good number of the Phase 2 reports, the Working Group on Bribery (WGC) or the peer review examiners specifically recommend that countries establish “formal rules”, re-examine their “principles and procedures”, or revisit their policies for denying access to public procurement contracts as a sanction for bribery of foreign officials. These include: Australia, Belgium, Bulgaria, Canada, Japan, Mexico, Sweden, and Switzerland. It is important to note that where the OECD Working Group on Bribery has specifically recommended ‘more formal rules’ or ‘revisiting policies’ on public procurement, these countries will need to address the issue specifically in their follow-up report.
- **Countries that already exclude.** Several countries reported that they already have a national system of excluding companies convicted of bribery from public procurement. These include: the US (which also suspends companies from tendering for public contracts when they are indicted for an offence), Greece, some Länder in Germany, Hungary, Italy (this is usually by judicial process/court order), Korea, and the Slovak Republic. Other countries reported that they were theoretically able to do so (or did so for other offences), but in practice there was little evidence that they did so for the offence of bribery of foreign public officials (Belgium, Norway, Sweden and Switzerland).
- **Corruption registers.** In its first Phase 2 report, the peer review examiners encouraged Germany to proceed with plans to set up a ‘federal corruption register’. In its follow-up report, Germany reported back that it has now established a federal corruption register (operative from January 2006) listing all companies excluded from public procurement for corruption-related reasons. Public authorities in Germany are required to inform the register of any exclusion made and to check the register before awarding a contract. Norway reported that it was discussing setting up such a register. Austria meanwhile operates a database on company performance and previous convictions that can be accessed by public procurement authorities. The peer review examiners in several reviews specifically noted the difficulties that procurement authorities would find in establishing whether a company had been convicted (Belgium, Sweden and Switzerland) and in some instances, recommended that a central register or list of convicted companies be set up (Hungary and Mexico). In the case of Belgium, the peer review of examiners noted that “an official judicial record for legal entities ... could be useful in disqualifying businesses with convictions for corruption”, and recommended that Belgium “set up a mechanism that would allow information to be circulated about companies convicted ... for example by the creation of a separate record of convictions for legal entities”.
- **Certification as a criteria for tendering.** In several countries, companies have to provide certification that neither they nor their directors have been convicted of a crime. These include: Bulgaria, Hungary, Slovak Republic. In the case of Sweden, the lead examiners recommended that Sweden “devise

procedures to verify whether participating in public procurement has been convicted of bribery of foreign public officials”.

Country reports

Australia (January 2006)

(ii) Disqualification from Contracting with the Government

162. There are no formal rules for disqualifying companies or individuals from contracting with the government where they have been convicted of the bribery of foreign public officials. Given that the monetary sanction for legal persons is quite low, such alternative or complementary administrative penalties may be useful and may act as a deterrent.

163. Since the courts do not have the authority to impose additional administrative sanctions such as disqualification from contracting with the Commonwealth government, it is important to review whether key government contracting agencies, such as the Department of Finance and Administration, Export Credit and Insurance Corporation (EFIC) and Australian Agency for International Development (AusAID), have special rules in their contracting processes for companies and individuals convicted of foreign bribery.

164. Officials responsible for public procurement in the Department of Finance and Administration, EFIC and AusAID confirmed that they do not maintain blacklists of firms convicted of criminal offences, including foreign bribery or any other corruption or fraud-related offences.

Department of Finance and Administration — Public Procurement

165. With regard to public procurement, conviction of a company for a foreign bribery offence would not automatically disqualify it from applying for a publicly funded contract. However, the Department of Finance and Administration indicates that if a company were convicted of an offence relating to the foreign bribery provisions, this would be sufficient ground for an agency to consider refusing to award a public procurement contact to that company. Section 44 of the Financial Management and Accountability Act (FMA Act) places a primary obligation on Chief Executive Officers of agencies to ensure proper (efficient, effective and ethical) use of Commonwealth resources. Issues such as the misuse of public money are addressed in the Fraud Control Guidelines, which are issued under the FMA Act. The Australian authorities also point to the general guidance in the Commonwealth Procurement Guidelines, which recommend the ethical use of resources when awarding contracts.² These provisions focus on the ethical behaviour to be adopted on the part of officials involved in handling and awarding public tenders. They do not refer to any necessity to take into account the ethical behaviour of companies applying in these tendering processes. In any case, public procurement agencies would retain the flexibility to not deal with a company based on ethical issues. In their view, where there is a conviction or clear factual evidence of a foreign bribery case concerning a company applying for a public tender, this could potentially constitute a reason to refuse a public procurement contract. There have not however been any practical cases to date.

² See part 6 of the Commonwealth Procurement Guidelines – January 2005 on Efficient, Effective and Ethical Use of Resources (footnote 106 in original report)

Commentary

The lead examiners recommend that Australia consider introducing formal rules on the imposition of additional civil or administrative sanctions upon legal persons and individual convicted of the bribery of foreign public officials, so that public subsidies, licences, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied as a sanction for foreign bribery in appropriate cases.

In addition, the lead examiners recommend that public agencies that provide contracting opportunities, such as the public procurement agencies, EFIC and AusAID, consider establishing a policy for denying access to such opportunities to individuals and companies convicted of the offence of bribing a foreign public official in appropriate cases, as well as including provisions for the termination of such contracts in appropriate

OECD Working Group on Bribery Recommendations:

181. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

(b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii)

Austria (February 2006)

c) Non-criminal sanctions

155. Non-criminal sanctions include exclusions from public procurement and general provisions providing for possible exclusions from the exercise of business. In addition, there are possible contractual consequences with regard to export credits. There is no provision requiring exclusion of convicted bribers from participation in privatisations.

i) Public procurement

156. Under section 51 of the Federal Law on Public Procurement 2002 (*Bundesvergabegesetz – BVergG*), the purchaser shall exclude entrepreneurs from participating in an award procedure if, inter alia, (1) a final judgment challenging their professional conduct has been rendered against them or, in the case of legal persons and certain other entities, against natural persons on their managerial body (section 51(3) BVergG); or (2) evidence available to the purchaser demonstrates that they have been guilty of grave professional misconduct, in particular in violation of provisions of labour or social laws (section 51(4) BVergG). Section 182 BVergG allows the purchaser to withdraw from a contract already awarded if "the tenderer or a person acting for him during the award procedure has committed a criminal offence suitable to influence the award decision". The excluded bidder can challenge the exclusion before a procurement tribunal.

157. The Federal Law on Public Procurement does not specify the timeframe during which the company is excluded. The lead examiners were informed that exclusions from participation in government tenders would last for three months and could be extended by six months, but the company would have the possibility to have the suspension lifted by demonstrating that it has done everything possible to avoid a recurrence.

158. The effectiveness of these provisions, however, appears limited. A representative of the central procurement agency of the Austrian federal government (BBG - *Bundesbeschaffung GmbH*, owned by the Republic of Austria) stated that "there is no real possibility to exclude firms from a tender procedure", including in the case of convictions for bribery. The BBG is entitled to request from suppliers documentation that allows it to assess whether or not the supplier is eligible. Austrian procurement authorities also have access to a database known as ANKÖ with information on companies participating in tenders, including registration, business performance, past court procedures and convictions. Austria has not clarified the extent to which BBG makes use of this power to request information or to which it uses the information contained in the database. Since the establishment of this database in 2001, the BBG has not excluded any individual or company from participation in procurement based on a conviction or evidence of grave professional misconduct related to corruption.

159. Austria has adopted a law implementing the European Union public procurement directive.⁵⁹ This law will enter into force on 1 February 2006 and will provide for mandatory exclusion from participation in public contracts of a candidate or tenderer who has been the subject of a final judgment for corruption.

Commentary

The lead examiners note that Austria has significant possible administrative sanctions for persons convicted of foreign bribery. In light of evidence that such sanctions are rarely applied in practice, they invite the Austrian authorities to consider ways to enhance their effectiveness in bribery cases, including with regard to legal persons.

Belgium (October 2005)

19. The legislative and organisational reforms undertaken during the past decade bear witness to the attention the Belgian government has devoted to fighting corruption. The importance attached to it is clearly reflected in two out of three National Security Plans (the Federal Security and Penal Policy Plan of 31 May 2000, covering the period 2001-2002, then the National Security Plan for the period 2004-2007); the adoption on 10 February 1999 of a law on the repression of bribery, domestic and international; the new prohibition on tax deductibility of commissions paid overseas by businesses in order to obtain or retain public procurement contracts or administrative authorisations; the addition in 1999 of a new clause, specifically aimed at bribery, excluding access to Belgian public procurement contracts; the insertion, also in 1999, of measures whereby government-supported export credits may be forfeited for bribery; and, finally, the creation of a special federal police department to handle complex bribery cases, the Central Office for Bribery Repression (OCRC).

21. Clearly, the priority given to the problem of domestic corruption can have an impact on whether or not the organs of public administration take notice of the bribery of foreign public officials. There is an obvious risk here for the way in which judicial investigations are carried out: given the general philosophy of government policy with regard to the fight against corruption, the examiners are afraid that these investigations will focus only on the bribery of Belgian public servants at the expense of transnational bribery. The risk is obvious in other sectors, too, for example as to the implementation of the clause barring enterprises from being awarded public procurement contracts on grounds of bribery: the priority given by the authorities to fighting corruption in the awarding of *Belgian* public contracts might lead the contracting authorities to concentrate solely on preventing that type of bribery, unaware that it was the legislator's intention also to exclude businesses convicted of involvement in acts of bribery of public decision-makers abroad.

27. A similar observation can be made with regard to the implementation of the laws and regulations introduced in 1996 and 1999 to disqualify from Belgian public contracts businesses that are shown to have committed, or been involved in, acts of bribery, in particular of foreign public officials, or have been made the subject of a verdict "having the effect of *res judicata* with respect to any offence affecting their professional ethics". The disqualification of a business determined to have bribed a foreign public official from eligibility for public contracts or public subsidies can be a highly effective preventive measure, as it could be a formula for inducing businesses to adopt concrete anti-bribery measures. But as none of the measures are in place to enable this disqualification to be implemented, its deterrent effect will in practice be minimal. In the view of the lead examiners, an official judicial record for legal entities, as was contemplated by a law in draft at the time of the examination of Belgium in Phase 2, could be useful in disqualifying businesses with convictions for corruption.

Commentary

The lead examiners recommend that Belgium review the principles and procedures in force in all bodies and authorities responsible for awarding public subsidies, public contracts and other advantages granted by the public authorities so as to ensure that the measures disqualifying companies determined to have bribed

foreign public officials from such advantages is applied as effectively as possible. Further, the examiners invite the Belgian authorities to set up a mechanism that would allow information to be circulated about companies convicted under Articles 250 and 251 of the Criminal Code, for example by the creation of a separate record of convictions for legal entities, distinct from the one for individual persons.

79. On the other hand, in view of the sometimes limited capacity of certain SJAs to deal with all the criminal offences referred to them (many of which are violations of general law which the Belgian public wants to be given priority treatment), they might be inclined to make choices based on the criminal policy priorities laid down in the national security plan jointly drawn up by the Ministers of the Interior and of Justice. The latest security plan, setting out the priorities for the federal police for the period 2004-2007, does not mention *specifically* the fight against bribery of foreign public officials. The only types of bribery included as police priorities are “bribery connected with the award and execution of [...] public procurement contracts” (the security plan) and “bribery, crimes and offences of a complex nature that prejudice the interests [...] of the public service especially in the context of the development, allocation and use of public subsidies or the grant of authorisations, permits, approvals and certifications” (the 2002 Circular). In the view of the examiners, efforts should be made by the Belgian authorities to provide the federal judicial police with more clear indications of its policy for criminal enforcement and prosecution in the field of foreign official bribery.

iii) Businesses convicted or involved in acts of corruption and their exclusion from Belgian public procurement.

147. Pursuant to government procurement legislation, any businessperson, supplier or service provider may be excluded from a public tender if that person has been convicted definitively for any crime affecting his/her professional integrity. Since entry into force of the law of 10 February 1999 amending the law of 20 March 1991 on the authorisation of public works contractors, the same rule applies specifically to enterprises that are found to have committed or have been involved in acts of corruption, particularly of foreign public officials. In practice, however, the risk that an enterprise that has committed or has been involved in acts of bribery of foreign public officials will be excluded or suspended from Belgian public procurement remains very limited.

148. While professional immorality duly established is grounds for exclusion at any stage of the procurement process (attribution and execution of contracts), professional immorality relating specifically to corruption is grounds for exclusion only at the award stage. Also, exclusion on grounds of corruption is applicable only to contracts above a certain threshold. Finally, the authorities have broad discretion on the question of exclusion, since the legislation requires the awarding authorities only to consider applying the clause when selecting competing firms, but not to apply it automatically (law of 20 March 1991 as amended by the law of 10 February 1999). On this point, as noted earlier, the absence of a police record for legal persons, together with the lack of any mechanism for feedback to the Belgian judicial and prosecution authorities of pertinent information on firms that have been found to have committed or been involved in acts of corruption certainly constitutes an obstacle for awarding authorities to exclude firms from the procurement process.

Commentary

The examiners recommend, as a means of strengthening the system of excluding from Belgian public procurement those enterprises determined to have bribed foreign public officials, that the Belgian authorities consider making the non-fulfilment of this criterion a ground for unilateral and mandatory exclusion from public procurement. Such a measure should also be applicable both at the contract awards stage and at the contract execution stage.

OECD Working Group on Bribery Recommendations:

176. With respect to other measures of prevention, the Working Group recommends that Belgium:

c. examine the principles and procedures in force in all the bodies and authorities responsible for granting public subsidies, public procurement contracts or other advantages awarded by public authorities, in order to ensure that there is a fully efficient system for refusing such advantages to enterprises determined to have bribed foreign public officials

(Revised Recommendation, Sections II v) and VI).

179. With regard to sanctions, the Working Group recommends that Belgium:

o. consider, either as part of the revision of the law on criminal liability of corporations or by any other means, the disqualification by law from public procurement of enterprises that are convicted of bribery of foreign public officials,

(Convention, Article 3; Revised Recommendation, Section VI ii)).

6. Legislative provisions concerning public procurement

Law of 24 December 1993 on public procurement and on certain contracts for works, supplies and services

Article 11. Any act, agreement or understanding that distorts the normal conditions of competition is prohibited. Bids submitted pursuant to such an act, agreement or understanding must be rejected. If such an act, agreement or understanding leads to the award of a public contract, execution of the contract must be stopped, unless the competent authority determines otherwise in a substantiated decision. Application of this provision may in no case give rise to compensation for the person awarded the contract.

Extract from the Royal decree of 8 January 1996 on public contracts for works, supplies and services and public works concessions.

Article 17. Without prejudice to the provisions governing the approval of works contractors, any contractor may be excluded from the procurement (at whatever stage of proceedings) if that contractor:

3. has been convicted by a judgment with the force of *res judicata* for any offence that affects the contractor's professional integrity.

Proof that the contractor is not in one of the situations cited in paragraphs 1, 2, 3, 5 or 6 may be adduced by producing the following documents:

a) for 1, 2 or 3: an extract of the police record or an equivalent document delivered by a judicial or administrative authority of the country of origin, showing that these requirements have been met.

When such a document or certificate cannot be delivered in the country concerned, it may be replaced by a sworn declaration or a solemn declaration by the interested

party given before a judicial or administrative authority, a notary or a qualified professional body in the country of origin.

Law of 20 Mar 1991 on the approval of works contractors

Article 4 (1). To obtain approval, the contractor must satisfy the following conditions:

4 a). The contractor must not have been convicted by a judgment with the force of res judicata for any offence that affects the contractor's professional integrity.

b). The contractor must not have been excluded from public procurement on the basis of article 19 (3) of this law.

Article 5. Registration in the official list of approved contractors in another member State of the European Communities is the equivalent of approval, pursuant to article 3, inasmuch as this approval is equivalent according to the conditions of article 4 (1).

Article 19 (1). A regional government may, upon the advice of the Commission, order the suspension or delisting of the approval of one or more contractors:

1. When the Commission has received a complaint from a public works manager concerning a listed contractor pursuant to article 2 with respect to one of the following grounds: [...]

d) failure to respect the prohibition of any act, agreement or understanding that would distort the normal conditions of competition, stipulated in article 11 of the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services, including acts of corruption punishable under articles 246, 247, 250 and 251 of the Criminal Code; [...]

3. A regional government may, upon the advice of the Commission, order the withdrawal of one or more authorisations for a contractor, or exclude a contractor from public procurement in the cases referred to in clauses 1.1 (b, d and e) and 1.2 (a and b).

4. The measures applicable under clauses 1.1 and 1.2 and 2 are proposed to the regional government by the Commission in a substantiated notice, after the contractor has been made aware of the charges against him and has had the opportunity to argue his defence.

The decision of the regional government is substantiated and notified by registered letter to the contractor. An extract of it is also published in the Belgian Monitor.

Bulgaria (June 2003)

(ii) Public Procurement

The Public Procurement Act, which came into force in 1999, is an important step in increasing accountability in the field of public procurement. However, it is reported that major deficiencies in the law, including insufficient transparency of the procedures for public procurement, create suspicion of corrupt practices³. The establishment in 2001 of the Public Procurement Register, which includes information on all public procurement tenders (with certain exceptions⁴) is a major step towards transparency. Concerns have been expressed about the efficacy in practice of the mechanisms for review and enforcement⁵, and corruption is still regarded as a major concern in the public procurement context. According to data provided by the Ministry of Justice, between 1 January 2001 and 10 December 2002, the PIFCA forwarded to the prosecutor's office 73 audit reports which gave rise to suspicions of criminal activity – not necessarily corruption – having taken place in the public procurement process. The examiners were told of cases where procurements were cancelled because of suspected misuse of funds. Foreign companies – which could include foreign State-owned enterprises – are now permitted to bid for public procurement contracts without having to register as a legal entity in Bulgaria. The major risk perceived by the Bulgarian authorities is that bidders might seek to bribe Bulgarian public officials in an attempt to win business. The view was expressed to the examining team that circumstances were unlikely to occur in the public procurement process which could give rise to bribery of foreign public officials. The possibility of bribery of officials of international organisations in connection with aid-funded projects was however mentioned by civil society representatives. In terms of preventing corruption, including foreign bribery, inadequacies appear in the current system at the level of eligibility and screening. Under the Public Procurement Act, all companies who have paid their taxes are, in principle, eligible to bid. The only evidence of good business reputation required is a certificate stating that none of the current managers or members of the board of directors, if any, has been convicted of an economic crime. Such convictions operate as a disqualification under Article 24 of the Act. This can easily be circumvented by changing the management structure of the company. Foreign bidders have to provide similar documentation from the authorities in their country of establishment, legalised by a Bulgarian consular official. There is no provision for temporary suspension from eligibility of those under investigation. The failure to impose stricter requirements for eligibility, coupled with a lack of focus on screening, means that the onus for detecting and reporting corruption falls on those responsible for post-procurement auditing and enforcement, who are at present ill-equipped to discharge this role effectively. As to reporting, the examiners were told that the Public Procurement Office reports suspected offences, including bribery, to the Court of Auditors and the Public Internal Financial Control Agency. Only if, and when, it receives the results of the inspection from one of these bodies will the Public Procurement Office report the matter to the Prosecutor's Office, though the PIFCA

³ In Coalition 2000's Corruption Assessment Report 2001 (footnote 19 in original report).

⁴ It should be noted that procurement relating to national defence and security, which would include military procurement, is outside the scope of Bulgaria's public procurement regime (footnote 20 in original report).

⁵ Concerns have been expressed in particular in view of the continued absence of a dedicated Public Procurement Agency. See e.g. OSI/EUMAP Report (2002), p. 119 (footnote 21 in original report).

itself refers to the Prosecutor's Office any findings in an audit report containing evidence of criminal activity with respect to public procurement.

Commentary

There is a need for proactive measures to be adopted to reduce the risks of foreign official bribery as well as other types of corruption in the procurement process. As a starting point, steps could be taken to increase the levels of awareness of the offence among the officials responsible for screening and enforcement. More stringent requirements could be imposed to disqualify individuals and companies whose directors or officers have previous involvement in corruption from eligibility for government contracts. As to reporting, the present system appears to be lengthy, inefficient and in need of clarification.

OECD Working Group on Bribery Recommendations:

6. Consider operating a policy of excluding any individuals, or any entities whose directors or officers have been found to have been involved in foreign bribery from eligibility for government contracts (Convention, Article 3; Revised Recommendation, Article VI).

Canada (March 2004)

87. According to a document entitled “Instructions to Bidders/Contractors” issued by Public Works and Government Services Canada (PWGSC), Canada may reject a bid for a public procurement contract where the bidder or any employee or subcontractor included as part of the bid has been convicted under section 121 (“frauds on the government”), 124 (“selling or purchasing office”), or 418 (“selling defective stores to Her Majesty”) of the Criminal Code. The PWGSC may also reject a bid where, with respect to current or prior transactions with the Government of Canada, evidence, satisfactory to Her Majesty, has been received of “fraud, bribery, fraudulent misrepresentation or failure to comply with any law protecting individuals against any manner of discrimination”. Thus, authority is not provided to reject a bid where there is a conviction of foreign (or domestic) bribery with respect to a prior transaction that was not with the Government of Canada.

Commentary

In light of the absence in Canada of additional civil or administrative sanctions upon persons and entities convicted of the bribery of a foreign public official, the lead examiners recommend that the Canadian authorities consider revisiting the policies of agencies such as EDC, CIDA and PWGSC on dealing with applicants convicted of bribery and corruption for determining whether these policies are sufficiently effective for the purpose of deterring companies that deal with them from engaging in the bribery of foreign public officials.

OECD Working Group on Bribery Recommendations:

6. e) Consider revisiting the policies of agencies such as Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption, given that Canada does not impose additional civil or administrative sanctions upon a person or company convicted of the bribery of a foreign public official. [Convention, Article 3.4, Revised Recommendation, Paragraphs II v) and VI ii)]

France (January 2004)

Nothing in Phase 2 report on public procurement

Germany (June 2003 and January 2006)

4. Issues relating to Public Procurement

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

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

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

Commentary

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

Additional Sanctions including Corruption Registers

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

134. However, a federal initiative to set up a nation-wide corruption register of unreliable companies is underway for the purpose of recording the serious failings of companies, including involvement in domestic and foreign bribery. At the stage of the on-site visit, only the general framework of the register had been set out in the form of draft legislation, and the German authorities expected that it would likely operate as follows: (i) offices involved in public procurement (which approximately amount up

to 32,000 offices throughout Germany) would be required to consult the register before providing a contract under tender; (ii) foreign companies as well as German companies would be subject to registration; and (iii) a company considered as “unreliable” would be registered for a certain period unless it were shown to be “reliable”.

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

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

Germany, Phase 2: Follow-up Report (January 2006)

Within the context of the **reform of the law on public procurement**, the Federal Ministry of Economics and Labour is currently preparing a regulation to exclude enterprises from competition for public contracts on the grounds of unreliability if employees whose activities are to be ascribed to the enterprise are found guilty of a corruption offence. Bribery of foreign public officials shall also constitute an offence leading to suspension from competition for public contracts.

(3.) In addition to these substantive rules on public procurement, there are plans to create a federal corruption register. The main purpose of such a register will be to provide public agencies with information on those enterprises which have been excluded from competition for public contracts for corruption-related reasons. The corruption register will also list those enterprises excluded from competition for public contracts for bribery of foreign public officials. The public agencies are obligated to report such exclusions to the register. They are also under the obligation to enquire with the register whether the company to whom they intend to award a particular contract is listed in the register. This makes it considerably easier for the public agency to check the reliability of the prospective contractor. The corruption register is to be introduced in early 2006. It will make a significant contribution to the combating of corruption and further raise the level of awareness of the punishability of corruption in general and of bribery of foreign public officials in particular.

Greece (July 2005)

(c) Public Procurement

203. Public procurement in Greece is administered by several agencies. Contracts for supplies are handled by the Ministry of Development, contracts for services by the Ministry of Finance and Economy, and contracts for public works by the Ministry of Environmental Planning and Public Works.

204. All three Ministries state that individuals and companies with a history of bribery are banned from the procurement process. A participant in a tender is required to produce a certificate from the competent authority which demonstrates that he/she does not have a previous conviction for “an offence concerning his/her professional conduct” (Article 14(1)(c), Presidential Decree 370/1995). According to the Greek authorities, this includes convictions for bribery. If the applicant is a legal person, it must demonstrate that it has not been banned previously from the procurement process (but not whether it has a prior criminal conviction). However, Greece was not able to provide statistics on bans that have been imposed.

205. Greek officials added that if a contractor is convicted of bribery while a contract is in effect, the contract is rescinded under the Civil Code and the contractor is banned from participating in future procurements.

206. After the on-site visit, Greece added that Law 3263/2004 amended the tender procedure for private contracts with a view to further enhance the transparency of the system.

207. The lead examiners are concerned that some legal persons who have been convicted of foreign bribery may nevertheless be able to avoid these sanctions. A legal person who participates in public procurement is only required to demonstrate that it has not been banned previously. Thus, a legal person who has been fined administratively under Law 2656/1998 for foreign bribery but not banned from the procurement process may escape detection. As well, in the absence of statistics on the sanctions that have been imposed, the lead examiners are unable to evaluate the effectiveness of the system.

Law 2656/1998

Article 5 - Administrative Sanctions

If any legal entity or undertaking has benefited in any way from punishable acts of the present law by fault of its managers, one of the following administrative sanctions will be imposed thereon by decision of the director of the competent regional directorate of SDOE (article 5 of presidential decree 218/1996, Government Gazette issue A 168):

1. Administrative fine up to three times the value of the benefit, or
2. Temporary or definitive prohibition of exercise of its business activity, or
3. Temporary or definitive exclusion from public benefits or aid.

Hungary (May 2005)

(ii) Legal persons

188. Article 3 of the Act CIV of 2001 on measures applicable to legal persons provides for the following measures: winding up the legal entity, limitation of the activity of the legal entity, and imposition of a fine. Measures to limit the activity and impose a fine may be ordered independently or jointly, but winding up the legal entity may not be combined with other sanctions. Fines can be of a maximum of three times the financial advantage gained or intended to be gained, and at least HUF 500 000 (EUR 2 038 and USD 2 727).

189. Sentences may also include limitations on the activity of the company. This may concern, *inter alia*, participation in public procurement, entering into concession contracts, or receiving funding from central or local government, as well as other activities prohibited by the courts. To date, however, there is no commercial register recording information about convictions of companies. Thus, it is unclear how the Hungarian authorities will ensure in practice that such interdictive sanctions are carried out.

190. Furthermore, if the sentence for a legal entity includes limitations on its activities, once the judgement has become final, any public procurement and concession contracts that it has been awarded may be rescinded, and it may be required to reimburse any public funds already received in connection with the offence. Winding up of the company may be ordered if serious circumstances exist, such as when the entity was established to cover up a criminal offence or if its actual activity served the purpose of covering up a criminal offence. Exceptions exist if the legal entity is considered to be acting in the public interest, is of strategic importance to the national economy or carries out national defence related tasks.

191. Given the very recent entry into force on 1 May 2004 of Act CIV of 2001 introducing the criminal liability of legal persons, practical experience is not yet available. However, the requirement of the prior conviction of a natural person in order to sanction the legal person may also preclude the application of effective, proportionate and dissuasive sanctions to legal persons, as required under Article 3 of the Convention.

c) Other sanctions

198. Article 3(4) of the Convention requires parties to “*consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official*”. Paragraph 24 of the Commentary indicates that “*among the civil or administrative sanctions, other than non-criminal fines, which might be imposed ...for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement ...*”. The sanctions that can be imposed by courts are addressed above; this article examines the approach taken by the relevant administrative agencies.

(i) Public procurement

199. Public procurement as a share of GDP is now very high by international standards in Hungary. As noted above, articles 5(2)(b) and 5(3) of Act CIV of 2001

provide that the court, in sentencing a legal person found guilty of a crime, may limit the ability of the entity to participate in public procurement procedures and rescind existing public procurement contracts. As noted above, these provisions have not yet been applied. During the on-site visit, public procurement representatives complained that as a general matter they have no link with the courts and that they do not receive information from the courts. There is no commercial register to record information about convictions concerning companies.

200. In addition to the provisions of Act CIV of 2001, a new Public Procurement Law entered into force in May 2004. The Law automatically excludes companies convicted of “*an offence concerning their business activities or professional conduct*” by a final judgement. [See Public Procurement Law art. 60(1)(c).] The exclusion lasts until “*the time limit for the detriments regarding criminal records lapses*”. The Hungarian authorities have not clarified the meaning of this latter phrase. In addition, the Public Procurement Law notes that limitations imposed under Act CIV of 2001 will be applied in the context of public procurement. The relationship between the automatic exclusion under the new Public Procurement Law and the limitation under Act CIV of 2001, which requires a court order, is not clear.

201. During the on-site visit, a representative of the Council for Public Procurement indicated that foreign bribery would constitute an offence concerning a company’s business activities and would accordingly attract the automatic exclusion. A representative indicated that companies are required to submit a notarised declaration as part of the tender process in which they declare that they do not have any convictions identified in art. 60 of the Law. (See art. 63.) The Public Procurement Act also provides for civil legal remedy actions by competitors or certain officials before an arbitration committee. The Arbitration Committee can impose sanctions for violations of the Act, including placing the bidder on a blacklist, nullifying decisions by contracting authorities or imposing fines of up to HUF 1 Million (EUR 4 077 and USD 5 455). Article 334(3) provides that where the arbitration committee detects suspicious activity relating to a possible crime, it shall report it to the competent authorities.

Commentary

The lead examiners take note of the extensive new provisions on public procurement. They invite the Hungarian authorities to take measures to improve the effectiveness of sanctions on companies convicted of bribery, such as by creating an appropriate register recording such convictions. They also invite the authorities to clarify the relationship between the sanctions relating to public procurement in Act CIV of 2001 and in the new Public Procurement Law.

Iceland (March 2003)

Nothing in Phase 2 report

Italy (December 2004)

Decree 231/2001

28. As noted earlier, the entry into force of Decree 231/2001 concerning the administrative liability of legal persons, has also greatly contributed to raising awareness regarding the offence of bribery of foreign public officials. Beyond the introduction of this new concept of liability of legal persons in the Italian legal system, the legislative decree has had a more immediate impact on the Italian business environment through the provisions recommending the development of organisational and management models in companies. Indeed, article 6(1)(a) provides that legal entities shall not be held liable if “before the fact was committed, (management) offices had adopted and effectively implemented organisational and management models so as to prevent offences of the kind which occurred”. Article 6(2) provides the criteria for organisational models to qualify as acceptable for the purpose of article 6(1)(a).⁶

29. Where an organisational model was not in place at the time an offence occurred, a company’s sanction may be reduced if, in the time between the offence and the trial, “an organisational model in order to prevent offences such as the one which occurred has been adopted and made effective” (article 12(2)(b)).⁷ The responsibility for drafting the codes of conduct lies with business associations (hence the initiatives taken by bodies such as Confindustria or ABI, see below), and the codes can be submitted for approval to the Ministry of Justice. At the time of the on-site visit, the Ministry had received 40 codes of conduct, some of which have been reviewed but only three had been approved. It is not wholly clear what consequence such approval by the Ministry may have at the trial stage. Representatives of the Ministry of Justice as well as prosecutors and magistrates interviewed during the on-site visit stressed that such approval of an organisational model by the Ministry of Justice would not preclude legal persons having adopted such approved models from being held liable before a court. Thus, it would appear that this approval could be taken into account by the courts as *prima facie* evidence that the company made reasonable efforts to prevent the commission of an offence, and at least as a mitigating factor in sentencing.⁸

(ii) Public Subsidies

Public Processes: Procurement and Privatisation

30. Where public procurement processes are concerned, the Italian authorities indicated that, to date, companies have not been held ineligible to enter public tender because of their involvement in the payment of bribes to foreign public officials. As regards sanctions for corruption of domestic public officials, in the Enelpower case, Siemens AG has been prohibited from entering into contracts with the public administration for one year as a sanction for bribing Italian public officials, pursuant

⁶ Similarly, article 7 provides the criteria for organization models which exonerate legal persons for offences committed by natural persons who are subject to the management or supervision of senior managers or officers (footnote 14 in original report).

⁷ In the first case under Legislative Decree 231/2001 involving liability of a legal person for acts of corruption of a domestic public official, the sanction was reduced in application of this provision. See the sentence by the Court of Pordenone, 4 November 2002 (footnote 15 in original report).

⁸ This issue of the defence provided to legal persons under article 6 of Decree 231/2001 is further discussed below under B.3.b) on Liability of Legal Persons (footnote 16 in original report).

to the Decree 231/2001.⁹ With respect to sanctions for corruption in public procurement processes, the lead examiners were informed that such instances usually resulted in the Italian Courts imposing custodial sentences on the officials concerned.

31. Corruption issues have been identified in the Italian public procurement process. In their answers to the Phase 2 questionnaires, the Italian authorities indeed acknowledge that some Italian public officials have been involved in either predetermining the price at which the contract is awarded or acquiescing in agreements external to the adjudicating department in order to distort the general framework of bids made as part of the tendering process. Cases have also occurred where an official has been bribed either to exclude competitors not aligned with the so-called “*cordata*” (roped party) or to arrange competitions with “tailor-made” admission requirements, in order to favour a particular participant or a restricted group of participants. Finally, a rarer and more subtle form of bribery involves tendering processes above the EU-set threshold, in which the official is bribed to exercise “discretion” in accepting or rejecting the documentation, which the participants have to present to justify the soundness and competitiveness of their bids.

32. Efforts at increasing transparency have however been undertaken. The Italian authorities indicated that, at the local level, certain administrations have attempted to prevent such practices by developing a protocol of understanding, whereby all the bids are subject to a “validation” process to ensure that the competition is genuine before the public procurement is publicly awarded. This appears, however, somewhat limited, both territorially, and in scope, since it would, notably, not fully prevent bribes being paid to public officials to grant or reject certain submissions in the course of the “validation process”. Thus, further efforts could usefully be undertaken to reinforce transparency in the public procurement process in Italy, notably through consolidation of the rules governing it, and supervision by a central authority.

33. Similarly, where privatisation processes are concerned, sanctions for corruption of (domestic or foreign) public officials have not resulted, to date, in companies being held ineligible to participate in privatisation programmes of state-owned companies. Since the early 1990’s, there has been widespread political consensus and government commitment on the progressive privatisation of state run companies in industrial, and service activities, including in oil and natural gas (ENI), banking (IRI), public utilities (ENEL), aviation (Alitalia), and food distribution (SME), and transparency needs to be sought in the context of this wide privatisation process underway in Italy. Decisions to privatise are taken by the government, with non-binding advice provided by Parliament.¹⁰ The Special Government Privatisation Committee, chaired by the Director General of the Treasury, is the body overseeing privatisation processes in Italy, with the objective to guarantee transparency in public tenders. In the course of a privatisation, an examiner from the Committee oversees the entire process; in this capacity, he usually appoints a bank to assess the estimated price of the company’s assets. Once such an evaluation has been given, a decision is made by the Committee to proceed with the privatisation, which proposes an agenda to the government for the transactions to be opened. Safeguards are built into the process in order to prevent corruption, including exclusion of bidders with a history of corruption or in a potential

⁹ Disqualification order in the Enelpower case by the Milan Ordinary Court, 27 April 2004 (footnote 17 in original report).

¹⁰ Law 481/1995 (footnote 18 in original report).

situation of conflict of interest, and drawing up of a list of (twelve to fifteen) authorised bidders. Like other public officials, those employed by the privatisation authorities are under an obligation to inform judicial authorities of suspected bribery occurring in the process; no such report has been made to date in this context.

65. As indicated by a representative of the *Corte dei Conti* during the on-site visit, three criteria are taken into account to determine whether a body is to be audited by the *Corte*: whether the body has been set up to achieve results of general interest; whether it has legal personality; and whether it is funded or managed by the State, or management is appointed by the State. The list of bodies audited by the *Corte dei Conti* includes, *inter alia*, SACE, ENI SpA, and ENEL SpA, while certain bodies, including some which have an important role in dealing with Italian companies involved in business activities abroad, do not appear on this list, notably the Special Government Privatisation Committee, and bodies involved in public procurement, and official development aid. Furthermore, casinos, which, in Italy, are controlled by the municipalities, are not subject to state audit by the *Corte*; this raises an additional concern.

222. (f) With respect to the power of the *Corte dei Conti* (State Audit Court) to audit public bodies, the application of that power to public or publicly-managed entities (1) involved in international transactions, (2) involved in contracting opportunities with Italian companies through public procurement or development aid, and (3) that are not subject to an external audit requirement (Revised Recommendation, Paragraph V.B.(i)).

OECD Working Group on Bribery follow-up:

(ii) The application of the “defence of organisational models” (*i.e.* the adoption of an organisational and management model, including internal control and compliance procedures, to prevent offences of the kind that occurred) (Convention, Article 2);

Japan (March 2005)

b. Administrative Sanctions

187. Effective administrative sanctions, including disqualification from participating in public procurement as well as official development assistance (ODA) and export credit programmes, can represent an important tool to combat the bribery of foreign public officials. Japan does not directly provide administrative sanctions upon conviction of the foreign bribery offence for either natural or legal persons (e.g. automatic disbarment from participation in public procurement). For this reason the on-site visit included an assessment of the policy approach of certain key agencies--the Japan Bank for International Co-operation (JBIC), the Nippon Export and Investment Insurance Agency (NEXI) and the Japan International Co-operation Agency (JICA)¹⁴⁰--involved in providing contracting and financing opportunities to Japanese firms, where their clients have been involved in the bribery of foreign public officials. Japan's public procurement authorities were not available during the on-site visit to discuss such policies in relation to the public procurement process.

Commentary

In light of the absence of additional administrative penalties upon persons and entities convicted of the bribery of a foreign public official, the lead examiners recommend that the Japanese authorities encourage agencies such as JBIC, NEXI and JICA and its public procurement authorities to revisit their policies on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence.¹⁴⁵

OECD Working Group on Bribery Recommendations

8. With respect to promoting awareness of the Convention and the offence of bribing a foreign public official established in the *Unfair Competition Prevention Law* (UCPL), the Working Group recommends that Japan make efforts to increase the awareness of:

(i) key agencies including the Ministry of Economy, Trade and Industry (METI), Ministry of Justice, Ministry of Foreign Affairs and Ministry of Finance about the important links between foreign bribery and other areas of government activity, such as public procurement, export credit, official development assistance and anti-monopoly cases;

OECD Working Group on bribery Follow-up

14. (e) The policies of agencies such as JBIC, NEXI and JICA and Japan's public procurement authorities on dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official, to determine whether these policies are a sufficient deterrence. (Convention Article 3.2; Revised Recommendation Paragraphs II v) and VI)

Korea (November 2004)

b. Indirect Sanctions

(i) Generally

131. Pursuant to the obligation under article 3.4 of the Convention,¹¹ the Korean authorities are considering the introduction of regulations for the purpose of establishing additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.¹² One such sanction under consideration is disbarment from participating in public procurement contracts. The Korean authorities have not specified a time frame for the introduction of these regulations.

132. In the absence of current additional civil and administrative sanctions for an offence under the FBPA, it is expedient to review the approach of the main agencies in Korea involved in providing contracting and financing opportunities to Korean firms, where their clients have been convicted of the bribery of foreign public officials. For this purpose, the on-site visit included discussions with the following agencies: 1. The Public Procurement Service; 2. The Korea International Cooperation Agency; 3. The two export credit agencies—the Korea Export Insurance Corporation, and the Export-Import Bank of Korea; and 4. The Ministry of Finance and Economy concerning privatization.

(ii) Public Procurement Service

133. The Public Procurement Service (PPS) is the central government agency responsible for procuring commodities and arranging contracts for construction projects involving government facilities. In 2002, the Korean government established a nation-wide integrated government procurement system for the purpose of simplifying the process and increasing transparency. One of the reforms undertaken to increase efficiency and prevent corruption was the establishment of an e-procurement system. The representative of the PPS indicated that there are few exceptions to the use of the tender process for supply contracts.

134. Pursuant to the “Integrity Pact”¹³, which is incorporated into all suppliers’ contracts, officers and representatives of supplier companies make several pledges, including the promise to not provide any public officials concerned with any illegal benefits including bribes and entertainment. The following measures are available for the purpose of sanctioning enterprises that are determined to have violated the Integrity Pact:

- i) Non-participation in PPS bids and bids by relevant end-user organisations for a period of one to two years from the date when sanctions by the PPS were imposed.
- ii) To accept cancellation of the contract, before its implementation, and termination or

¹¹ Article 3.4 of the Convention requires each party to “consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official” (footnote 108 in original report).

¹² See 2-18 of Explanatory Manual published by the Ministry of Justice (footnote 109 in original report).

¹³ Revisions to the Integrity Pact became effective on 1 March 2004, and are reflected in the discussion in this paragraph.

cancellation of part or the whole of the contract, after implementation, where they are found to have provided relevant officials with bribes or entertainment.

The Public Procurement Service indicated that in 2001 there were no disqualifications for bribery, in 2002 there were three, and in 2003 there was one.

Mexico (September 2004)

Commentary

Finally, the lead examiners invite the Mexican authorities to consider the introduction of additional sanctions on legal persons, such as the temporary or permanent disqualification from participation in public procurement and public works, and a general exclusion from entitlement to public benefits or aid.

a) Prevention by the Public Administration

106. Mexican anti-corruption policy does not exclusively focus on the administration but seeks to involve the private sector as well.¹⁴ Notably, the Mexican authorities plan to introduce requirements for participating in public tenders aimed at preventing corruption of Mexican public officials. Draft bills to amend the *Law on Procurement, Leases, and Services by the Public Sector* (LAASSP) and the *Law on Public Works and Related Services* (LOPSRM), were approved by the Senate on November 11, 2003 and are currently under review by the Chamber of Deputies. These measures seek to prevent the inclusion of elements or characteristics in the bidding bases that could exclude certain participants or that are biased towards a particular brand or vendor, situations which may encompass bribery.

107. Apparently, there is no general system of “blacklisting” for companies sanctioned for, or involved in, corruption, in order to exclude them from future public procurements and public works. However, some individual initiatives exist. The Mexican authorities indicated that where the LAASSP and LOPSRM are infringed, the contracting agency¹⁵ abstains from contracting with the company or individual involved, and that the corresponding list of sanctioned companies may be consulted on the SFP web pages, in the section on penalised suppliers and contractors.¹⁶ The SFP indicated that the Ministry of Environment has created a list of companies having been involved in cases of bribery or more generally, mismanagement. The list is not a blacklist per se (the listed companies or persons are not excluded from future bids), but is given to public servants for information purposes. In one specific case, the Ministry was able to administratively sanction a public servant who favoured a company, but did not have enough evidence to sanction the company itself. Nonetheless, the company’s name was included in the list, as well as a notation of the conflict of interest that existed between the public servant and the company.

Commentary

Building on such pre-existing foundation, the lead examiners recommend that the Mexican authorities develop tools dedicated to the prevention of bribery of foreign public officials directed at Mexican companies exporting and investing abroad. The lead examiners also encourage the Mexican authorities to make the listing of companies having been involved in bribery cases in the framework of Mexican public works or public procurements widely available to all federal (and eventually

¹⁴ On February 26, 2001, the President of the Republic signed the National Agreement for Transparency and Combating Corruption with 83 social organisations from the business, labour, academic, and agricultural sectors, societies and associations, political parties and non-governmental organizations (footnote 95 in original report).

¹⁵ The contracting agencies include agencies of the Federal Government, the States and the Government of the Federal District (footnote 96 in original report)

¹⁶ <http://www.funcionpublica.gob.mx/unaopspf/dgasan/indexsan.htm> (footnote 97 in original report)

state) agencies in order to inform them of the potential risk of dealing with these companies, and to consider extending this list to include companies having been sanctioned for bribery of foreign public officials.

OECD Working Group on Bribery Recommendations:

185. d) Consider the introduction of additional sanctions on legal persons, such as the temporary or permanent disqualification from participation in public procurement and public works, and a general exclusion from entitlement to public benefits or aid; (Convention, Article 3; Phase 1 Evaluation, paragraph 3)

Norway (April 2004)

148. Questioned about the availability of additional civil or administrative sanctions to a person guilty of bribery of a foreign public official⁷⁷ during the on-site visit, the Norwegian authorities indicated that they can emphasise a conviction for bribery of a foreign public official when allocating state aid or to the authorities in charge of awarding public contracts. In the area of public procurement, a vendor who has committed bribery may be excluded from participating in the bid for a contract. However, no routine has been established to ensure that public entities can receive information about a particular party convicted of bribery. Discussions are ongoing within the Ministry of Foreign Affairs on whether such parties should be listed in an official register. For the time being, some legal issues remain to be solved before a decision can be taken.

Slovak Republic (December 2005)

(ii) Public Procurement

226. Since Phase 1, Slovakia has amended its legislation to allow bans on public procurement. A person is disqualified from public procurement if that person, his/her legal representative or a member of his/her representative body has been sentenced to a criminal offence “the merit of which relates to enterprise”.¹⁷ Slovakia believes that this provision covers convictions for bribery, but it was unable to advise whether it has imposed bans because of bribery.

227. The onus is on a participant to prove that he/she has no previous conviction for bribery. A Slovak participant must present an extract from the Slovak Penal Registry which shows all valid convictions. A non-Slovak participant must provide an equivalent document from the jurisdiction in which it operates. A participant which is a company must produce extracts for all of its representatives (*i.e.* persons listed in the Commercial Register who have authority to act on behalf of the company).¹⁸

228. The Public Procurement Office (PPO) oversees the public procurement process in Slovakia. However, it is the responsibility of each individual government body that conducts a tender to ensure that participants do not have convictions for bribery. The PPO becomes involved only when there is a complaint. The PPO assured the lead examiners that officials involved in public procurement in all government bodies have been trained on the applicable legal framework.

¹⁷ Act 523/2003 Coll. on Public Procurement, Article 29(1)(d) (footnote 124 in original report).

¹⁸ Act 523/2003 Coll. on Public Procurement, Articles 29(2)(a), 29(2)(d) and 31(1), amending Act 575/2001 Coll. According to the Slovak authorities, a certificate issued by the Slovak Penal Registry shows convictions in Slovakia within the previous 100 years. Older convictions are expunged from the record. The certificate may also show convictions of a Slovak citizen by a foreign court because the Slovak government receives information about such convictions from some foreign governments (footnote 125 in original report).

Sweden (September 2005)

d) Public Procurements, Licenses and Privatisation

35. The Convention and Revised Recommendation contemplate that Parties may ban enterprises that have participated in foreign bribery from participating in public procurement as an administrative sanction.

36. Public procurement in Sweden is governed by the Act on Public Procurement (SFS 1992:1528) (LOU). The Act covers procurement by a wide range of government entities, including the state, government agencies, local authorities and county councils. It also applies to certain undertakings, associations, societies and foundations “which have been established to meet the general interest, provided that these needs are not of an industrial or commercial nature”.

ii) Potential Administrative Sanctions as Preventive Tool

40. The National Board for Public Procurement (NOU) is responsible for supervising the application of the Act on Public Procurement (LOU).¹⁹ The NOU, however, does not administer public procurement; it merely reviews the actions of government authorities in the procurement process to ensure their compliance with the LOU.

41. According to the NOU, the LOU permits the imposition of bans against suppliers that have engaged in bribery of foreign public officials. It is the position of the NOU that a conviction is “likely” not necessary before a ban on a supplier may be imposed, given that the LOU also permits debarment where a supplier is guilty of grave professional misconduct.²⁰

42. Less clear, however, is whether and how bans are imposed in practice. According to the NOU, prior to awarding a contract, the government agency involved will verify the economic and professional ability of a participant by examining its tax filings, licenses to operate, financial statements and documents pertaining to its credit worthiness. There are, however, no procedures to specifically verify whether the participant had previously engaged in bribery. Furthermore, the NOU has not issued guidelines on when a ban may be imposed, though it believes that the individual government agencies that administer procurement have done so. There are no blacklists of companies that are to be banned from participating in public tenders. Bans have never been imposed as a sanction for bribery.

43. Pursuant to the LOU “suppliers” can be banned from participating in public procurement. It is not clear whether debarment from public procurement can be applied to legal persons, given that there is a need for a “conviction” or a finding that the supplier is “guilty”, and “corporate fines” under Chapter 36 of the Penal Code do not constitute a conviction and are not applied upon a finding of guilt. The Swedish authorities explain that there does not appear to be a court decision in which debarment was imposed on a legal person. In any case, according to the NOU, bans can only be indirectly applied to an individual when a court convicts him/her of

¹⁹ LOU, Chapter 7 and Chapter 1, sections 1-2 (footnote 37 in original report).

²⁰ Chapter 1, section 17 of the LOU reads: “A supplier may be excluded from participation in an award procedure if he: [...] 3. has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*, 4. has been guilty of grave professional misconduct and the contracting entity can furnish proof of this circumstance” (footnote 38 in original report).

committing a crime in the course of business. In such a case it is possible for the court to impose a “trading prohibition” on the individual. Such prohibitions are enforced by the company registry and usually prevent an individual from engaging in activities such as becoming a shareholder or board member of a company. A trading prohibition excludes the possibility to run any business activity.

44. In terms of awareness-raising, the NOU has not publicised potential sanctions against individuals or companies which engage in bribery. It also has not raised the awareness of foreign bribery among its own staff, among the staff of the procurement authorities over which it supervises, or the private sector.

45. Another area of activity where debarment could have a preventive effect is the privatization process. The Swedish government holds stakes in a significant share of the economy, including in 57 state-owned companies. The government does not have a privatisation programme in place for these holdings, nor has it announced plans to establish such a programme in the future. A state-owned company may be sold only after parliamentary approval. Thereafter, the government handles the entire divestment process, including the choice of buyers.

46. As with public procurement, the Swedish government may ban companies that have engaged in bribery from bidding for privatised assets. The government does not, however, inquire whether a prospective buyer has engaged in bribery in the past. The government also has not issued guidelines on when such bans may be imposed. Bans have never been imposed in the past.

Commentary

The lead examiners recommend that Sweden (1) devise procedures to verify whether a participant in public procurement has been convicted of bribery of foreign public officials, (2) consider debarring legal persons subject to corporate fines for bribery of foreign public officials from participating in public procurement, and (3) raise the awareness of the offence of bribery of a foreign public official among the officials of the National Board for Public Procurement.

i) Public Officials in General

88. There is no explicit sanctionable obligation for personnel of the public administration to report suspicions of crimes that they may have while performing their official duties. However, most of public officials met during the on-site visit stated that they are subject to a reporting obligation (see below heading iv on Sida). Some public officials referred to the Constitution whereas others referred to “general laws”. None of the public officials knew whether their respective administrations had issued guidelines on what to report and how to report suspicions of crimes, but they generally believed that they would report their suspicions to the police or a prosecutor, after having discussed the matter internally with their superior. For instance, the representative of the National Board for Public Procurement indicated that the Board has not advised its staff to report suspicions of foreign bribery to their superiors or law enforcement authorities, but he believed that Board staff is aware of an obligation to report.

OECD Working Group on Bribery Recommendations

220. 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:
(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).

231. With respect to sanctions for bribery of foreign public officials, the Working Group:

(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);

Switzerland (February 2005)

115. If all reasonable and necessary organisational measures have not been taken to prevent commission of the bribery offence within the enterprise, the company may also incur criminal liability. However, the penalty is limited essentially to a fine, which may be as much as CHF 5 million (approx. €3.3 million). There is no provision in criminal law for the suspension or prohibition of industrial or commercial activities, including exclusion from eligibility for subsidies or participation in public procurement procedures. It is only indirectly, under the terms of the law governing federal and cantonal public procurement contracts or contractual clauses attached to export guarantees, that the company can be threatened with temporary exclusion from municipal, cantonal or federal contracts or the suspension of export privileges. Nor does the new law provide for offences committed by companies to be placed on criminal record, though the courts can order confiscation of corporate assets. According to the magistrates interviewed, this option has frequently been used in the past, even before corporate criminal liability was introduced.

c) Exclusion from public procurement contracts and export subsidies

i) Exclusion from public procurement contracts

128. An earlier draft of the law introducing criminal liability of legal persons contained provisions that would have enabled the courts to order dissolution of the enterprise or a ban on carrying on a commercial activity. However, parliament decided to remove these sanctions from the final text. It is thus only indirectly, under the terms of the law governing federal and cantonal public procurement contracts or contractual clauses attached to export guarantees, that a company can be threatened with temporary exclusion from municipal, cantonal or federal contracts or the suspension of export privileges. However, even if a company has been convicted of a bribery offence, there seems little risk in practice that it will be excluded from public procurement contracts or public subsidies, even though exclusion can be a very powerful tool since it could encourage enterprises to take practical steps to prevent bribery.

129. Swiss public procurement law is complex, since 26 cantonal regulations coexist alongside the federal law of 16 December 1994 on public procurement. There is no across-the-board rule relating to the conditions under which an awarding authority can exclude a bidder or revoke a contract after it has been awarded. These conditions vary from one canton to another and between the cantons and the Confederation; furthermore, they contain no explicit reference to conviction for bribery (of Swiss or foreign public officials) as grounds for exclusion. The rules governing cantonal and municipal public procurement simply refer to the general notion of "professional misconduct duly established by a court judgment" as grounds for exclusion,²¹ while Articles 11 and 3(2)a of the Public Procurement Act – which define the grounds for refusal to award a contract or exclusion from Confederation public procurement procedures – make no explicit reference of that type.²² Given that the awarding

²¹ Cantonal and municipal public procurement procedures are governed by the Intercantonal Agreement on Public Procurement of 25 November 1994 (AIMP, RS 172.056.4), which is why they all include the ground of exclusion for "professional misconduct duly established by a court judgment" set forth at paragraph 27, letter H of the agreement's guidelines for implementation (footnote 106 in original report).

²² Under the terms of Article 3(2) of the Public Procurement Act, the awarding authority "is not required to award a contract according to the terms of this Act: a) when it could be contrary to morality or endanger public order and

authorities met during panel discussions showed limited awareness of the existence in Swiss law of the offence of bribery of foreign public officials, as the examining team found during the on-site visit, it seems very uncertain, in the Examiners' opinion, whether the grounds for exclusion contained in cantonal and federal regulations would actually be applied to a bidder convicted of bribing foreign public officials.²³

130. Even if an awarding authority were to try and apply the conditions for excluding an enterprise convicted of bribery, the authority's capacity to discover whether a bidder has a criminal record is limited in practice since there is no formal process whereby it can find out whether an enterprise or an employee has been prosecuted or convicted under Articles 322septies et 100quater of the Criminal Code. Combined with the limited investigative resources available to awarding authorities, the absence of any formal procedure for the exchange of information could hinder enforcement of cantonal regulations, like those of the canton of Valais, which state that conviction for professional misconduct constitutes grounds for exclusion if it occurred "within two years preceding the tender procedure".²⁴ If information about the conviction is not forthcoming in good time, the Examiners fear that the sanction of exclusion cannot be imposed in all cases.

Commentary

In order to strengthen the overall effectiveness of the penalties for the offence of bribery of foreign public officials, the Lead Examiners recommend that the Swiss authorities envisage, in the context of the revision of the federal law on public procurement, measures to temporarily or permanently ban any company convicted of bribery of foreign public officials from participating in public procurement procedures, and that a similar treatment be envisaged for access to export credits.

OECD Working Group on Bribery Recommendations

147. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:

b. In order to strengthen the overall effectiveness of sanctions for the offence of bribery of foreign public officials, consider, in the context of the amendment of the federal law on public procurement, the temporary or permanent disqualification from any public procurement of enterprises convicted of bribing foreign public officials,

safety; b) when protection of the health and life of persons, animals or plants so requires; or c) when it infringes intellectual property rights." Under the terms of Article 11, the awarding authority can revoke the award or exclude certain bidders from the procedure (...) "in particular when: a) they no longer meet the qualification criteria set forth at Article 9 [bidder's financial, economic and technical capacity]; b) they have provided false information to the awarding authority; c) they have failed to pay all or some taxes or social contributions; d) they do not comply with the requirements set forth at Article 8 [bidder's compliance with equal pay for men and women for services rendered in Switzerland]; e) they have concluded agreements which significantly restrict or prevent all effective competition; f) they are the subject of bankruptcy proceedings." The moral integrity clause designed to prevent bribery in federal public procurement procedures that the Federal Purchasing Commission (an interdepartmental strategic and coordinating body) advises federal awarding authorities to include in their contracts targets only gifts or other advantages that the bidder might offer or solicit in order to win a federal contract and not bidders who might previously have been involved in the bribery of Swiss or foreign public officials (footnote 107 in original report).

²³ At the time of the Phase 1 review, the Swiss authorities said that at that time there had been no cases of exclusion from public procurement contracts on the ground of bribery (Phase 1 Report, para. 3.5) (footnote 108 in original report).

²⁴ Article 23 of the ordinance on public procurement of 11 June 2003 of the Conseil d'Etat of the canton of Valais (footnote 109 in original report).

and consider a similar approach for export credits [Convention, Article 3.4; Revised Recommendation, Article II.v) and Article VI.ii)].

United Kingdom (March 2005)

Nothing in Phase 2 report

United States (October 2002)

50. Beyond the public relations concerns, the costs in terms of legal fees and management time of having to defend an action are themselves far from negligible. Worse still, in the view of large private companies and their counsel, is the threat of suspension of export privileges, as happened to the Lockheed Corporation in 1994, or the withdrawal of eligibility to bid for government contracts or apply for government programs. A mere indictment for an FCPA violation is grounds for suspension, as happened to the Harris Corporation which was tried – and acquitted – on FCPA charges in 1991. Once an agency bars or suspends a company from federal non-procurement or procurement activities, other agencies in turn are required by the Code of Federal Regulations under its Title 48: “Federal Acquisition Regulations System” to exclude the company. Furthermore, the United States will not provide advocacy assistance unless the company certifies that it and its affiliates have not engaged in bribery of foreign public officials in connection with the matter, and maintain a policy prohibiting such bribery. Corporate violators of the FCPA may also be excluded from participating in trade missions.