ESTONIA: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 20 June 2008.

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EXECUTIVE SUMMARY

The Phase 2 Report on Estonia by the OECD Working Group on Bribery evaluates and makes recommendations on Estonia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Working Group notes that Estonia has dedicated considerable efforts and resources to fight corruption. These actions, however, have focused almost exclusively on domestic and not foreign bribery. The level of awareness of foreign bribery and the Convention in Estonia is accordingly low.

Because of a lack of awareness of the foreign bribery offence and the OECD Convention, the Estonian public and private sectors have implemented very few measures to fight foreign bribery. The Report notes a lack of activity, policies and efforts by Estonia's law enforcement agencies, prosecutor's offices, the judiciary, tax authorities, diplomatic services, official development assistance programme, and other relevant government Ministries. A similar vacuum is found among Estonian accountants, auditors, tax and legal professionals, private enterprises, and civil society. The Report accordingly recommends that Estonia take measures in all of these sectors to prevent, detect, report and raise awareness of foreign bribery.

In the area of legislation, the Group is concerned that Estonia's current regime for the criminal liability of legal persons is inconsistent with the Convention. Consequently, sanctions for foreign bribery against legal persons in Estonia are not effective, proportionate or dissuasive. The Group therefore recommends that Estonia amend its Penal Code to broaden the criteria for the liability of legal persons in order to make prosecution of legal persons that commit foreign bribery more likely and more effective. As for the offence of foreign bribery, Estonia has not made significant legislative changes since its Phase 1 Review in February 2006. As a result, there remain several shortcomings in the offence, such as the failure to expressly cover bribery of foreign officials who perform legislative functions, and the need to refer to foreign law in order to prove the offence. The Report urges Estonia to amend its Penal Code and address these deficiencies.

The Report also notes some positive aspects of Estonia's implementation of the Convention. Estonia's legislation expressly denies the tax deduction of bribe payments. KredEx, Estonia's officially supported export credit agency, has taken several measures to prevent and raise awareness of foreign bribery. These range from requiring anti-corruption declarations from applicants to discussing with clients the risks of foreign bribery in certain overseas markets. Estonian prosecutors and law enforcement agencies have an effective system for case assignment, co-ordination, and information sharing. Finally, shortly before this Report was adopted, Estonia took some measures to raise awareness among tax officials, diplomats, and staff in the Ministry of Foreign Affairs. It also initiated the legislative process to deal with some deficiencies in its laws. The report refers to but does not evaluate the proposed legislative amendments.

The Report and the recommendations therein reflect findings of experts from Bulgaria and Sweden and were adopted by the OECD Working Group on Bribery. Estonia will provide an oral follow-up report on its implementation of the recommendations within one year of the Group's approval of the Phase 2 Report. It will further submit a written follow-up report within two years. The Phase 2 report is based on the laws, regulations and other materials supplied by Estonia. It is also based on information

obtained by the evaluation team during its five-day on-site visit to Tallinn in January 2008, during which the team met representatives of the Estonian public administration, private sector and, civil society.

A. INTRODUCTION

1. The On-Site Visit

1. On 14-18 January 2008, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Tallinn, Estonia, as part of the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation). The purpose of the visit was to evaluate the application and enforcement of Estonia's legislation implementing the Convention and the Revised Recommendation.

2. The examining team was composed of lead examiners from Bulgaria and Sweden as well as members of the OECD Secretariat. Prior to the visit, Estonia responded to the Phase 2 Questionnaire and a supplemental questionnaire. It also provided translations of the relevant legislation, documents and case law. During the visit, the examining team met representatives of the Estonian public and private sectors and civil society.[1] As noted below, the on-site visit was well-attended by Estonian officials but less so by the private sector and civil society. The Estonian authorities explained that some business, media and civil society representatives accepted invitations but ultimately did not attend the meetings. The examination team expresses its appreciation of Estonia's high level of co-operation throughout the process. It is also grateful to all the participants at the on-site visit for their co-operation and openness during the discussions.

2. General Observations

3. Estonia is a relatively small country of 45 277 sq. km and a population of 1.34 million. It is located in Eastern Europe on the Baltic coast and shares land borders with Latvia and the Russian Federation. The capital Tallinn is by far the largest city, with roughly 30% of the country's population. Estonians and Russians are the two largest ethnic groups at 69% and 26% respectively.[2] Estonia joined the European Union in 2004.

(a) Economic System

4. The Estonian economy is relatively small but modern and extremely open. Estonia's GDP is the second smallest of the 37 Parties to the OECD Convention.[3] The region of Harju, which includes Tallinn, leads the country in wage levels, investment, and the number of registered companies.[4] Since the transition to a market economy in the 1990s, the share of industry and agriculture in GDP has fallen sharply, while that of services now accounts for almost 70%.[5] The fastest rates of growth in recent years have been in

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1 See Annex 1 for a list of participants.

2 Statistics Estonia (www.stat.ee/statistics). Population statistics are current as of 1 January 2006.

3 At current market prices (Source: International Monetary Fund 2007).

4 The Economist Intelligence Unit (2007), *Country Profile – Estonia*, The Economist Intelligence Unit, London, p. 27; Statistics Estonia (2007).

5 In 2007, services accounted for 69% of GDP, while industry and agriculture accounted for only 15% and 3% respectively (Source: Statistics Estonia).

financial intermediation and the travel industry.[6] Much of the economic growth is attributed to the free-market, liberalisation policies that have been adopted since the 1990s. Estonia is consistently ranked as one of the most business and investment friendly countries.[7]

5. Commensurate with the size of its economy, the volume of Estonia's international trade is comparatively low. Finland and Sweden are by far the biggest export destinations, though Russia and Latvia also play significant roles. Machinery and equipment was the largest category of traded goods. This is followed by mineral commodities, owing to Estonia's role as a transit country of Russian oil products. The food sector also relies on sales to Russia.[8]

6. Inward foreign direct investment (FDI) plays a more significant role in Estonia's economy than outward FDI.[9] Latvia and Lithuania are the main investment destinations, with Russia a distant third. Real estate activities and financial intermediation are the major sectors of both inward and outward FDI.[10]

(b) Political and Legal Systems

7. Estonia is a parliamentary republic. The legislature consists of a unicameral 101-seat parliament (Riigikogu). Members are elected by direct vote to four-year terms. The head of state is the President who is elected to a five-year term by parliament (or an electoral college if parliament cannot reach the requisite majority). Laws adopted by parliament enter into force only upon receiving a Presidential proclamation. Parliament also appoints a Prime Minister nominated by the President to head the executive government. The Prime Minister in turn nominates the government's ministers who must then be approved by parliament and appointed by the President.[11]

8. Estonian law is based on German legal tradition and is founded on statute law. Universally recognized principles and norms of international law are considered an inseparable part of the Estonian legal system. If a law conflicts with a ratified international treaty, the treaty prevails. Legal acts are passed by parliament or referendum. Other sources of law include presidential decrees and regulations adopted by the government under laws. A decision of a higher court binds a lower court only in the case to which the

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6 Bank of Estonia (2006), *Annual Report 2006*, Bank of Estonia, Tallinn, at p. 95.

7 World Bank (2007), *Doing Business*, World Bank, Washington D.C.; The Economist Intelligence Unit (2007), *Country Profile – Estonia*, The Economist Intelligence Unit, London, pp. 4-6 and 22-25.

8 In 2006, the main export destinations were (1) Finland (18.5%), (2) Sweden (12.0%), (3) Latvia (8.8%), (4) Russia (7.9%), (5) United States (6.7%) (Source: Statistics Estonia). The main export commodity groups were (1) machinery and appliances (24%), (2) mineral products (16%), (3) wood and articles of wood (9%). In 2006, import from CIS countries was 12% of the total (Source: World Trade Organisation; Statistics Estonia; InvestinEstonia.com).

9 In 2005 and measured on an absolute basis, Estonia's outward FDI flow and FDI stock were 30th and 35th respectively (Source: UNCTAD).

10 In 2006, FDI inflow by country: (1) Sweden (54%), (2) Finland (26%), (3) U.K. (5%); inward FDI stock by country: (1) Sweden (40%), (2) Finland (26%), (3) U.K. (4%); inward FDI stock by sector: (1) real estate activities (30%), (2) financial intermediation (28%), and manufacturing (18%); outward FDI position: (1) Latvia (34%), (2) Lithuania (32%), (3) Russia (9%); outward FDI stock by sector: (1) real estate activities (38%), (2) financial intermediation (32%), and transport, storage and communication (10%) (Source: Bank of Estonia; InvestinEstonia.com).

11 Constitution of Estonia, Chapters IV-VI.

decision relates, *i.e.* the doctrine of precedent does not apply. However, the Supreme Court may declare a law unconstitutional, after which lower courts are entitled to not apply the law.[12]

9. In addition to the OECD Convention, Estonia has ratified the Council of Europe Criminal Law Convention on Corruption (but not the Additional Protocol)[13] and the Civil Law Convention on Corruption. It has not signed the United Nations Convention against Corruption but plans to do so in 2008.

(c) Implementation of the Convention and the Revised Recommendation

10. Estonia deposited its instrument of accession to the OECD Convention in November 2004. The Convention entered into force in Estonia in January 2005. Sections 288, 297 and 298 of the Penal Code, which implements the Convention, came into force in July 2004. In February 2006, the Working Group completed the Phase 1 Examination of Estonia. Since then, there have been a few relevant legislative developments in Estonia, including new influence peddling and false accounting offences, and amendments to the provisions on confiscation and limitation periods. After the on-site visit, Estonia drafted amendments to several relevant laws. At the time of this report, the Estonian legislature was considering the amendments. If adopted by parliament, the amendments would enter into force upon receiving Presidential proclamation. This report refers to but does not evaluate these changes. This approach has been taken because the lead examiners and the Working Group could not be sure of the final version of the provisions. Nor have they had the opportunity to assess the provisions' application in practice.

(d) Cases Involving the Bribery of Foreign Public Officials

11. Estonia has not had any investigations or prosecutions of bribery of foreign public officials. There have also been no cases involving the UN Oil-for-Food Programme.

3. Outline of the Report

12. This report is structured as follows. Part B examines Estonia's efforts to prevent, detect and raise awareness of foreign bribery. Part C looks at the investigation, prosecution and sanctioning of foreign bribery. Part D sets out the Working Group's recommendations and issues for follow-up.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

13. In recent years, corruption has become an important topic of public debate in Estonia, in parliament, in civil society and in the media, partly as a result of the European Union accession process. Yet, prior to the on-site visit, the focus of the approach has been on the probity of Estonia's civil servants and the integrity of its public contracts. Little has been done to raise awareness of the foreign bribery offence or the Convention. Estonia's anti-corruption efforts have focused almost solely on domestic

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[12] Constitution of Estonia, Articles 3 and 123; European Judicial Network (2007), *Legal Order – Estonia*, European Commission, Brussels; Mill, K. (2000), "Features – An Overview of Estonian Law and Web Resources", Law and Technology Resources for Legal Professionals, www.llrx.com. However, Estonia explained that a Supreme Court decision would be binding if the Court rules on an issue on which other sources of procedural law are silent.

[13] Estonia intends to ratify the Additional Protocol by October 2009.

corruption. Even more troubling is a widely-held view that "doing business differently", as formulated by many panel participants, is a necessary aspect of doing business in some foreign countries.

(a) Government Initiatives to Raise Awareness

14. Estonia's legislative, organisational and other reforms over the past few years demonstrate its attention to fighting corruption. The government has adopted anti-corruption strategies for several years.[14] It has maintained an anti-corruption Web site that refers to the OECD Convention and the criminalisation of foreign bribery.[15] In 2005, the definition of corruption was expanded to characterise the crime as a phenomenon involving the private sector. Estonia has also adopted laws to combat corruption, established a complex economic crimes department in the Public Prosecutor's Office, and appointed prosecutors to specialise in corruption cases.

15. Yet, the focus of the approach has been on domestic bribery. For instance, Estonia's "Honest State" anti-corruption strategy for 2004-2007 did not explicitly deal with foreign bribery or the OECD Convention. The new anti-corruption strategy for 2008-2012, under preparation at the time of the on-site visit, is broader than "Honest State" in that it covers more public officials and activities in the private sector most. At the on-site visit, Estonian officials stated that the new strategy would not specifically refer to foreign bribery. This was rectified when the Government adopted the strategy in April 2008. The strategy now mentions the Convention and proposes awareness-raising seminars for the private sector.

16. The emphasis on domestic corruption has resulted in relative inactivity *viz.* foreign bribery. At the time of the on-site visit, Estonian authorities, with a few exceptions, had not raised awareness of foreign bribery or the Convention among Estonian public officials or the private sector. For example, the relevant Ministries (Justice, Internal Affairs, Finance, and Economic Affairs and Communications) had made no efforts to raise awareness among their staff. As well, there were no campaigns to inform exporting businesses and relevant professionals (accountants, auditors, lawyers) about the foreign bribery offence, or to encourage the development of corporate internal compliance programmes, as proposed in the Revised Recommendation. No efforts have been made either to promote the OECD Guidelines on Multinational Enterprises (which includes a chapter on domestic and foreign bribery) among enterprises active in foreign markets.[16] It was only after the on-site visit that the Ministry of Economic Affairs and Communications and Enterprise Estonia decided to promote the Guidelines through the Internet and seminars for entrepreneurs. At a conference after the on-site visit, the Minister of Justice also referred to the Convention and the importance of fighting foreign bribery in a speech. The representatives of government, business and NGOs also agreed to draft general principles on business ethics.

17. The low level of awareness negatively impacts the prevention, detection and prosecution of foreign bribery. For example, Estonian public officials are obliged to report criminal offences to law enforcement. However, government personnel who are in a position to prevent and detect foreign bribery may not do so because of a lack of awareness, thus leaving such illegal activities undetected. There are exceptions, such as references to foreign bribery in the seminars held by Enterprise Estonia.[17] Another

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[14] See GRECO (2001), *First Evaluation Round Report on Estonia*, GRECO, Strasbourg, paras. 10-24.

[15] www.korruptsioon.ee/6448.

[16] Estonia is an adhering country under the Guidelines.

[17] Enterprise Estonia (EE) is a publicly-funded body that aims to, among other things, promote Estonian exports and enhance the competitiveness of Estonian enterprises overseas. In addition to operations in Estonia, EE has six overseas representative offices, including two in Russia. EE provides information about foreign markets, potential partners, and market-entry barriers. It has held seminars for Estonian businesses on specific markets, including China, Russia, and Ukraine. EE also operates an information Web site dedicated to small- and medium-sized enterprises and new businesses, but the site does not refer to foreign

exception is measures taken by KredEx, Estonia's official export credit agency. Yet these examples are rare. The government's inactivity in turn leads to a complete absence of initiatives by the private sector to raise awareness of foreign bribery. As a result, private individuals (such as accountants and auditors) that are in a position to detect and report foreign bribery are unlikely to do so. Enterprises exposed to risks of foreign bribery are also unlikely to take measures to prevent or detect such crimes.

18. During the on-site visit, the lead examiners heard various participants downplay the importance of foreign bribery for Estonia. This claim was justified by an alleged "weak presence" of Estonia in trade and investment relations with corruption-prone countries. A closer look at the facts reveals a different picture: Estonian enterprises have significant trade and investment links with countries that are widely considered to be rife with corruption. In fact, during the on-site visit, several Estonian officials admitted that it was probably necessary to bribe in order to do business in these countries. Though reluctant to talk about their experience with bribery abroad, business organisations and enterprises acknowledged that risks of foreign bribery exist. Some referred to "rumours" about such incidents. Civil society representatives suggested that bribery would be seen by many Estonians as a "necessary evil" when doing business in some countries.

19. The examiners are concerned about the downplaying of the relevance of the Convention and awareness-raising arising from the alleged unimportance of foreign bribery for Estonia. Estonian authorities have a key role in raising awareness of the Convention and the offence of foreign bribery. The relevant ministries should take measures to raise awareness of the foreign bribery offence among its staff. As will be seen below, the Government also has a key role in encouraging Estonian businesses that trade or invest abroad to comply with the most rigorous standards. There is also a need to proactively engage civil society and the general public to raise the profile of the foreign bribery offence and the Convention. In this regard, it is necessary to expressly highlight the offence of foreign bribery in anti-corruption programmes. Initiatives that target "corruption" generally are not sufficient. One would assume that most Estonian citizens who come across a reference to "corruption" in government publications will therefore associate the term only with domestic - not foreign - corruption. After the on-site visit, the Ministry of Justice partly remedied this problem by introducing the issue of foreign bribery into Estonia's anti-corruption strategy for 2008-12.

(b) Private Sector Initiatives to Raise Awareness

(i) The Business Sector

20. The private sector has invested very little effort to raise awareness of foreign bribery or the OECD Convention, which likely reflects the Estonian authorities' corresponding lack of action. By the time of the on-site visit, the only effort taken was a seminar arranged with the support of, *inter alia*, the Estonian-U.K. Chamber of Commerce and the Embassy of Sweden. Three additional seminars on business ethics in the past year did not specifically address foreign bribery. The Estonian Chamber of Commerce only provided a link to the OECD Guidelines on Multinational Enterprises on its Web site. Another likely symptom of this inaction: the examiners did not meet any Estonian enterprises; only the subsidiaries of three foreign multinationals attended the on-site visit. Estonia explains that the overwhelming majority of Estonian enterprises are small or medium-sized enterprises that do not invest abroad, and that most prospective enterprises are owned by foreign investors. In the examiners' view, however, some Estonian enterprises nevertheless do operate internationally. Representatives of Estonian civil society were of a similar view.

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bribery or the Convention (Enterprise Estonia Yearbook 2006; Web site of Enterprise Estonia, www.eas.ee).

21. Given this lack of awareness, there are expectedly few corporate compliance measures to combat foreign bribery. A model code of conduct prepared by the Chamber of Commerce does not refer to foreign bribery. Estonian business organisations do not have model compliance programmes, nor have they promoted codes of conduct prepared by organisations outside Estonia. The stock exchange's model corporate governance code does not deal with bribery. The Estonian subsidiaries of foreign multinationals are subject to their parent companies' codes of conduct. One Estonian academic felt that these codes have not been implemented effectively. Local enterprises generally do not have codes of ethics, according to NGOs at the on-site visit.

22. Estonian business organisations are aware of the need for greater efforts in terms of awareness-raising and prevention. At the on-site visit, they expressed willingness to develop, in partnership with the Estonian authorities, specific activities addressing foreign bribery risks in the framework of the new anti-corruption strategy for 2008-2012.

(ii) Civil Society and Trade Unions

23. The inactivity in raising awareness of foreign bribery extends to Estonian civil society.[18] NGOs (including the local chapter of Transparency International) told the examiners that Estonian civil society and the media so far have not been particularly active in scrutinising how Estonian businesses behave abroad. Efforts have primarily been devoted to fighting domestic bribery. Like other sectors met by the examining team, they downplayed the importance of the issue of foreign bribery for Estonian companies, though they were receptive to raising awareness of foreign bribery in their programmes and activities.

Commentary

With a view to promoting the effective implementation of the Convention, the lead examiners recommend that Estonia act resolutely to raise the level of awareness of the Convention and the foreign bribery offence (a) within the public sector and government agencies that can play a role in detecting and reporting foreign bribery, and (b) among the general public. The lead examiners also recommend that Estonia act with vigour – in association with the business community – to induce Estonian companies to raise their ethical standards in fighting bribery of foreign public officials. They further recommend that Estonia take steps to assist the business community to prevent and detect foreign bribery, including by developing tools to that end.

2. Reporting, Whistleblowing and Witness Protection

(a) Duty to Report Crimes

24. Estonian public officials have a duty to report crimes of bribery. Public officials and public servants must report corrupt acts to the head of their agency, the police, the Security Police or the Prosecutor's Office. Failure to report may result in a fine and/or disciplinary sanctions, including termination of employment.[19] In the examiners' view, the existence of such a duty to report is positive. However, the effectiveness of such a reporting duty is tempered by the lack of awareness of the foreign bribery offence among Estonian public officials.

25. There is no corresponding duty for private individuals to report foreign bribery. Individuals are obliged to report first degree crimes unless the offender is a relation. There are no obligations to report

[18] As trade unions did not attend the on-site visit, there is no information about them.

[19] Anti-Corruption Act, Section 23.

second degree crimes, such as foreign bribery.[20] The examiners were told at the on-site visit that Estonian citizens consider reporting offences as "delation" and hence unusual. Nonetheless, there were 96 reports of domestic bribery from 2004 to April 2008. Reports may be made via a hotline or the government's anti-corruption Web page (www.korruptsioon.ee).

(b) Whistleblowing and Whistleblower Protection

26. Estonia has no specific laws on whistleblowing. For public officials, a whistleblower's anonymity is maintained unless the report was made in bad faith or if his/her testimony in court is required. Employees may only be dismissed pursuant to the grounds listed in the Public Service Act (for public servants) and the Employment Contracts Act (for private sector employees and support staff in the public sector). To enforce his/her rights, the Public Service Act allows an aggrieved official to demand reinstatement or compensation. Under the Employment Contracts Act, a whistleblower may ask a court or a labour dispute resolution body to review a disciplinary decision or dismissal.[21] Estonian officials indicate that these provisions have never been invoked by a whistleblower.

27. The lead examiners find that these general laws on dismissal from employment may be insufficient to protect whistleblowers in both the private and public sectors from reprisal. Some of the grounds of dismissal are rather vague and broad, *e.g.* breach of duties or loss of trust.[22] It is not clear under Estonia law whether whistleblowing could amount to a breach of an employee's duty to maintain an employer's "business and production secrets".[23] Finally, these provisions may not cover reprisals that are short of dismissal, *e.g.* transfer to a different position, change of duties etc.

28. Estonia is aware of these problems and has decided to study the issue as part of the new anti-corruption strategy. It hopes the study will result in a new whistleblowing regime, especially for the health sector. In the examiners' view, this is a positive development, but stronger whistleblower protection would enhance detection of transnational bribery only if there is greater awareness of the offence. The public is unlikely to report transnational bribery if there is no awareness of the issue.

Commentary

The lead examiners recommend that Estonia strengthen measures for protecting whistleblowers, in order to encourage public and private sector employees to report acts of transnational bribery without fear of reprisals or dismissal.

(c) Witness Protection

29. Witness protection is primarily provided under the Witness Protection Act. Under certain circumstances, the Central Criminal Police may provide physical protection to witnesses and their family members. The Criminal Procedure Code further allows a witness to maintain his/her anonymity during criminal proceedings in some cases.[24] These measures are available in domestic and foreign bribery prosecutions but have never been used in these cases.

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[20] Except for a repeated offence of foreign bribery, which is a first degree crime.

[21] Public Service Act, Section 13 and 135; Employment Contracts Act, Section 142; Employees Disciplinary Punishments Act.

[22] Employment Contracts Act, Sections 86 and 103-104.

[23] Employment Contracts Act, Section 50.6).

[24] Witness Protection Act; Criminal Procedure Code, Section 67.

3. Officially Supported Export Credits

30. Export credit agencies offer credits and guarantees to companies that engage in international business transactions and thus may play a vital role in raising awareness of the Convention and detecting foreign bribery. The agency responsible for officially supported credits in Estonia is the Credit and Export Guarantee Fund (KredEx). KredEx offers credit guarantees to exporters and foreign buyers. The United States and Russia are the two largest export destinations in KredEx's portfolio of guarantees.[25] KredEx also offers products such as financing for SMEs and investment guarantees in non-Estonian companies. KredEx is not a member or observer of the OECD Working Party on Export Credits and Credit Guarantees and does not take part in the Working Party's surveys on bribery and export credits. However, KredEx voluntarily applies the 2006 OECD Council Recommendation on Bribery and Officially Support Export Credits.[26]

(a) Awareness-Raising Efforts

31. KredEx has engaged in activities to raise awareness among its clients. Applicants must sign a declaration that they or anyone acting on their behalf would not engage in bribery. Breach of this declaration results in the termination of support and reimbursement by the applicant of funds already paid by KredEx. In addition, KredEx recently held seminars on exporting to Eastern Europe[27] in which it pointed out the risks of foreign bribery in certain countries in the region. KredEx's Web site does not refer to foreign bribery or the Convention but only to the text of the anti-corruption declaration.

32. To raise awareness internally of foreign bribery, KredEx has instructed its staff to explain the anti-bribery declaration to the client and to ensure that the client signs the declaration.

(b) Detection of Foreign Bribery

33. To enhance the detection of bribery, KredEx representatives co-operate closely with the importer and almost always visit the importer in the foreign country. That aside, there has been no specific training on how to detect bribery or how to deal with clients who use foreign agents. KredEx employees have not come across any instances of suspected foreign bribery.

34. During the on-site visit, it was indicated that KredEx employees are not considered as public officials and as such are not subject to the same reporting obligations as Estonian civil servants. KredEx is considered by law as a private company. Hence, the duty of public officials to report bribery does not apply to KredEx employees. However, two of the five members of KredEx's board of directors are government officials who have a duty to report. Unfortunately, it is not clear whether the board would necessarily be informed of all instances of suspected bribery detected by KredEx employees. Before an application is approved, the KredEx employee responsible must make a presentation on the application that could include bribery-related issues. But depending on the size of the guarantee, the presentation is not always made to the board. In sum, it is not certain that KredEx will report every suspicion of foreign bribery to law enforcement.

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[25] As of 31 December 2006, KredEx's export guarantee portfolio by country was: United States (15.38%), Russia (14.84%), United Kingdom (9.06%), Germany (9.05%), and Finland (7.60%) (KredEx (2006), *Annual Report 2006*, KredEx, Tallinn, p. 16, www.kredex.ee).

[26] TD/ECG(2006)24.

[27] KredEx Annual Report 2006, www.kredex.ee.

Commentary

The lead examiners recommend that Estonia ensure that suspicions of foreign bribery detected by employees of KredEx are reported to law enforcement.

4. Official Development Assistance (ODA)

35. Another agency in Estonia likely to deal with individuals or businesses that could be involved in transactions tainted by foreign bribery is the External Economic and Development Co-operation Department of the Ministry of Foreign Affairs. Since 1998, the Department has administered Estonia's ODA programme. Estonia is not a member of the OECD Development Assistance Committee but voluntarily follows the Committee's principles.

36. In financial terms, Estonia's ODA programme is relatively small but increasing steadily. The Ministry's aid budget has risen from EUR 1.5 million in 2007 to EUR 4 million in 2008. Just under half of the budget is allocated to bilateral assistance, with the remaining going to humanitarian assistance, support of multilateral organisations, and public governance activities. Bilateral assistance has been directed primarily at Afghanistan, Georgia, Moldova, and Ukraine. In the past, roughly half of all bilateral assistance has been project-based. There are no direct contributions to physical infrastructure projects, though opportunities for public procurement could arise in some programmes.[28]

(a) Awareness-Raising Efforts

37. Although Estonia's bilateral assistance is directed at countries where corruption is often rife, Estonian ODA authorities had not raised awareness of foreign bribery before the on-site visit. They had not raised awareness within the ODA department in the Ministry of Foreign Affairs (which consists of eight people) or among the various public and private institutions participating in development assistance efforts. There was no reference to corruption in the ODA programme's basic principles and goals as set out in the "Principles of Estonian Development Co-operation" promulgated by parliament. There was also no reference to corruption on the ODA programme's Web site, standard project approval forms, or standard project reports. Similarly, no steps had been taken to introduce anti-corruption clauses in standard contracts issued by the Department. The contract only required a contractor to inform the government of problems in the project's implementation.

38. Estonia took some steps to ameliorate the situation after the on-site visit. The Ministry of Foreign Affairs prepared an information sheet on corruption in ODA and disseminated it to all Ministry staff. The document includes definitions of corruption-related terms, a short overview of the situation in Estonia, guidelines for diplomats, and an overview of the OECD Convention. The Ministry has sent the document to all of its employees and also posted it on its intranet. The Ministry further indicated that it would amend its standard contract for ODA-funded projects to require an anti-bribery declaration similar to the one used by KredEx (see above). The Ministry intends to refer to the practice in other countries (*e.g.* Sweden) when updating the contract.

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[28] In 2006, Estonia contributed 0.09% of gross national income (GNI) or EEK 175 million (EUR 11.21 million) to ODA. It aims to increase its contribution to 0.17% of GNI by 2011 (Web site of the Ministry of Foreign Affairs, www.vm.ee; *The Estonian Government's European Union Policy for 2007-2011* at p. 43, *www.riigikantselei.ee/failid/ELPOL_2007_2011_EN.pdf*).

(b) Detection and Reporting of Foreign Bribery

39. Government staff working with ODA, like other public servants, must report any criminal offence to law enforcement and prosecutorial authorities. However, such personnel are unlikely to detect foreign bribery, given the low level of awareness of the risk of foreign bribery.

40. As with general awareness-raising, action regarding the detection and reporting of foreign bribery in the ODA context occurred only after the on-site visit. The information sheet referred to above instructed all diplomats to report credible suspicions of foreign bribery to the prosecutor's office and the relevant department within the Ministry of Foreign Affairs. Estonia has not trained Ministry staff or diplomats on the reporting procedure but hopes to do so in the near future.

Commentary

The examiners recommend that Estonia further raise awareness of foreign bribery among staff and project partners involved in ODA, including by providing training. The examiners also recommend that Estonia incorporate an anti-bribery declaration in its standard contract for ODA-funded projects.

5. Foreign Diplomatic Representations

41. Estonian overseas diplomatic representations may raise awareness of foreign bribery among Estonian enterprises and individuals involved in international business transactions. They can also be an important source of information on foreign bribery committed by Estonian individuals and companies abroad.

42. At the on-site visit, an official from the Ministry of Foreign Affairs (MFA) indicated that embassy staff tells Estonian companies about the risks of bribery and advises them to not bribe. In the opinion of the lead examiners, additional specific action is necessary. Otherwise, MFA staff might not have the necessary skills to advise Estonian companies and individuals on the risk of bribery in foreign markets, and to work together with law enforcement on bribery cases.

43. Estonia also took steps after the on-site visit to address the reporting of foreign bribery. As noted above, diplomats have been instructed through an information sheet to report all credible suspicions of foreign bribery to prosecutors and the relevant department in the Ministry. Training on the reporting procedure is expected soon.

Commentary

The lead examiners recommend that Estonia's overseas diplomatic representations further raise awareness of foreign bribery among the Estonian business sector and its overseas staff, including by providing training.

6. Tax Authorities

(a) Tax Deductibility of Bribes

44. Estonian tax authorities can also prevent and detect foreign bribery. Since January 2004, Estonia's Income Tax Act has expressly denied the deduction of bribe and gratuity payments from income tax. The prohibition applies to income tax payable by resident and non-resident natural and legal persons.[29]

(b) Awareness, Training and Detection

45. Estonia's tax authorities have rather broad powers of investigation to ascertain the tax position of taxpayers and thus, at least in theory, to detect bribes and gratuities. Apart from tax crimes, they may investigate other offences (*e.g.* bribery) that are connected to a tax offence. They can audit and control a taxpayer's accounting books and records or bookkeeping. They can also order a financial institution to produce information, including data subject to bank secrecy (Section 61 of the Taxation Act and Section 88 of the Credit Institutions Act). However, Estonian tax authorities do not perceive any risk that taxpayers would try to deduct bribe payments from taxes. No such deductions have been detected so far. Accordingly, it has not made any efforts to raise awareness of non-deductibility among the general public or accounting, auditing and tax professionals. In addition, Estonian tax authorities may also provide information to Estonian investigators, prosecutors and courts in order to prevent, detect, investigate or prosecute crimes. Tax secrecy also does not apply to information provided to the financial intelligence unit in suspected money laundering cases.

46. The tax authorities may also exchange information with foreign authorities. If the information is to be used in tax proceedings, the legal authority to exchange information for tax purposes derives primarily from bilateral agreements. Estonia is party to over 30 tax treaties, many of which are with signatories of the OECD Convention.[30] Pursuant to Section 30 of the Taxation Act, Estonian authorities may override tax secrecy if foreign authorities request information pursuant to an international agreement. With EU member states, information exchange may take place pursuant to the EU directive on mutual assistance (77/799/EEC as amended) and Regulation 2003/1978. Information for use in criminal proceedings may be exchanged through treaties on mutual legal assistance in criminal matters, such as the European Convention on Mutual Assistance in Criminal Matters. In the absence of a treaty or agreement, a prosecutor will consider a request for tax information on an *ad hoc* basis under Criminal Procedure Code. Estonia asserts that, in these cases, Section 30 of the Taxation Act does not prohibit the release of secret tax information.

47. In preparation for their controls, tax officials are given some guidance in ways of identifying unlawful expenditures that may be associated with bribery of foreign public officials. The *OECD Bribery Awareness Handbook for Tax Examiners*, a comprehensive practical manual for tax examiners on how to detect and identify bribes during tax audits, has been translated into Estonian. An information letter on the Handbook was circulated among tax officers and, drawing on the OECD Handbook, a new manual for tax auditing has been issued. The Handbook has also been used to some degree to train tax auditors on how to design audit plans. However, the Handbook itself has not been distributed to tax officials. In terms of training, one Estonian tax official attended an OECD seminar in Lithuania on bribery awareness for tax examiners. Estonia itself has not organised any training activity on foreign bribery for tax officials.

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[29] Income Tax Act, Sections 12(1), 14, 29(3), 34.11), 51(1) and 51(2); *Phase 1 Report: Estonia*, paras. 178-179.

[30] Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

According to the Estonian authorities, as a result of these awareness raising and training efforts, tax auditors have "average knowledge" of how to detect bribes. In 2007, two cases of suspected domestic bribery were detected and forwarded to the police for investigation, which the lead examiners find encouraging.

48. After the on-site visit, Estonia stated that the *OECD Handbook for Tax Examiners* was posted on the tax authority's intranet. New guidelines on bribery detection were also drafted and posted on the intranet. The examiners are encouraged by these developments, and they encourage Estonia to train its tax officials on bribery detection using the new guidelines and the *Handbook*.

(c) Duty to Report Foreign Bribery

49. Although tax officials are subject to the duty on all public officials to report corruption, they have not detected irregularities associated with transnational bribery. Undeniably, detecting foreign bribery is intrinsically complex. However, in the examiners' view, the fact that only general instructions and limited training in detecting bribery had been developed for tax examiners may explain this state of affairs.

50. On-site discussions revealed that there are no systematic procedures to detect bribery. No special effort is made to verify fees paid to foreign agents. The main method of detecting irregularities involves identifying taxpayers who use known shell companies or "missing traders". In the lead examiners' opinion, it would be important that Estonia's tax authorities fully exploit the potential of the *OECD Handbook for Tax Examiners*.

Commentary

The lead examiners recommend that Estonia make additional efforts to train tax officials on bribery detection and reporting, and to raise their awareness of foreign bribery.

7. Accountants and Auditors

(a) Accounting and Auditing of the Private Sector

(i) Awareness and Training

51. Awareness of foreign bribery and the Convention in the Estonian accounting and auditing professions appears to be low. There is no evidence of any efforts by Estonian authorities to raise awareness in these professions. Auditors have received guidelines and training on anti-money laundering measures, but not on foreign bribery or the Convention. Consequently, the auditors at the on-site visit (including one from a Big Four international accounting firm) admitted that they had no knowledge of the accounting and auditing requirements of the Convention and Revised Recommendation. The Estonian auditors who met the examining team did not believe that (domestic or foreign) bribery is an issue for auditors. They rather downplayed the importance of bribery of foreign public officials for Estonian companies, a claim justified, among other reasons, by an alleged weak presence of Estonian companies in countries in which bribery is common. One auditor was of the view that companies that bribe are not audited. Some of the auditors at the on-site visit believed that Estonian companies do not bribe. Not surprisingly, there are no reports of Estonian auditors uncovering a case of domestic or foreign bribery.

52. In the examiners' view, downplaying the importance of the accounting and auditing requirements of the Convention because of an alleged weak presence of Estonian companies in sensitive markets could prove hazardous. Accounting and auditing are crucial to the fight against foreign bribery, as evidenced by their explicit reference in the Convention and Revised Recommendation. Yet, Estonia has made no efforts

to engage their accountants and auditors in this process. Remedial action is urgently needed, much like in other sectors in Estonia.

(ii) Accounting and Auditing Standards

53. Accounting and auditing requirements are set primarily by the Accounting Act.[31] Accounting entities include legal persons registered in Estonia, sole proprietors and branches of foreign companies registered in Estonia.[32] In general terms, the Act requires accounting entities to organise their accounts in a manner that provides “up-to-date, relevant, objective and comparable information concerning the financial position, economic performance and cash flows of the accounting entity”. All “business transactions” must be documented, as well as posted and recorded in accounting ledgers and journals. “Business transactions” include transactions or events that change the entity’s assets, liabilities or owners equity.[33] Taken together, these provisions prohibit the activities described in Article 8 of the Convention and Paragraph V.A.i. of the Revised Recommendation.[34]

54. In more specific terms, two sets of accounting standards are used in Estonia. International Financial Reporting Standards (IFRS) as adopted by the European Commission are applied to listed companies and certain companies in the financial sector. Other companies may use IFRS or Accounting Standards Generally Accepted in Estonia (Estonian GAAP) developed by the Accounting Standards Board. Estonian GAAP is based on IFRS, EU accounting directives, and guidelines issued by the Board. The differences between IFRS and Estonian GAAP are not relevant for present purposes.[35]

55. These accounting standards require Estonian companies to disclose in their financial statements their full range of material contingent liabilities. In particular, companies are required to disclose their full potential liabilities for foreign bribery, false accounting, and other losses which might flow from conviction of the company or its agents for bribery. This satisfies Paragraph V.A.ii. of the 1997 Revised Recommendation.

56. Enterprise groups may be required to produce consolidated financial statements. An accounting entity must provide a consolidated statement that covers other entities in which it holds (a) majority voting rights, or (b) a right to appoint or remove a majority of the supervisory or management board.[36]

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31 The Commercial Code sets out additional requirements for companies. Further requirements may apply to some accounting entities under other statutes, *e.g.* the Credit Institutions Act, Bankruptcy Act, Foundations Act, Commercial Associations Act, Non-Profit Associations Act, Securities Market Act, and tax legislation.

32 Accounting Act, Section 2.

33 Accounting Act, Sections 4 and 6.

34 *Phase 1 Report: Estonia*, paras. 140-141.

35 Estonian GAAP is essentially a simplified summary of IFRS, with fewer requirements and less disclosure. The standard is intended to be used by small- and medium-sized enterprises (SMEs). International Accounting Standards (IAS) not adopted in Estonian GAAP include IAS 19 (Employee Benefits), IAS 26 (Accounting and Reporting by Retirement Plans), IAS 29 (Hyperinflation), and IAS 31 (Joint Ventures): Accounting Act, Sections 3 and 17; World Bank (2004), *ROSC Estonia – Accounting and Auditing*, World Bank, Washington D.C., para. 33; Larson and Street (2004), “Convergence with IFRS in an Expanding Europe: Progress and Obstacles Identified by Large Accounting Firms’ Survey”, Journal of International Accounting, Auditing and Taxation, vol. 13, issue 2, 2004, pp. 89-119 at section 5.3; Haldma (2005), “Harmonization of Estonian Accounting System with the European Framework”, Tartu University; International Federation of Accountants (2006) “SMO 7: Comparison with IASB Pronouncements”.

36 Accounting Act, Sections 27-31.

57. Auditing standards in Estonia are based on the International Standards on Auditing (ISAs). Audits are governed by the Auditing Guidelines issued by regulation of the Minister of Finance. The Guidelines in turn require auditors to conduct audits in accordance with the ISAs, exercise due care and diligence, and comply with the principles of integrity, objectivity, and independence. The Guidelines were expected to be abolished in 2008, after which the ISAs were to apply directly to Estonian auditors.

(iii) External Auditing

58. A relatively large proportion of entities in Estonia are required to submit to external auditing. A company must be externally audited if its share capital exceeds EEK 400 000 (EUR 25 600) or if it meets two of the three following criteria: (1) turnover or income of EEK 10 million (EUR 640 000); (2) balance sheet total of EEK 5 million (EUR 320 000); and (3) at least 10 employees. For enterprise groups, the criteria are applied to the entire group. Sole proprietorships and partnerships do not have to be audited.[37] In 2004, enterprises presented 51 450 "activity reports" of which 11 240 were externally audited (21.85%). The Board of Auditors estimates that this covers 80-90% of the total turnover, employees and assets of Estonian enterprises. In the examiners' view, these requirements for external auditing should satisfy Paragraph V.B.i of the Revised Recommendation.

(iv) Duty to Report Foreign Bribery

59. Estonian auditors are not required to disclose crimes *per se* in the annual report; they only need to specify "material weaknesses in accounting and internal control systems".[38] Auditors at the on-site visit added that the annual report need only disclose "material discrepancies". There is thus no obligation to report small, unrecorded bribery transactions that do not affect the valuation of the company. Likewise, a secret slush fund that was established for the purposes of bribery must be disclosed only if it impacts the financial picture of the audited entity. Put differently, auditors are not required to disclose all crimes in the annual report, but only those with material financial consequences for the audited entity.[39]

60. As for reporting foreign bribery to competent authorities, Estonian auditors are precluded from doing so. In Phase 1, Estonia stated that auditors may report foreign bribery to law enforcement but are not obliged to do so. Auditors at the on-site visit were of a different view. An auditor is bound to disclose information about a suspected money laundering transaction, or when compelled by a court, law enforcement, the State Auditor, or the Board of Auditors. Otherwise, an auditor's duty of confidentiality prevents voluntary disclosure of suspicions of bribery to law enforcement.[40] Furthermore, this duty applies even if the audited entity's management and shareholders fail to respond to a crime disclosed in the annual report.

61. To conclude, the lead examiners recommend that Estonia require auditors to report indications of a possible illegal act of bribery to management and corporate monitoring bodies. They also recommend that Estonia consider requiring auditors to report such indications to the competent authorities. Auditors at

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37 Commercial Code, Section 190; Accounting Act, Section 14(3); Enterprise Estonia, *Tallinn Investment Guide*, p. 27.

38 Auditing Guidelines, Section 15(2).

39 Estonia took a slightly different position in Phase 1. At that time, it stated that auditors must report indications of illegal acts in the audited entity's annual report. The legal basis for this requirement was not clear (*Phase 1 Report: Estonia*, paras. 145-146).

40 Authorised Public Accountants Act, Section 38; Auditing Guidelines, Regulation 50 of 15 June 2000 by the Ministry of Finance, Section 5; Money Laundering and Terrorist Financing Prevention Act, Section 5(1)6); *Phase 1 Report: Estonia*, paras. 145-146.

present are only required to disclose in the annual report suspicions of bribery that have material financial consequences. The reporting standard embodied in the Revised Recommendation is not qualified in such terms. Furthermore, disclosure in the annual report could be meaningless in some cases. A company's management and shareholders are not obliged to inform law enforcement of bribery disclosed in an annual report.[41] Should they choose to not advise the authorities, then the bribery allegations will likely never come to light, since an auditor is prohibited from voluntarily reporting to law enforcement.

Commentary

Bearing in mind the major role auditors and accountants may play in detecting acts of foreign bribery, the lead examiners recommend that Estonia take steps to increase awareness of foreign bribery and the Convention among accountants and auditors. They also recommend that Estonia require auditors to report indications of a possible illegal act of bribery to management and corporate monitoring bodies, and that Estonia consider requiring auditors to report such indications to the competent authorities.

(b) Accounting and Auditing of the Public Sector

62. The National Audit Office (NAO) is Estonia's public sector auditor. Headed by the Auditor General, the NAO is an independent state body created under the Constitution. Its audits involve assessing, among other things, the audited entity's financial statements and the legality of the entity's activities. Audit results are forwarded to parliament. In addition to governmental bodies, it may audit companies that have borrowed public funds or over which the state exercises dominant influence.[42] But in practice, this is done by private sector auditors.

63. Auditors in the NAO are required to report crimes, including foreign bribery. Legislation and internal regulations require auditors to report crimes to the head of the audit team, who in turn reports the matter to law enforcement authorities.

8. Anti-Money Laundering

(a) Suspicious Transaction Reporting

64. The Money Laundering and Terrorist Financing Prevention Act 2007 (MLTFPA) governs the money laundering reporting system in Estonia. The system requires reporting of suspected money laundering transactions and certain cash transactions over EEK 500 000 (EUR 32 000). The reporting obligations apply to a wide range of entities, including financial intermediaries and certain non-financial businesses and professionals. Suspicious transactions and accounts may be frozen. The MLTFPA also requires entities to conduct customer due diligence and identification.[43]

65. The MLTFPA deals specifically with politically-exposed persons (PEPs), a subject that is closely related to corruption and bribery.[44] The Act defines PEPs to cover senior officials of foreign governments,

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[41] Estonia states that such disclosure by management or shareholders would amount to self-incrimination.

[42] Constitution of Estonia, Articles 132-138; National Audit Office Act, Sections 6, 7, 15 and 51.

[43] MLTFPA, Sections 3, 10, 32 and 60.

[44] Politically exposed persons (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, *e.g.* heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials. For more information, see the Glossary of *The Forty Recommendations (2003)*, Financial Action Task Force, Paris.

international organisations, and the EU. Special measures are required when establishing a business relationship or entering into a transaction with a PEP. These include enhanced due diligence to verify the identity of a customer, the authenticity of supporting documents, and the origin of funds.[45] The two banks that attended the on-site visit stated that they have access to a database of PEPs.

66. Suspicious transaction reports (STRs) are made to the Financial Intelligence Unit (FIU), an independent body within the Central Criminal Police. The FIU is responsible for analysing STRs and forwarding them to law enforcement as appropriate. To assist in this task, the MLTFPA empowers the FIU to obtain information (including information subject to bank secrecy) from reporting entities, other government agencies, and third parties. The FIU also exchanges information with its foreign counterparts and has received approximately 100 overseas inquiries annually.[46] There are 19 memoranda of understanding with other FIUs to facilitate co-operation and exchange of information. A new programme on asset recovery began in 2008.

67. The FIU has detailed statistics on the number of STRs. These include the source of STRs, the number of STRs forwarded to law enforcement, and whether STRs resulted in investigations, prosecutions or convictions. Since 2000, there has been one money laundering conviction that involved domestic corruption as a predicate offence.

68. To discharge its duties, the FIU has 24 staff members, including five analysts, six supervisors of reporting entities, and four asset recovery specialists. According to the FIU, it takes only one working day to process an STR, after which the head of the FIU's analytical unit would decide whether to conduct an in-depth analysis. The analysis usually takes one month, but in some cases can take up to one year. The FIU also has technical resources (such as databases and software) at its disposal.

(b) Typologies, Guidelines and Feedback

69. The FIU has issued advisory guidelines on indicators of suspicion and interpretation of the legislation. The guidelines have been updated, with one issued in 2007 and another in 2008 to accompany the entry into force of the new MLTFPA. The guidelines on suspicions transactions consist of typologies but do not address (domestic or foreign) corruption or PEPs.[47]

70. The FIU is required to inform reporting entities of the use of reported information.[48] Each year, the FIU indicates to each entity the reports that have been forwarded to law enforcement, and whether the reports resulted in investigations, prosecutions or convictions. The two banks that attended the on-site visit were satisfied with the feedback that they had received from the FIU.

71. The FIU is also required to train prosecutors, law enforcement, and the staff of reporting institutions.[49] Over 30 training events are offered annually and roughly 2 000 persons attended these sessions in 2006-2007. The major Estonian bank that attended the on-site visit stated that it received very good training from the FIU. However, the other, smaller Estonian bank informed the lead examiners that its staff had not received adequate training, without further elaborating.

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45 MLTFPA, Sections 19-21.

46 See also MLTFPA, Sections 36-46; *Phase 1 Report: Estonia*, para. 135.

47 The FIU's guidelines supersede those issued earlier by the Bank of Estonia and the Estonian Banking Association. See also MLTFPA, Section 39; and MONEYVAL (2004), *Second Mutual Evaluation Report on Estonia - Summary*, Council of Europe, Strasbourg, para. 15.

48 MLTFPA, Section 37(1)2).

49 MLTFPA, Section 37(1)7).

(c) Sanctions for Failure to Report Suspicious Transactions and Other Breaches

72. Responsibility for the enforcement of the suspicious transaction reporting system is divided between the FIU and the Financial Supervision Authority (FSA). The FSA is an autonomous, independent body that operates at the Bank of Estonia, the central bank. It is responsible for monitoring compliance with the MLTFPA system *viz.* most credit and financial institutions. The FIU performs the same function *viz.* non-financial businesses and professions, and financial institutions not monitored by the FIU.[50] To enforce the MLTFPA, the FIU conducted 203 on-site inspections in 2007. Likewise, the FSA has conducted on-site inspections of all banks at least once every two years, though the inspections also cover issues unrelated to money laundering.

73. Breaches of the MLTFPA are punishable by fines.[51] There are also criminal offences for failure to conduct customer due diligence and failure to report a suspicious transaction, both of which are punishable by a pecuniary punishment.[52] The administrative and criminal sanctions are available against both natural and legal persons. In practice, no criminal sanctions have been imposed thus far, though some administrative sanctions were imposed in 2004-2007.

C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY AND RELATED OFFENCES

1. Investigation and Prosecution of Foreign Bribery

74. In Estonia, the prosecutor has a central role in foreign bribery investigations and prosecutions. He/she is in charge of directing the police to conduct investigations. The prosecutor must also apply the mandatory prosecution principle and take a case to court, subject to certain specified exceptions.

(a) The Public Prosecutor's Office

75. Unlike many other continental European countries, Estonia prosecutor's office is established by statute, not constitution. Prosecutors also do not have the status of judges. The Prosecutor's Office Act (POA) establishes the Prosecutor's Office as a body under the Ministry of Justice. The Office is subdivided into four District Prosecutor's Offices (DPOs) that cover the entire country and the national Public Prosecutor's Office (PPO). DPOs and the PPO are headed by Leading Prosecutors (LP) and the Chief Public Prosecutor (CPP) respectively.

76. The prosecutor's offices have some degree of specialisation in corruption cases. In the Northern DPO (which includes Tallinn), two prosecutors and one assistant prosecutor specialise in corruption cases full-time. In the Viru DPO, one senior prosecutor specialises in corruption cases full-time and another prosecutor does so part-time. In the remaining two DPOs and the PPO, corruption cases are also assigned to prosecutors who are experienced in such cases, though these prosecutors also deal with other types of crime. There are fewer prosecutors specialising in corruption now than at the time of Phase 1 because the

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50 MLTFPA, Sections 37(1)4) and 47.

51 MLTFPA, Sections 57-64.

52 Penal Code, Sections 395 and 396.

corruption case-load has been lower than expected. Estonian prosecutors informed the examiners that human resources in the prosecutor's offices were adequate.[53]

(b) Police Bodies Involved in Foreign Bribery Cases

77. As noted above, although the prosecutor plays a central role in criminal investigations, it is the police who actually carry out investigations. Two investigative bodies are relevant to foreign bribery cases: the Police Board, which is the main police body in Estonia, and the Security Police. Both are under the Ministry of Internal Affairs.

78. The Security Police Board is a police body with nationwide jurisdiction. It is primarily responsible for investigating, among other things, corruption involving high-level Estonian officials,[54] including foreign bribery committed by such officials (see below). The Security Police has a corruption unit with an undisclosed number of officers.

79. The Police Board consists of national and regional police bodies. There are two police agencies at the national level, one of which is the Central Criminal Police (CCP), the most important body in foreign bribery cases. In addition to conducting investigations, the CCP is responsible for police-level international co-operation, including exchange of intelligence. It has ties with INTERPOL, EUROPOL and Schengen, as well as liaison officers in Finland, Russia, and EUROPOL. The CCP is also responsible for conducting surveillance and pre-trial proceedings, as well as preventing money laundering.[55] In addition to officers specialising in financial and economic crime in the Economic Crime Department, the CCP has one corruption-analyst.

80. At the regional level, public prosecutors can rely on the assistance of the Police Board's four regional Police Prefectures, each of which covers a specific geographical region. The Prefectures are responsible for, among other things, conducting pre-trial proceedings in criminal matters, unless a certain task has been specifically assigned to another investigative body.[56] The Northern Prefecture (which covers Tallinn) has five specialised investigators. In the remaining three Prefectures, the Economic Crime Divisions investigate corruption cases. Overall, Estonia has fewer officers specialising in corruption now than in Phase 1,[57] largely because of difficulties in filling vacant positions despite recent salary increases. Nonetheless, during the on-site visit, human resources have been described by Estonian officials as generally adequate except possibly at the local level.

(c) Awareness of and Training on Foreign Bribery of Prosecutors, Police and the Judiciary

81. Training for prosecutors has not dealt specifically with foreign bribery so far. New recruits undergo a training programme that focuses more on practical knowledge. However, the Convention was

53 Estonia indicated that there were 99 registered corruption offences in the first nine months of 2007. However, according to Estonian prosecutors, this statistic is not the best indicator of workload because it includes dormant cases, *e.g.* information from anonymous sources upon which a prosecutor cannot act.

54 Anti-corruption Act, Section 26^8(3); Web site of the Security Police Board, www.kapo.ee; see also the Security Authorities Act.

55 Police Act, Sections 11^1; Web site of Estonian Police, www.pol.ee.

56 *Ibid*.

57 During Phase 1, Estonia had 29 police officers specialising in corruption (nine in the Central Criminal Police and five in each of the four Prefectures). There were plans to implement a parliamentary proposal creating local anti-corruption units with at least 50 specialised investigators and prosecutors (*Phase 1 Report: Estonia*, para. 107). Those plans did not materialise.

mentioned in one course on international conventions.[58] Training of prosecutors on the liability of legal persons has also been noticeably absent. A 2004 report found that Estonian prosecutors did not have sufficient training on the rules concerning criminal liability of legal persons and the problems of corruption linked with legal persons.[59] At the time of the on-site visit, no such training had taken place.

82. Police training has focused mostly on domestic corruption. Estonian officials stated that there is only general training on corruption issues (though not specifically foreign bribery) for new and existing police officers. In 2005-2008, 186 police officers attended 10 training events on topics such as public corruption, corruption in municipalities, corruption prevention etc. Transnational corruption was not covered. The Resident Twinning Advisor from Finland added that police training on corruption issues have been limited and mostly *ad hoc*. Most corruption investigators also have little experience in this type of crime. A twinning project with Finland in 2008 will hopefully remedy the situation.[60]

83. Finally, training and awareness of foreign bribery for the judiciary could also be improved. At the on-site visit, the Estonian judiciary indicated that it had received training on subjects such as liability of legal persons, MLA, confiscation, and money laundering. Foreign bribery has not been one of the topics, however.

84. In the examiners' view, Estonian authorities should provide public prosecutors, the police and the judiciary with adequate training on the foreign bribery offence and the criminal liability of legal persons. The dearth of foreign bribery cases cannot not justify the absence of such training, since deficiencies in awareness and skills could itself lead to the lack of cases. As well, training in domestic bribery is not a complete substitute for foreign bribery since the latter involves different legal principles and *modus operandi*, *e.g.* the use of foreign intermediaries and shell companies etc. More training on foreign bribery and the Convention would also help remedy the overall lack of awareness noted earlier. As for the training of the police, the situation was expected to improve with the implementation of a twinning project with Finland in 2008. The new anti-corruption strategy for 2008-2012 also envisions training in this area.

Commentary

The lead examiners recommend that Estonia (a) raise awareness of foreign bribery and the Convention among prosecutors, law enforcement and the judiciary, and (b) train new and practising prosecutors, police officers and judges on the offence of foreign bribery, and the investigation of legal persons (particularly in bribery cases).

(d) Division of Competence and Co-ordination

85. The division of competence in foreign bribery cases depends largely on the complexity of the case and the necessary investigative measures. At the prosecutor level, the PPO has conduct of complex, sensitive cases involving high (foreign or Estonian) officials and/or politicians, or if a case requires a great deal of international co-operation. The PPO will therefore conduct most foreign bribery cases. The remaining cases are conducted by the DPO of the district in which the crime occurred.

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58 Estonia stated that its prosecutors have three internal training events annually, as well as regular round-table meetings in the Prosecutor's Office for exchanging experience. Recent additional training have been provided by the U.S. Federal Bureau of Investigation (2000), Ministry of Justice (2004), the Latvian authorities (2004), EU/PHARE project (2004), Finland (2005), and the United States (2007).

59 GRECO (2004), *Second Round Evaluation Report: Estonia*, GRECO, Strasbourg, para. 73; GRECO (2006), *Second Round Compliance Report on Estonia*, GRECO, Strasbourg, paras. 61-62.

60 See also the Police Act, Section 11^5.

86. At the police level, the Security Police is responsible only for foreign bribery committed by senior Estonian officials. Otherwise, the Central Criminal Police has conduct if the case has a significant international aspect. Most foreign bribery cases will likely fall into this category. The Police Prefectures conceivably can conduct the simplest foreign bribery investigations, *e.g.* bribery of a low-level foreign official in Estonia. A decree sets out the division of competence between the Security Police and the Police Board. Within the Police Board, the division of competence is based on an oral agreement, with the prosecutor in charge of the case making the ultimate decision.[61]

87. Additional mechanisms facilitate co-ordination among law enforcement bodies. There are written agreements for sharing information between the Security Police and the Police Board,[62] and between the Police Board and the tax authorities. All law enforcement bodies can access a central database of open cases. This allows a prosecutor to check whether an accused is involved in other cases. There is also frequent personal contact among officials of different law enforcement bodies. The prosecutors, police and tax officials at the on-site visit stated that there was smooth co-ordination among the various law enforcement agencies. The Finnish Resident Twinning Advisor, who had interviewed almost all police officers involved in corruption cases, found no problems with information sharing among law enforcement bodies.

(e) Commencement and Conduct of Investigations

88. According to Estonian officials, both prosecutors and the police may commence criminal proceedings under the CPC. In foreign bribery cases, however, the police will likely discuss the matter with the Chief Public Prosecutor's Office before commencing proceedings.

89. The prosecutor is also pivotal to the conduct of criminal investigations and proceedings. The prosecutor directs investigative bodies – usually the police – in conducting an investigation and ensures the investigation's legality and efficiency. Many investigative steps (*e.g.* search and seizure) require the prosecutor's express order, while others may also require a court order. If the prosecutor is satisfied that sufficient evidence has been collected, he/she will declare the pre-trial proceedings complete. The prosecutor will then decide whether to file a statement of charges (essentially an indictment) and bring the suspect to trial (CPC Sections 213-227).

90. Because of the mandatory prosecution principle, Estonia does not have a real prosecution policy setting out priorities in the prosecution of certain crimes. Attempts were made to issue such a document in the recent past.[63] But as noted earlier in this report, unofficial priorities have been named to a certain extent, including for corruption and economic crimes. This is clearly reflected in the establishment in the PPO of a special department for complex economic crimes, and in designating prosecutors who specialise in corruption cases.

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61 See also CPC, Section 212.

62 Government Regulation Nr. 193 (19 July 2007).

63 Due to the limited capacity of Estonia's prosecution service in the late 1990s, the Ministry of Justice, the prosecutor's office service and the Ministry of Internal Affairs produced a document in 2000 called "Approving the Main Goals in Combating Crime Till 2003". The aim of this document was to divide criminal procedural resources economically, thus enabling an increase in procedural efficiency. However, the prosecution service and the police did not put the document into practice. Staff of both bodies felt that setting a higher priority for penal action against specific crimes was against the law (Eurojustice (2004), *Country Report: Estonia*, Chapter I, www.eurojustice.org/member_states/estonia/country_report/2769/).

(f) Termination of Proceedings by the Prosecutor

91. Investigative bodies and prosecutors are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence. At the end of an investigation, the prosecutor usually files an indictment if there is sufficient evidence. However, there are other circumstances under which the proceedings may be terminated (CPC, Section 6). The provisions for termination apply equally to natural and legal persons. Proceedings may also be terminated against some accused in a case but not others.

92. During Phase 1, the Working Group was concerned that foreign bribery prosecutions in Estonia could be terminated for the reasons listed in Article 5 and Commentary 27 of the Convention.[64] The Group accordingly decided to follow up this issue in Phase 2. The Group's comments focused on two grounds of termination, namely (1) offences committed abroad, and (2) the lack of public interest and negligible guilt.[65] In Phase 2, the examiners noted two additional grounds that could be relevant, namely termination for co-operating offenders and plea bargaining.

(i) Offences Committed Abroad

93. The Criminal Procedure Code (CPC) allows a prosecutor to terminate proceedings if (a) the offence was committed in a foreign state but the consequences of the offence occurred in Estonia, and if the proceedings may result in serious consequences for Estonia or are in conflict with other public interests (Section 204(2)); (b) the offence was committed outside the territory of Estonia (Section 204(1)(1)); or (c) an accomplice committed the offence inside Estonia but the consequences of the offence occurred outside (Section 204(1)(3)). Sections 204(1)(1) and 204(1)(3) have been invoked in four cases involving physical abuse, larceny, and fraud,[66] but Estonia was unable to elaborate the precise reasons for terminating these cases. Section 204(2) has never been used.

94. On its face, foreign bribery prosecutions could be terminated under these sections based on improper considerations. These provisions will likely apply to many foreign bribery cases given the transnational nature of the crime. However, the sections themselves do not expressly prohibit the consideration of factors listed in Article 5 and Commentary 27 of the Convention. Nor are there guidelines, commentaries or preparatory works to that effect. According to the Estonian authorities, the fact that the OECD Convention overrides Estonian legislation – and thus Section 204 of the Criminal Procedure Code – would alleviate the risk of improper considerations.[67] Yet, in the examiners' view, given the low level of awareness of the Convention in Estonia, there is no guarantee that Article 5 and Commentary 27 would be heeded in practice.

95. Of particular concern is Section 204(2) which expressly refers to the consequences of prosecution as well as other public interests. This could be construed to call for a consideration of national economic interest, the potential effect upon relations with another state, the identity of the natural or legal persons involved, and other concerns of a political nature. At the on-site visit, an Estonian prosecutor candidly

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[64] Article 5 of the Convention states that foreign bribery investigations and prosecutions must 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." Commentary 27 adds that prosecutorial discretion "is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature."

[65] *Phase 1 Report: Estonia*, paras. 198-200.

[66] *Phase 1 Report: Estonia*, para. 117.

[67] As noted earlier, international conventions ratified by Estonia (such as the OECD Convention) take precedence over domestic legislation (see section on Political and Legal Systems at p. 6).

admitted that the phrase "other public interests" is broad. The concept could allow a foreign bribery case to be terminated because it involves a large contract and a major Estonian company. In the examiners' view, this would infringe the Convention. After the on-site visit, Estonia reiterated that the Convention overrides Estonian legislation. Hence, foreign bribery cases could not be terminated based on public interest or other considerations that are prohibited by the Convention. But in the absence of additional information (*e.g.* case law) that corroborates this position, the examiners remain concerned.

96. The problem is exacerbated by the relative lack of oversight and accountability in the application of Section 204. The Prosecutor's Office has not issued guidelines on the factors that could be considered. A decision to terminate does not require the approval of a court or a superior prosecutor. Nor are reasons for termination necessarily recorded in writing or made public, unlike in some countries. Estonia was thus unable to explain to the examiners the bases upon which four previous cases had been terminated under Section 204. In foreign bribery cases, the foreign government employing the bribed official may appeal the termination of a prosecution to the Estonian Prosecutor's Office.[68] The importance of this latter measure may be overstated, however. In many foreign bribery cases, the foreign government is not interested in bringing the guilty parties to justice, let alone appeal the termination of a prosecution. All in all, the absence of adequate oversight and accountability increases the likelihood that Section 204 could be applied in a manner inconsistent with the Convention.

97. The situation might improve in the near future. After the on-site visit, Estonia prepared amendments to the CPC to prohibit the termination of proceedings "on grounds of national economic interests, interests of foreign policy, or other grounds … if this would be contrary to an international treaty which is binding for Estonia." Parliament was considering the amendment at the time of this report. The examiners find this development to be positive. However, the application of the new provision in practice and efforts to raise awareness of the provision would need to be further assessed.

Commentary

The lead examiners recommend that Estonia take steps to ensure that terminations of foreign bribery prosecutions under Section 204 of the Criminal Procedure Code are consistent with Article 5 and Commentary 27 of the Convention.

(ii) Lack of Public Interest and Negligible Guilt

98. Under Section 202 of the CPC, a prosecutor may terminate proceedings for an offence in the second degree (*e.g.* foreign bribery) if (a) the offender's guilt is negligible; (b) the offender has remedied or begun remedying the damage, or has paid or agreed to pay the expenses related to the proceedings; and (c) there is no public interest in the continuation of the proceedings. Termination may be conditional upon payment of a fine and/or performance of community service. The termination must also be approved by a court. In foreign bribery cases, the government of the bribed official may appeal a decision to terminate.

99. Estonia asserts that the Chief Public Prosecutor has issued a guideline precluding prosecutors from terminating foreign bribery cases under Section 202. The guideline provides that prosecution of every offence in office is deemed to be in the public interest if the offender is in a position of trust, profits from the offence, or is an official listed in the Anti-Corruption Act. In the examiners' view, the guideline does not conclusively address terminations of foreign bribery cases. First, the wording of the guideline contemplates an offender to be an official, not a bribe-giver. This is especially significant since bribe-

[68] According to Estonian officials, a decision to terminate a prosecution (under this or any other provision of the CPC) may be appealed by a "victim" of the crime. In corruption cases, the institution who employed the corrupted official is a "victim", but a competitor who lost a tender for a contract is not.

taking is considered a more serious crime than bribe-giving, according to Estonian officials.[69] Hence, even if a prosecution of an official is in the public interest, the same may not be true for the prosecution of the bribe-giver. Second, the guideline does not expressly cover foreign (as opposed to domestic) bribery. Many of the officials listed in the Anti-Corruption Act are also clearly Estonian – not foreign – officials. This conclusion is reinforced by the Estonian government's focus on domestic bribery and neglect of foreign bribery in its anti-corruption policy and efforts. It is thus arguable that domestic bribery prosecutions are more likely to be in the public interest than foreign bribery. For these reasons, the examiners believe that it may be prudent to monitor the application of Section 202 in foreign bribery cases.

Commentary

The lead examiners recommend that the Working Group monitor the application of Section 202 in foreign bribery cases as practice develops.

(iii) Co-operating Offenders

100. Under Section 205 CPC, a prosecutor may terminate proceedings if (a) an offender has significantly facilitated the ascertaining of facts relating to an offence which is important from the point of view of public interest in the proceedings, and (b) without the offender's assistance, detection of the offence and collection of evidence would have been precluded or especially complicated. Proceedings may be recommenced if the offender stops co-operating or re-offends within three years. A decision to terminate does not require the approval of a court or a superior, nor does the Code provide avenues for review. There are no guidelines on the application of the provision.

101. One issue is whether Section 205 can be used to terminate proceedings against an Estonian briber who co-operates with foreign authorities in the prosecution of a bribed official. In the absence of guidelines on the provision's application, there has been some confusion over this issue. Estonia first stated in the negative because it would not have an interest in prosecuting a foreign official. At the on-site visit, Estonia stated that the provision could apply to "international cases". In the lead examiners' view, the wording of the provision is indeed sufficiently broad to apply to an Estonian briber who co-operates with foreign authorities.

102. The Working Group has noted in other Phase 2 examinations that provisions of this nature must be applied judiciously. This measure can help solve foreign bribery cases, particularly those involving the upper echelons of criminal organisations. At the same time, concepts such as "significantly facilitating the ascertaining of facts" and "complicated detection or collection of evidence" are vague. There are no guidelines, commentaries or *travaux préparatoires* (preparatory works of the legislature) that could assist interpretation. The absence of judicial or internal review further raises questions of accountability and transparency. Estonia maintains that the Convention legally binds its prosecutors and thus prohibits them from considering the factors enumerated in Article 5 and Commentary 27 of the Convention. In the examiners' view, this argument is weakened by the general lack of awareness of the Convention (and thus of Article 5 and Commentary 27). Estonia should accordingly consider taking additional steps to ensure the observance of these provisions of the Convention.

(iv) Plea Bargaining

103. Under Estonian law, the accused and the prosecutor may also plea bargain in foreign bribery cases. Plea bargaining was introduced in Estonia's Criminal Procedural Code to speed up the procedure

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[69] Hence, for example, bribe-taking generally attracts heavier sentences than bribe-giving. See section on Actual Criminal Sanctions Imposed in Practice at p. 46.

and reduce the workload of overburdened courts. It has been used quite frequently over the past few years. A representative of the Estonian judiciary at the on-site visit estimated that as much as 90% of all criminal proceedings in some regions are resolved by plea bargaining. A report noted that in 2002 up to 50% of all criminal cases ended in plea bargaining, with the figure rising to 80% in some regions.[70] More recent statistics provided by Estonia showed that 33% of all criminal cases in 2007 were resolved by plea bargaining, with the figure rising to 57% in the south. For offences related to office (*e.g.* corruption), 75% of cases ended with plea bargains.

104. Plea bargaining raises concerns similar to those for the termination of proceedings against co-operating offenders. The process involves negotiations between the offender and the prosecutor that may cover, among other things, the facts of the case, the legal assessment of the criminal offence, the nature and extent of the damage, the type and severity of the punishment, and the property subject to confiscation. The CPC contains no guidance on how prosecutors should conduct plea negotiations, such as what factors to consider or the amount of discount to be applied to a sentence. The Supreme Court has listed some factors which relate largely to the personal circumstances of the accused. The Prosecutors' Office has issued guidelines on plea bargaining that address drug cases only. Estonian prosecutors stated that, in practice, prosecutors in corruption cases will likely take into account the size of the contract, the company, and the bribe. Nevertheless, the prosecutor ultimately retains wide discretion on whether to plea bargain and how much discount should be given to the sanctions. In sum, there is little control on how plea bargaining operates. Coupled with the prevalence of the practice, it may be important to take measures to ensure that Article 5 and Commentary 27 of the Convention are respected.

Commentary

The lead examiners recommend that Estonia take steps to ensure that the provision of immunity to co-operating offenders and plea bargaining do not impede the effective enforcement of the foreign bribery offence. They also recommend that the Working Group monitor the application of plea bargaining and the provision of immunity to co-operating offenders in foreign bribery cases.

(g) Prosecutorial Independence

105. Extraneous political and economic factors can also affect foreign bribery cases if a prosecutor is not sufficiently protected from external pressure and influence. Estonian statutes specifically provide for prosecutorial independence. Section 2(2) of the POA states that "prosecutors shall be independent in the performance of their duties and act only pursuant to law and according to their conscience." There is a similar provision in Section 30(2) of the Criminal Procedure Code (CPC). However, it should be noted that the Constitution guarantees the independence of institutions such as the courts or the state auditor, but not that of the prosecutor.

106. Despite these statutory provisions, the executive government nevertheless retains some influence over the Prosecutor's Office. The government appoints the Chief Public Prosecutor (CPP) on the proposal of the Minister of Justice and after considering the opinion of parliament's Legal Affairs Committee.[71] The Minister of Justice determines the number of prosecutors in each prosecutor's office.[72] He also has

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[70] Eurojustice (2004), *Country Report: Estonia*, Chap. II, www.eurojustice.org/member_states/estonia/countryreport /2770.

[71] Prosecutor's Office Act, Section 16.

[72] Prosecutor's Office Act, Section 5^1.

budgetary control.[73] Further, he has supervisory control over the Prosecutor's Office, though the Prosecutor's Office Act expressly excludes such control from *pre-trial* criminal proceedings.[74] At the *trial* stage, prosecutors must fall back on the general provision on prosecutorial independence (Section 30(2) CPC) to resist Ministerial interference.

107. There are other situations in which prosecutorial independence could be limited. Senior prosecutors can control their subordinates in specific prosecutions.[75] A higher ranking prosecutor may "revoke an unlawful or unjustified ruling, order or demand of a prosecutor".[76] Furthermore, the CPP or a Leading Prosecutor may, "with good reason," substitute a subordinate prosecutor in a criminal proceeding with another prosecutor.[77] A decision to substitute is final and not reviewable. There are no guidelines or commentaries to help interpret the rather vague and broad concepts of "unjustified ruling, order or demand" and "with good reason".

108. The examiners' concern is that this legislative framework was recently applied in practice. In 2004, the CPP exercised his power of substitution to take over and then terminate a prosecution against a former Minister of Finance, ostensibly because there were no grounds to proceed.[78] Participants at the on-site visit referred to another case in which the CPP refused to appeal the acquittal of another Minister. Estonian officials pointed out that the CPP who made these decisions is no longer in office, but that is not sufficient to alleviate the examiners' concerns.

109. In the examiners' view, Estonia should do more to ensure prosecutorial independence, given the recent historical context, the rather broad statutory language, and the lack of constitutional protection for the prosecutor's office. Apart from strengthening the legislation, Estonia could consider providing further guidance on the exercise of control over prosecutors. Requiring written reasons for replacing or overruling a prosecutor and making them publicly available could also add transparency and accountability.

Commentary

The lead examiners have concerns that decisions to substitute prosecutors in foreign bribery cases may be influenced by the factors described in Article 5 and Commentary 27 of the Convention. They therefore recommend that Estonia take steps to ensure prosecutorial independence in foreign bribery cases. They also recommend that the Working Group monitor this issue as practice develops.

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73 Prosecutors at the on-site visit stated that budgetary resources and salary levels in recent years have been good.

74 Prosecutor's Office Act, Section 9(1).

75 This is in addition to the general, supervisory power by the CPP and LPs over the Prosecutor's Office and DPOs respectively (Prosecutor's Office Act, Sections 4^1(2), 9(2); Criminal Procedure Code, Section 213(5)).

76 Criminal Procedure Code, Section 213(6).

77 Prosecutor's Office Act, Section 10.

78 Eurojustice (2004), *Country Report: Estonia*, Chapter II, www.eurojustice.org/member_states/estonia/country_ report/2770.

(h) Investigative Techniques and Bank Secrecy

(i) Search and Seizure, Including Bank Information

110. Pre-trial search and seizure is governed by several provisions in the CPC. Section 91 allows the search of evidence or an object liable to confiscation upon a prosecutor's order or a court ruling. Under Section 142, property may also be seized pursuant to a court order requested by a prosecutor to secure a civil action, confiscation or fine. Additional provisions may apply to seizure of specific things, *e.g.* postal or telegraph communications under Section 89. The police, a prosecutor, or a court may require a financial institution to provide information that is subject to bank secrecy.[79] During the on-site visit, Estonian investigators reported good co-operation by financial institutions in this regard.

(ii) Special Investigative Techniques

111. In addition to the above measures, more sophisticated techniques may be used to gather evidence in transnational bribery cases. The CPC offers various special investigative measures ranging from surveillance and examination of mail to interception of telephone and email, undercover police operations, and covert entry into a building or dwelling. Barring exigent circumstances, the techniques may be used only with the prior authorisation of a prosecutor and, in some cases, a judge.

112. Special investigative techniques cannot be used in all foreign bribery investigations. Special techniques are available only for investigating offences with a maximum punishment of at least three years' imprisonment.[80] The offences of *giving a bribe* and *giving a gratuity*, which cover most acts of foreign bribery, meet this requirement. However, special techniques are not available for the offences of *arranging a bribe* or *arranging a gratuity*. Under Estonian law, when a principal bribes an official through an intermediary, the *intermediary* is guilty of arranging the bribe (while the principal is guilty of giving the bribe).[81] The unavailability of special investigative techniques for the offences of arranging bribes and gratuities could seriously handicap investigations of intermediaries.

113. Case law in the near future may partly alleviate this problem. Special techniques arguably could be used against an intermediary if the investigation as a whole also encompasses the principal briber. (The principal briber commits the offence of giving a bribe or gratuity, which is eligible for special techniques.) The Estonian Supreme Court was considering this very argument at the time of this report. Yet even with a favourable ruling, special techniques will likely remain unavailable against an intermediary when Estonian authorities are *not* investigating the principal briber. Such a situation could arise if a non-Estonian businessman hires an Estonian intermediary to bribe a non-Estonian official. Given this uncertainty, the

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79 Credit Institutions Act, Section 88.

80 Special investigative techniques are only available for investigating first degree offences as well as second degree offences with a maximum punishment of at least three years' imprisonment (Criminal Procedure Code, Sections 110-122). A first degree offence is one whose maximum punishment is more than five years' imprisonment, life imprisonment or compulsory dissolution. A second degree offence is punishable by up to five years' imprisonment or a pecuniary punishment (Penal Code, Section 4). According to the English translation of Section 110 of the CPC supplied by Estonia, special techniques are available for offences "in the second degree for which at least up to three years' imprisonment is prescribed as punishment." Taken literally, this would mean that special techniques can be used only for second degree offences that provide a minimum punishment of three years' imprisonment. However, Estonian officials explained that the correct translation should be that special techniques are available for second degree offences whose maximum punishment is at least three years' imprisonment.

81 For a discussion of the differences between giving vs. arranging a bribe or gratuity, see Section C.2 The Offence of Foreign Bribery at p. 28.

examiners believe that Estonia should amend its legislation to make special techniques clearly available in all foreign bribery cases.

Commentary

The lead examiners welcome the availability of the range of special techniques available for investigating the offences of giving a bribe and giving a gratuity. They recommend that Estonia amend its legislation to make special investigative techniques available for all cases of foreign bribery where appropriate.

(i) Mutual Legal Assistance and Extradition

114. Chapter 19 of the Criminal Procedure Code (CPC) governs extradition and mutual legal assistance (MLA) in Estonia. The provisions of the Code apply subject to an applicable international treaty or generally recognised principles of international law.

115. Estonia has extradition and MLA arrangements with most of its major trade and investment partners. For extradition, Estonia is party to the European Convention on Extradition (including both Additional Protocols), OECD Convention (which provides a treaty-basis for extradition in foreign bribery cases), a multilateral treaty with Lithuania and Latvia, and a bilateral treaty with the United States. Estonia may also rely upon the European Arrest Warrant. For MLA, Estonia is party to the European Convention on Mutual Assistance in Criminal Matters (including both Additional Protocols), a multilateral treaty with Lithuania and Latvia, and bilateral treaties with Poland, the Russian Federation, Ukraine, and the United States. Requests for seizure and confiscation of assets may be made under the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. In addition, Estonia may provide extradition and MLA in the absence of a treaty. Estonian authorities stated that incoming requests may be in Estonian or English. Urgent requests may also be in Finnish or German.[82]

116. Estonia will refuse extradition and MLA where a request endangers its “security, public order or other essential interests” (CPC Section 436(1)1)). Such grounds have apparently never been used to refuse a request. Estonian officials stated that this provision would not be used to refuse a request in a case that involves sensitive markets or prominent high-level foreign politicians since the Convention takes precedence over the CPC.[83] Yet, in the examiners’ view, given the low level of awareness of the Convention in Estonia, there is no guarantee that Section 436(1)1) would be applied without regard to the factors listed in Article 5 of the Convention.

117. Apart from the issue of essential interests, the examiners did not identify any fundamental problems with the law, procedure, or the quality and timeliness of responses to MLA and extradition requests from abroad. Statistics show that Estonia is fairly active in international co-operation. From 2001-2006, there was an annual average of 283 and 186 incoming and outgoing MLA requests respectively, and 21 and 28 incoming and outgoing extradition requests respectively. It takes an average of three months to execute a request. Estonia has not rejected any requests, though in some cases it had to seek additional information from the requesting state. As for outgoing requests, Estonia has had difficulties securing extradition and MLA from a neighbouring non-EU country with which it has significant trade and investment ties. Estonian officials stated that the problems are particularly acute when a suspect in the case is a national of that country, in which case Estonia receives no co-operation whatsoever.

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82 See also Criminal Procedure Code, Sections 458(3) and 460(2)2).

83 See Section C.1(f)(i) Termination of Proceedings by the Prosecutor – Offences Committed Abroad at p. 26.

118. Estonia may wish to ensure that it is more proactive in spontaneously providing information on foreign bribery cases to other Parties to the Convention. In a 2007 case, Estonia prosecuted an employee of an Estonian subsidiary of a Finnish company for offering to bribe an Estonian official. Estonian authorities found that there was insufficient evidence that the Finnish subsidiary bribed the official. Accordingly, they did not advise their Finnish counterparts of the allegations. In the examiners' view, it may have been advisable for Estonian authorities to do so. Other Parties to the Convention have an interest in prosecuting the briber. They may decide to prosecute even if Estonia does not, since they may have additional evidence or different standards of liability (*e.g.* negligent failure to supervise). Spontaneous provision of information could therefore assist the overall implementation the Convention. Furthermore, Estonian authorities confirmed that there are no general legal impediments for them to provide information to foreign authorities under these circumstances.

Commentary

The lead examiners are of the opinion that Estonia has, in general, a developed and responsive system to deal with extradition and MLA requests. However, they recommend that Estonia transmit as soon as possible information in foreign bribery cases to the competent authorities in foreign states whenever such information could be relevant to an investigation in that state. They also recommend that the Working Group monitor whether Estonia considers the factors listed in Article 5 and Commentary 27 of the Convention when denying extradition or MLA.

2. The Offence of Foreign Bribery

119. During Phase 1, the Working Group noted a number of deficiencies in Estonia's foreign bribery offences. Estonia has not made significant legislative changes since then. Accordingly, most of the shortcomings identified by the Working Group remain.

(a) Overview of Estonia's Foreign Bribery Offences

120. Bribery of foreign public officials is covered by two offences in the Penal Code. The offence of giving a *gratuity* (Section 297) deals with paying an official to perform a *lawful* act or omission. Payment in exchange for an *unlawful* act or omission is covered by the offence of giving a *bribe* (Section 298). Failure to exercise discretion impartially is an unlawful act, according to Estonian case law.

121. Additional elements of the offences are found in other sections of the Penal Code.[84] Section 288 defines a *foreign public official*. Sections 293 and 294 add that gratuities and bribes may include *property or other benefits*. The offences cover payments made in exchange for acts or omissions already performed, and for those reasonably believed will be performed. The bribed official must also "take advantage of his/her official position."

122. The interpretation of the Estonian foreign bribery offence may draw upon the OECD Convention and Estonia's jurisprudence on domestic bribery. The *travaux préparatoires* on the bribe-giving and gratuity-giving offences incorporate the Convention's Commentaries. The Commentaries are thus a primary legal source for interpreting the legislation.[85] As well, the domestic and foreign versions of the offences share many elements. Court decisions and academic commentary on Estonian domestic bribery offences may therefore be useful in foreign bribery cases also.

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[84] The offences of accepting a bribe and accepting a gratuity define additional elements based on the concept of "mirror offences". For a discussion of the concept, see the *Phase 1 Report: Estonia* at para. 7.

[85] *Phase 1 Report: Estonia*, para. 4.

(b) Non-Autonomous Definition of the Foreign Bribery Offence

123. The OECD Convention requires Parties to enact "autonomous" definitions of the foreign bribery offence.[86] In other words, a Party's foreign bribery offence must not require proof of foreign law, *e.g.* the law of the country of the bribed official. An autonomous definition is desirable for at least two reasons. First, shortcomings in the law of a foreign country would not lead to deficiencies in a Party's foreign bribery offence. Second, proof of foreign law could be difficult, especially if the foreign country is uncooperative.

124. In Phase 1, the Working Group found that Estonia's foreign bribery offence was not autonomous in three respects. First, under Section 288 of the Penal Code, a person is a foreign public official if he/she would be considered an Estonian official had he/she worked for an equivalent body in Estonia. If there is no equivalent body in Estonia, then the person is a foreign public official only if he/she performs public functions under the laws of the foreign country.[87] Second, for liability to arise, the bribed official must take advantage of his/her official position in performing the act or omission requested by the briber. Proof of this element requires an examination of foreign laws, instructions and documents that describe the foreign official's duties.[88] Third, as noted above, whether the crime in question is giving a bribe or giving a gratuity depends on the lawfulness of the bribed official's act or omission. Lawfulness is determined according to foreign law.[89] Estonia responded to these concerns by pointing out that foreign law can be proven via various means, *e.g.* mutual legal assistance or witness testimony.[90]

125. Nevertheless, the Working Group expressed concerns in the Phase 1 Report and invited Estonia to consider remedying the problem by amending the legislation.[91] Estonia has not done so. At the on-site visit, Estonian officials indicated that the non-autonomous definition was not an issue. No problems have emerged because there have been no actual foreign bribery cases in Estonia. But in the examiners' view, the absence of cases cannot justify a foreign bribery offence that plainly falls short of the requirements of the Convention.

Commentary

The lead examiners recommend that Estonia amend its Penal Code to define an autonomous foreign bribery offence that fully complies with the requirements of the Convention.

(c) Definition of a Foreign Public Official

126. The Phase 1 Report raised concerns about several aspects of the definition of a foreign public official in Estonia's Penal Code. The Code defines a foreign public official as a person: (i) who holds office in a state or local government agency or body, or in a legal person in public (Section 288(1)). This was referred to as the "official position" criterion in Phase 1; (ii) to whom administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets, or functions of a representative of state authority have been assigned (Section 288(1)). This was referred to as the

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86 See Article 1(1) and Commentary 3 of the Convention. This general principle is subject to exceptions such as a defence that bribery is permitted or required by foreign law (Commentary 8).

87 *Phase 1 Report: Estonia*, paras. 22 and 185.

88 *Ibid.* paras. 37 and 189.

89 *Ibid.* paras. 42 and 189.

90 *Ibid.* para. 190.

91 *Ibid.* paras. 190-1.

"functional" criterion in Phase 1; and (iii) who works in a foreign state or an international organisation (Section 288(3)).[92] The person in question must meet all three criteria.

(i) The "Official Position" Criterion – Cross-References to Other Legislation

127. The first concern raised in the Phase 1 Report related to cross-references to other legislation. The interpretation of the "official position" criterion requires examining several statutes beyond the Penal Code. For example, determining the state and local government agencies whose officials are covered by the Penal Code requires consulting the Public Service Act.[93] The Anti-Corruption Act (ACA) is used to interpret the terms "office" and "official position".[94] Furthermore, the Penal Code and the ACA contain separate and different definitions of an "official". Legislators, judges and board members of state-owned companies are deemed to be officials under both the Penal Code and the ACA, despite being expressly mentioned only in the latter.[95]

128. The meaning of a state or local government "body" in the Penal Code also requires external references. A state or local government "body" refers to an "administrative authority" described in Section 8(1) of the Administrative Procedure Act (APA). A "body" under the Penal Code thus means "any agency, body or official which is authorised to perform public administration duties by an Act, regulation or a contract under public law." The concept is said to include persons outside formal state agencies who are given public functions (*e.g.* via contract). The definition of a "body" is therefore functional in nature.[96]

129. This approach to interpreting the "official position" criterion raises two issues. First, the Working Group noted in Phase 1 that the reliance on cross-references to other statutes may be too complex in transnational bribery cases. The Group therefore decided that this issue would benefit from further discussion in Phase 2.[97] Second, the examiners find that cross-referencing can create uncertainty and inconsistencies. For instance, a state or local government "body" means an "administrative authority", which is in turn defined to include "bodies" that perform public functions. The definition is thus circular. As well, the definition of an "official" in the ACA applies to the Penal Code, even though the Code has its own definition and does not refer to the ACA. Furthermore, the definition of a "body" from the APA is functional in nature. This causes overlap between the "official position" and "functional" criteria in the Penal Code's definition of an "official". Estonian officials, however, assert that the concept of a "body" has not resulted in any serious difficulties in practice.

130. The issue of cross-referencing remains unresolved because Estonia has not amended these provisions since Phase 1. The Estonian officials at the on-site visit do not believe this to be a problem because the corruption offences in many other countries take a similar approach. The Working Group has taken a different view, noting that extensive cross-referencing could impact the enforcement and visibility of the foreign bribery offence, and hence the issue merits further monitoring and evaluation.[98]

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92 *Ibid.* paras. 24-25 and 30. Estonia amended the definition of "officials" after Phase 1. In essence, the definition was enlarged to include certain persons in the private sector. The amendments therefore do not affect the issues discussed in this report.

93 *Ibid.* para. 26.

94 *Ibid.* para. 25.

95 *Ibid.* para. 27.

96 *Ibid.* para. 27.

97 *Ibid.* paras. 24 and 186.

98 *Mid-term Study of Phase 2 Reports*, paras. 15 and 562.

Commentary

The lead examiners recommend that the Working Group monitor the impact of cross-references between the foreign bribery offence and other Estonian statutes on the enforcement and visibility of the offence.

(ii) The "Functional" Criterion

131. The lead examiners believe that the Working Group's concerns in Phase 1 over the "functional" criterion have been resolved. The Estonian Penal Code's definition of an official covers only persons with "administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets, or functions of a representative of state authority." Given this wording, the Working Group was concerned that the definition covered only officials of relatively senior rank.[99] In Phase 2, Estonia referred to case law concerning bribery of junior officials, such as line level traffic police officers. Another case covered bribery of officials who prepare the conditions of tender but do not have the power to decide which tender to accept.[100]

132. The lead examiners are concerned, however, over whether the Penal Code covers bribery of legislators. The "functional" criterion does not expressly include legislative functions.[101] An Estonian prosecutor at the on-site visit stated that legislators are covered because they perform managerial functions, but the examiners do not find this convincing. A representative of the Estonian judiciary added that she personally would not interpret the current definition of public officials to include legislators. There is also no case law involving bribery of (foreign or domestic) legislators under the Penal Code. For these reasons, the lead examiners conclude that Estonia's definition of a foreign official does not cover foreign legislators.

Commentary

The lead examiners recommend that Estonia amend Section 288(1) of the Penal Code to expressly cover bribery of foreign public officials who perform legislative functions.

(iii) Working in a Foreign State or International Organisation

133. The offences of giving bribes and gratuities apply to foreign officials by reason of Section 288(3). The provision stipulates that the definition of officials "extends to officials working *in* foreign states or international organisations." Taken literally, the provision would not cover bribery of non-Estonian public officials who are in Estonia (and therefore not in a foreign state). Estonian officials at the on-site visit clarified that the correct translation should be "officials working *for* foreign states".

(d) Third Party Beneficiaries

134. Case law has resolved doubts that were raised during Phase 1 over whether Estonia's foreign bribery offence covers third party beneficiaries. The OECD Convention covers bribes offered, promised or given to a foreign public official, whether for that official or a third party (Article 1(1)). Estonia's foreign

99 *Phase 1 Report: Estonia*, paras. 30-32 and 186.

100 Decision 3-1-1-68-05 of the Estonian Supreme Court.

101 The "official position" criterion covers legislators by cross-referencing the Anti-Corruption Act (see previous section). However, the "official position" and the "functional" criteria are conjunctive. In other words, legislators are foreign officials only if they are covered under both criteria.

bribery offence does not contain language to the same effect.[102] Estonia has provided case law which shows that the offence applies to bribes benefitting a public official's family members. A conviction can be sustained if there is a connection between the official and the beneficiary. This can be established even if the beneficiary is a charity, political party or legal person.

(e) An Official's Act or Omission in Relation to the Performance of Official Duties

135. The OECD Convention covers bribes given to an official in order that the official act or refrain from acting "in relation to the performance of official duties" (Article 1(1)). This includes any use of the public official's position, whether or not within the official's authorised competence (Article 1(4)). This definition covers a person who bribes a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to the briber (Commentary 19).

136. During Phase 1, the Working Group found that Estonia's foreign bribery offence was narrower than the Convention in this regard. The offence did not cover an official who uses his/her office outside his/her competence as in the example described in Article 1(4) and Commentary 19. At the time of Phase 1, Estonia's parliament was considering a bill to criminalise trading in influence which would apparently remedy this deficiency.[103]

137. The offence of influence peddling came into force in 2006. Section 298^1 of the Penal Code reads:

> 298^1. (1) A person who consents to a promise of property or other benefits or who accepts property or other benefits in return for illegal use by the person of his or her actual or presumed influence with the objective of achieving a situation where *an official performing public administration duties* commits an act or omission in the interests of the person handing over the property or giving the benefit, or a third person shall be punished by a pecuniary punishment or by up to 3 years' imprisonment. [Emphasis added]

138. This provision does not completely meet the requirements of the Convention. The new offence indeed covers the example described in Commentary 19, namely, bribing a foreign official to influence *another official* to award a contract to the briber. However, the Working Group has pointed out in another Phase 2 examination that the Convention is broader. Article 1 also covers bribery of a foreign official to act outside his/her competence and influence *a private individual or company* to award a contract to the briber. On its face, Estonia's influence peddling offence does not cover this situation because the person who is influenced must be "an official performing public administration duties". An Estonian prosecutor at the on-site visit confirmed that this is the case. This results in a significant loophole, since public officials in many countries wield considerable influence over private businesses, and Estonian individuals could bribe such officials with impunity.

Commentary

The lead examiners recommend that Estonia ensure that it covers all acts in relation to the performance of an official's duties, including any use of the public official's position, whether or not within the official's authorised competence.

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102 *Phase 1 Report: Estonia*, paras. 33 and 188.

103 *Ibid.* paras. 40-41.

(f) Bribery through Intermediaries - The Offence of Arranging a Bribe or Gratuity

139. Under Estonian law, in addition to giving bribes and gratuities, there are additional offences of *arranging* bribes and gratuities (Penal Code Sections 295 and 296). During Phase 1, Estonia stated that if a person bribes a foreign official through an intermediary, then the intermediary is guilty of arranging a bribe. In practice, the offence had never been used up till that time.[104] But in theory, if an Estonian businessman used an Estonian intermediary to bribe a foreign official, the latter would be guilty of arranging a bribe or gratuity.

140. Case law since Phase 1 has confirmed somewhat Estonia's position. In Judgment 2-1/88/2005, a tax official solicited a bribe from a businessman. The official's girlfriend acted as an intermediary for the official, negotiating on the official's behalf and receiving the bribe money. The official was ultimately convicted of attempting to take a bribe, while his girlfriend was found guilty of attempting to arrange a bribe.[105]

(g) Proposed Amendments to the Foreign Bribery Offence

141. After the on-site visit, Estonia prepared a bill to amend the foreign bribery offence in the Penal Code. If adopted, the definition of foreign public officials would no longer cross reference other statutes and would include foreign officials who perform legislative functions. Third party beneficiaries would also be expressly covered. Parliament was discussing the bill at the time of this report. The examiners welcome these developments. However, they note that the application in practice of the amended laws would merit further assessment.

3. Liability of Legal Persons

142. Article 14 of the Penal Code provides liability against legal persons for criminal offences, including foreign bribery. A legal person is held responsible for an act which is committed by a body or senior official thereof in the interest of the legal person. Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. This provision gives rise to three issues: First, whose acts may give rise to liability, *i.e.* what is the meaning of a "body or senior official"? Second, what types of acts may give rise to liability, *i.e.* what is the nature of the requisite act? Third, what does "in the interest of the legal person" mean?

143. In Phase 1, the Working Group identified a number of shortcomings in Estonia's scheme for imposing criminal liability against legal persons. These include the identification theory of corporate liability, the requirement that a body or senior official have knowledge of the specific act of bribery, the exclusion of negligent conduct, and the necessity that a body or senior official act in the interest of the legal person. Estonia agreed that "these issues raise problems in Estonia, and informed the Working Group that the Estonian Ministry of Justice may suggest amendments to its Parliament, based on a thorough analysis of the issues." The Working Group welcomed Estonia's position and encouraged Estonia to change its legislation.[106]

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[104] *Phase 1 Report: Estonia*, para. 46.

[105] Estonia stated that the accused were convicted of attempt rather than full offences because the bribe was eventually delivered by undercover police officers. Under Estonian law, this amounts to attempt, not the full offence.

[106] *Phase 1 Report: Estonia*, paras. 194-195.

144. As will be seen below, Estonia had taken no action by the time of the on-site visit to address the Working Group's concerns. At the on-site visit, Estonian officials stated that a study planned for 2007 was postponed to give precedence to more important tasks. Liability of legal persons was considered less significant because of the low level of practice in the area. A study of liability of legal persons is now envisaged for the coming years, but no definite time frame was provided. In the meantime, all of the deficiencies identified in Phase 1 subsist.

(a) Whose Acts May Give Rise to Liability – The Meaning of a "Body or Senior Official"

145. In Phase 1, the Working Group was concerned that the type of natural persons whose acts can lead to corporate liability in Estonia was too narrow. Liability against legal persons arises only if there is an act that is committed by "a body or senior official" of the legal person. This requires a separate consideration of what amounts to a "body" and a "senior official".

146. The "body" of a legal person is defined relatively narrowly. A legal person's bodies are mainly the general meeting and the management board.[107] Specific laws may provide additional bodies, the most common being a supervisory board.[108] It appears from the Phase 1 Report that additional corporate organs such as audit committees do not qualify.

147. The definition of a "senior official" is more fluid. The Phase 1 report states that the concept covers persons who have "regulating or decision making power within the company that identifies him/her with the legal person and its course of action." Estonian courts have held that this includes executives who "make independent decisions in specific areas and … direct the will of the legal person". However, the concept does not include a person who has "a power of control over the legal person but who does not work for the company", such as a controlling shareholder.[109]

148. In Phase 2, Estonian officials defined a "senior official" slightly differently. A senior official is a person who has the power to make final decisions that bind the legal person. This is determined on a case-by-case basis. But generally speaking, regional managers of corporations would be considered "senior officials", while engineers or sales representatives would not. Case law supports perhaps an even narrower view. In all of the cases in which legal persons have been convicted of bribery, a member of the management board committed the crime.

149. In addition, it is necessary to at least *identify* (but not convict) a natural person constituting the "body or senior official" who is responsible for the offence. Failure to do so precludes liability against the legal person. The only exception is when the body in question decides to commit the crime by secret voting, thus making it impossible to determine who voted for the decision. Estonian officials added that investigators can easily ascertain the identity of management and supervisory board members by consulting company registers.[110]

150. The concept of a "body or senior official" is essentially the identification theory of corporate liability that has been commented on by the Working Group on other occasions.[111] Under this theory, the corporation is liable only for the acts and intent of one or more of the natural persons who constitute the

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107 Section 31 of the Civil Code Act.

108 *Phase 1 Report: Estonia*, para. 59.

109 *Ibid.* para. 60.

110 *Ibid.* paras. 61 and 65.

111 For a more detailed discussion of this subject, see the *Mid-term Study of Phase 2 Reports*, paras. 136-144.

company's "directing mind". Liability is likely to arise due to acts of only senior management, such as board members. Such a scheme is therefore unacceptable for large companies with decentralised, international operations. It is also problematic because the decision to bribe may often be taken at the lower level of large enterprises. Moreover, the theory requires imputing the guilty mind state to a single natural person. It does not acknowledge a corporate criminal mind by combining the knowledge or mental states of different people. This makes liability even less likely, since large multinational enterprises generally have complex and distributed decision-making structures and bodies.[112]

151. After the on-site visit, Estonia drafted a bill to amend the provisions in the Penal Code on liability of legal persons. The proposed amendment would impose criminal liability against legal persons for acts performed by "a body, a member of a body, senior official, or a competent representative" of the legal person. As with the other legislative amendments discussed above, Estonia's parliament was considering the bill at the time of this report. In the examiners' view, if the amendments were passed, then the application in practice of the new provisions should be further assessed. This is especially so since the term "competent representative" is not defined in Estonian jurisprudence. Estonia also indicated that there would be no further amendments to corporate criminal liability until the above-mentioned study is concluded in the coming years.

(b) What Acts May Give Rise to Liability

152. In Phase 1, the Working Group was also concerned that only *intentional* conduct by a body or senior official can lead to liability against a legal person. As with almost all countries, Estonian criminal law only punishes *intentional* criminal conduct. In the context of legal persons, culpability arises only when a body or senior person of the legal person engages in intentional conduct. Thus, liability clearly arises when a body or senior person directly bribes a foreign official. In addition, a body or senior official who directs or authorises a subordinate to bribe a foreign official is a principal offender or an abettor "depending on the intensity of his/her involvement."[113] The legal person will likely be liable, though there is no case law yet to support this proposition.

153. Estonia also stated at the on-site visit that, if a senior official tells a subordinate to "do what it takes to get a contract", then liability results only if the official "foresees the occurrence of circumstances which constitute the necessary elements of an offence and tacitly accepts that such circumstances may occur." Liability is also questionable if a body or senior official knowingly fails to prevent a person from bribing. In sum, there must be proof that a body or senior official had knowledge of the specific act of bribery.

154. Estonian officials further stated that negligent conduct by a body or senior official is not sufficient to attract liability. A legal person is therefore not liable if bribery occurred because senior management negligently failed to adequately supervise its subordinates. The Working Group noted in Phase 1 that this was problematic.[114] The bill amending the Penal Code described above does not deal with this issue.

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112 The collective knowledge doctrine imputes to a corporation the sum knowledge of all or some of its employees for the purpose of creating the necessary guilty intent for the corporation. The doctrine prevents corporations from evading liability by compartmentalising and dividing employee duties: Fisher (2004), "Corporate Criminal Liability", 41 Am. Crim. L. Rev. 377.

113 Estonia's Response to the Phase 2 Questionnaire.

114 *Phase 1 Report: Estonia*, paras. 61 and 192-195.

(c) An Act Committed "in the Interest of the Legal Person"

155. The third requirement for liability is that a senior officer or body of a legal person must commit an act that is "in the interest of the legal person". According to Estonia in Phase 1, this means that the offender must commit the crime with the legal person's benefit in mind. It does not require, however, that a legal person actually benefit from the act. Nor must the act be "strictly connected" to the legal person's area of business.[115]

156. Such a requirement could result in a loophole, as the Working Group has observed in other Phase 2 examinations. A company in a business conglomerate could bribe a foreign official for the benefit of another company in the conglomerate. Neither company could be punished because the act and the benefit cannot be attributed to the same legal person.[116] Estonian officials confirmed that this would be the case in Estonia. Mere membership in the same conglomerate is not sufficient; the act of a body or senior official must benefit the legal person with whom he/she is affiliated. There is no case law in Estonia on this point. The bill amending the Penal Code described above also does not deal with this issue.

Commentary

The lead examiners recommend that Estonia amend its Penal Code to broaden the criteria for the liability of legal persons in order to make prosecution of legal persons that commit foreign bribery more likely and more effective.

4. Jurisdiction

(a) Territorial Jurisdiction

157. Estonia's Penal Code provides that an act is deemed to be committed at the place where the person acted; where the person was legally required to act; where the consequence constituting a necessary element of the offence occurred; or where the person expected such a consequence to occur. A phone call or e-mail from Estonia offering or promising a bribe is sufficient to attract territorial jurisdiction.[117]

(b) Nationality Jurisdiction

158. Estonia requires dual criminality in order to invoke nationality jurisdiction against natural persons, *i.e.* the subject conduct must be a crime in the place where it occurred (Penal Code, Subsection 7(1)). Hence, nationality jurisdiction cannot be invoked if an Estonian national bribes an official of foreign country A while in foreign country B, and foreign bribery is not an offence in country B. This led the Working Group to voice concerns in Phase 1 and to decide that this issue should be horizontally reviewed in Phase 2.[118]

159. As well, Estonia cannot exercise nationality jurisdiction over legal persons. Such jurisdiction applies only to Estonian citizens and hence only natural persons (Penal Code, Subsection 7(1)). For this reason, it was noted in Phase 1 that a legal person can be sanctioned for foreign bribery committed abroad

115 *Ibid.* para. 57.

116 See OECD (2006), *Mid-term Study of Phase 2 Reports*, paras. 146-148.

117 *Phase 1 Report: Estonia*, para. 90-91.

118 *Ibid.* paras. 93, 97 and 196.

only if an Estonian body or senior official of the legal person committed the crime. This results in a significant loophole, since Estonian companies can use non-Estonian individuals to bribe foreign officials with impunity. Estonia acknowledged this concern and stated that it would study the issue and possibly suggest legislative amendments to parliament.[119]

160. The bill amending the Penal Code that is before parliament addresses these issues. If passed, the bill would eliminate the dual criminality requirement for nationality jurisdiction over natural persons and create nationality jurisdiction over legal persons. The new provisions, however, would apply only to foreign bribery and not other offences. The examiners welcome these developments but they again note the need to assess these provisions' application in practice after their entry into force.

(c) Universal Jurisdiction

161. Estonia states that it is debatable whether it can exercise universal jurisdiction to prosecute foreign bribery. Section 8 of the Penal Code provides jurisdiction to prosecute an act that is punishable because of a binding international agreement, regardless of where the act occurred. In Phase 1, Estonia suggested that the provision could apply to foreign bribery cases.[120] In Phase 2, some Estonian officials stated that this was unlikely. In the absence of relevant case law, it remains doubtful whether universal jurisdiction would apply to foreign bribery cases.

Commentary

The lead examiners recommend that Estonia establish nationality jurisdiction to prosecute legal persons for foreign bribery. They also recommend that the Working Group monitor the impact of (a) the absence of nationality jurisdiction to prosecute legal persons for foreign bribery, and (b) the dual criminality requirement on nationality jurisdiction to prosecute natural persons for foreign bribery.

5. Statute of Limitations

162. Some provisions concerning the limitation period for foreign bribery have been amended since Phase 1. The length of the period has not changed. For giving or arranging a bribe or a gratuity, it remains at five years from the commission of the offence to the date of conviction and ten for aggravated offences. Under the new provisions, the period may be interrupted by the performance of certain procedural acts or if an accused absconds. When a period is interrupted, it will run again from the beginning, *i.e.* another five years in the case of foreign bribery (Penal Code, Section 81). There is no longer a 15-year "ultimate" limitation period.

163. The limitation period, however, is not interrupted or suspended when there is an outstanding MLA request. The statute lists the procedural acts that interrupt the limitation period, *e.g.* the application of a preventive measure, the prosecution of the accused, and adjournment of a hearing because an accused fails to appear. Requesting MLA from a foreign country is not on the list. An official at the on-site visit confirmed that an MLA request would not interrupt a limitation period.

164. Estonia could not provide statistics on cases that have been statute-barred. It readily acknowledged that there may be domestic bribery cases in which the limitation period expired. Statistics for 2002-2006 did indicate that the average length of domestic bribery investigations (until a case is taken to court or terminated) was 133 days for cases with one act of bribery and 185 days for cases with multiple

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119 *Ibid.* paras. 95 and 193-194.

120 *Phase 1 Report: Estonia*, para. 41.

acts. An official at the on-site visit added that bribery cases usually do not have problems with limitation periods because special investigative techniques are used. Cases are therefore usually prosecuted while they are fresh.

165. Despite this information, the lead examiners remain somewhat concerned that MLA requests do not interrupt or suspend the limitation period. The statistics on the length of domestic bribery prosecutions suggest that the limitation period generally does not pose any problems to these cases. However, foreign bribery investigations are often more complex. They also frequently require MLA from foreign countries and hence take much longer. The situation is exacerbated by the fact that some of Estonia's trade and investment partners are slow in providing assistance, as noted above.[121] The Working Group has commented on a similar issue in at least one other Phase 2 report.

Commentary

The lead examiners recommend that Estonia consider whether the limitation period for foreign bribery allows adequate time for the investigation and prosecution of this offence, especially in light of the fact that the making of an MLA request does not interrupt or suspend the limitation period. They also recommend that the Working Group monitor this issue as more practice develops.

6. The Offence of Money Laundering

(a) Scope of the Money Laundering Offence

166. A new definition of money laundering, which modifies the scope of eligible predicate offences, entered into force in Estonia in 2008.[122] The offence now expressly covers laundering of proceeds derived from criminal activity that takes place outside Estonia. Estonian officials at the on-site visit stated that dual criminality is necessary, *i.e.* the predicate activity must be a crime at the place where it occurred. Another official stated the opposite view after the on-site visit, however. The amendment also replaced the term "criminal offence" with "criminal activity" in the definition of money laundering. According to Estonian authorities, the purpose was to remove the requirement that the prosecution prove that the money being laundered derived from a specific offence. For example, the Estonian authorities believe that it is now sufficient to prove that the laundered assets were proceeds of bribery generally, as opposed to proceeds of a specific act of bribery. Estonian officials also clarified that there must be proof beyond a reasonable doubt of the criminal activity giving rise to the proceeds, though a conviction for the predicate activity is not necessary *per se*.

167. Regarding the types of activity that amount to laundering, Estonia clarified that self-laundering is an offence, and that there had been seven convictions for self-laundering by the time of the on-site visit. Negligent money laundering is not a crime but a law has been drafted to change this situation. As for the definition of proceeds, Estonia initially stated that the offence does not cover the laundering of instrumentalities of crime, *e.g.* a bribe.[123] Estonia took the contrary position after the on-site visit, though there was no case law in support of this position. Estonia also asserted that the new definition of money laundering covers the laundering of indirect proceeds (*i.e.* the proceeds from proceeds of crime).

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121 See Section C.1(i) Mutual Legal Assistance and Extradition at p. 32.

122 See Annex 3 for the text of the Money Laundering and Terrorist Financing Prevention Act 2007, Section 4.

123 *Phase 1 Report: Estonia*, para. 126.

Commentary

The examiners recommend that Estonia take steps to (a) clarify whether its money laundering offence covers the laundering of a bribe, and (b) ensure that foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred.

(b) Sanctions for Money Laundering

168. Money laundering is punishable by up to five years' imprisonment. The punishment increases to 2-10 years if certain aggravating factors are present. Legal persons may be fined up to EEK 250 million (EUR 16 million) and/or dissolved. The laundered property may also be confiscated (Penal Code, Section 394).

(c) Enforcement of the Money Laundering Offence

169. Money laundering cases are handled by prosecutors in each District Prosecutor's Office who specialise in such prosecutions. In addition, each Office has specialists in financial and economic crime who can assist. If a case concerns both corruption and money laundering, then the prosecutor who has initial conduct of the case will prosecute both offences. The prosecutor will choose and supervise the appropriate police body to conduct the investigation. The measures for co-ordination and division of competence described above apply equally here.[124]

170. Estonia's statistics on enforcement of the money laundering offence are not always consistent, though they do exhibit some general trends. According to statistics from the Ministry of Interior for 2004 to September 2007, there were 26 investigations but only one conviction for money laundering, with the offender receiving 2 years' jail and a 5-year ban on certain activities. Confiscation was ordered in three other money laundering cases but the basis for confiscation was not clear. Statistics from the Financial Intelligence Unit show that 77 money laundering investigations were started from 2003 to September 2007, and that there have been four convictions. No information is available about the sanctions imposed. Statistics provided after the on-site visit indicate that 29 money laundering prosecutions were initiated in 2003-2007 as a result of suspicious transaction reports. According to the Prosecutor's Office, there were 51 registered money laundering offences and one prosecution in 2003-2006. There was no indication of the number of convictions or sanctions imposed. An official stated at the on-site visit that there have been seven convictions for self-laundering.

171. The available statistics, though inconsistent, suggest that the number of convictions for money laundering has been somewhat low so far. The lead examiners are therefore of the opinion that it could be beneficial for Estonia to examine why this is the case. A thorough analysis of the money laundering offence will require Estonia to maintain better statistics that include data on the number of investigations, prosecutions, and sanctions (including confiscation). Also helpful would be statistics on the number of cases in which bribery is the predicate offence.

Commentary

The lead examiners recommend that Estonia maintain more consistent statistics on the enforcement of the money laundering offence. They also recommend that Estonia examine why it has a low number of convictions for money laundering, and that the Working Group monitor this issue as practice develops.

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[124] See Section C.1(d) on Commencement of Investigations, Division of Competence and Co-ordination at p. 20.

7. The Offence of False Accounting

(a) Scope of the False Accounting Offence

172. According to the Estonian authorities, conduct of the type prohibited by Article 8 of the Convention could be sanctioned pursuant to two provisions in the Penal Code. Charges could be brought first under Section 381^1(1), under which "knowing violation of the requirements for maintaining accounting, or knowing and unlawful destruction, concealment or damaging of accounting documents, or failure to submit information, or submission of incorrect information in accounting documents, if the possibility to obtain an overview of the financial situation of the accounting entity is thereby significantly reduced, is punishable by a pecuniary punishment or up to one year of imprisonment". There is no case law interpreting the concept of "significantly reducing" an overview of the financial situation of an accounting entity. According to the Estonian authorities, the concept could be used to exclude *de minimis* bookkeeping errors from liability.

173. Charges could also be brought under Section 381, which provides that certain persons (*e.g.* a founder, management board member etc.) who fail "to submit essential information or submit incorrect information, concerning the financial situation of or other verifiable circumstances relating to the company, to the founders, shareholders, members, auditor, or special auditor of the company, shall be punished by a pecuniary punishment or up to one year of imprisonment."

174. In the examiners' view, these two offences do not fully meet the requirements of the Convention. Section 381^1 only covers the activities described in Article 8(1) of the Convention if such activities "significantly reduce" the possibility of obtaining an overview of the accounting entity's financial situation. The Convention does not contain such a qualification. Estonia's offence is thus akin to those in other countries that only punish material breaches of accounting standards and which have been criticised by the Working Group. As for Section 381, the offence is relatively narrow. It can only be committed by specified persons (a founder, management board member etc.) and only pertains to information provided to certain people (*e.g.* auditors). As such, it will likely only supplement Section 381^1, which has a wider scope. More importantly, Section 381 does not remedy the above-mentioned shortcoming of Section 381^1.

175. In theory, legal persons in Estonia could be punished for offences under Sections 381 and 381^1. However, the general limitations to liability of legal persons discussed earlier also arise here.[125]

(b) Sanctions for False Accounting

176. The maximum sanctions available for false accounting are relatively light. Offences under Sections 381 and 381^1 are punishable by one year's imprisonment and/or a fine of up to 500 times the average daily taxable income of the offender. According to Estonia, a court may also confiscate any proceeds derived from the false accounting. The examiners are mindful that Estonia's economy is the smallest among the 37 Parties to the Convention.[126] Nevertheless, the maximum sanctions available are low on both an absolute scale and when compared to those in jurisdictions that have attracted the Working Group's criticism.

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[125] See Section C.3 on Liability of Legal Persons at pp. 30-33.

[126] See Section A.2(a) on Estonia's Economic System at p. 5.

177. The lead examiners are also unable to assess the adequacy of sanctions for false accounting in practice as there have been no convictions under Sections 381 and 381^1.[127]

Commentary

The lead examiners recommend that Estonia (a) amend the Penal Code to ensure that the false accounting offences cover all of the activities described in Article 8(1) of the Convention, (b) take steps to ensure that sanctions for false accounting are effective, proportionate and dissuasive, and (c) maintain detailed statistics on sanctions for false accounting.

8. Sanctions for Foreign Bribery

(a) Criminal Sanctions

(i) Sanctions against Natural Persons

178. The examiners find that the maximum sanctions available in the Penal Code against natural persons for giving a bribe or gratuity are adequate. Giving a gratuity is punishable by a maximum of three years' imprisonment and/or a fine of 500 times the average daily taxable income of the offender. Repeat offenders are punishable by up to five years' imprisonment. Giving a bribe is punishable by imprisonment of one to five years, and two to ten years for repeat offenders. For offenders who violate official duties or abuse their professional or official status, a court may ban that person from engaging in certain occupational activities for up to three years.

179. However, the sanctions for arranging a bribe or gratuity (*i.e.* acting as an intermediary) are much lower. Arranging a bribe or gratuity is punishable by imprisonment of up to one year. The maximum sentence is three years for aggravated forms of the offence (*e.g.* repeat offender, taking advantage of an official position). Estonian officials believe that the maximum sanctions are adequate since in most cases the offender merely passes the bribe or gratuity to an official. With respect, the examiners find that the sanctions available for arranging a bribe or gratuity may not be adequate. The offence may indeed often cover intermediaries who have no involvement beyond merely passing a bribe, but it can also concern intermediaries with greater involvement. Indeed, Estonian courts have convicted an intermediary under this provision for negotiating and accepting bribe money on behalf of an official. As well, intermediaries in transnational bribery cases often receive significant financial rewards for their role in the crime. A maximum sentence of one year's imprisonment in these cases would not be effective, proportionate or dissuasive.

Commentary

The lead examiners recommend that Estonia take steps to ensure that the sanctions for arranging a bribe and arranging a gratuity are effective, proportionate and dissuasive.

(ii) Sanctions against Legal Persons

180. Under the Penal Code, legal persons who engage in foreign bribery may be fined up to EEK 250 million (EUR 16 million). This should meet the requirements of the Convention, considering the size of

[127] Estonia only provided statistics on the number of proceedings commenced and taken to court. In 2006, 5 proceedings were commenced under Section 381, 1 was taken to court, and 3 were terminated (including 1 under the opportunity principle). No proceedings were commenced under 381^1 in 2006. In 2007, four proceedings were commenced under Section 381 and one proceeding under Section 381^1. No cases were taken to court in 2007 under either section.

Estonia's economy and the maximum sanctions available in other Parties to the Convention. A criminal records registry maintains a record of all convictions of legal (and natural) persons.

(iii) Confiscation

181. Parties to the OECD Convention must be able to seize and confiscate the bribe and the proceeds of foreign bribery, or property the value of which corresponds to the proceeds. Alternatively, they must be able to impose monetary sanctions of comparable effect.[128]

182. Estonia's Penal Code allows confiscation of the bribe and the proceeds of foreign bribery. Confiscation of a bribe is discretionary.[129] Confiscation of the proceeds of bribery is mandatory, but a court may decline to confiscate if it would be "unreasonably burdensome" or if the value of the assets is disproportionately small compared to the costs of confiscation.[130] According to Estonian officials, indirect proceeds (*i.e.* the proceeds of proceeds) may also be confiscated. Confiscation of a bribe and the proceeds of bribery are available only upon a conviction. The thing to be confiscated must belong to the offender at the time of judgment. A thing belonging to a third party may be confiscated only if it was acquired as a gift, at considerably below market value, or with knowledge that the object of the transfer was to frustrate confiscation. A bribe can also be confiscated from a third party who "aided in the use of the objects or substance for the commission or preparation of the offence".

183. The Penal Code also allows monetary sanctions that correspond to the value of the proceeds of bribery. If the assets that are subject to confiscation have been "transferred, consumed, or the confiscation thereof is impossible or unreasonable for another reason", then the court may order payment of an amount equivalent to the value of the assets (Penal Code, Section 84).

184. In 2007, Estonia enacted new provisions on "extended confiscation".[131] A court may confiscate the assets of an offender who has been convicted and sentenced to imprisonment of three years or more, and if there is a rebuttable presumption that the asset was acquired through a criminal offence. The presumption arises based on the nature of the offence, the offender's income, his/her financial situation, and standard of living. Confiscation is also available against property belonging to a third party who acquired the property as a gift, at substantially below market value, or with the intention of frustrating confiscation.

185. Estonia has sought to promote the use of confiscation. The government recently adopted a new approach of "following the proceeds of crime". To that end, it has provided training for investigators and prosecutors in a fraud seminar, and more is expected in 2008. Confiscation has been discussed frequently, according to Estonian authorities at the on-site visit.

(iv) Actual Criminal Sanctions Imposed in Practice

186. Estonia could not provide detailed statistics on the sanctions imposed for domestic bribery cases prior to the on-site visit. Estonian officials acknowledged that the system of criminal statistics has not functioned well. Plans for improvement are afoot. After the on-site visit, Estonia did provide some data on domestic bribery prosecutions for 2007.

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[128] Convention, Article 3(3).

[129] Penal Code, Sections 83(1) and 83(2); *Phase 1 Report: Estonia*, para. 82.

[130] Penal Code, Section 83^1; *Phase 1 Report: Estonia*, para. 82.

[131] Penal Code, Section 83^2.

187. Nevertheless, information from other sources suggests that, while the maximum sanctions available in the Penal Code for giving bribes and gratuities appear adequate, the actual penalties imposed are not. The sanctions that have been imposed against natural persons for domestic bribery are much lighter than the maximum. Officials who take bribes or gratuities often avoid imprisonment.[132] Estonian officials added that bribe-giving is considered less serious than bribe-taking and thus likely attracts even lighter sentences. Some convictions for giving a gratuity result in fine. Jail is imposed only in the most serious cases involving large amounts of money. The government has also sought alternatives to jail because it considers Estonia to have a relatively high prison population *per capita*.

188. Even when jail sentences are imposed for domestic bribery, they are often suspended, thus resulting in no actual imprisonment. The Penal Code allows actual imprisonment to be substituted with probation (with or without supervision). The Code and case law give only general guidance on when jail sentences may be suspended, *e.g.* when justified by the circumstances of the offence and the offender.[133] In practice, domestic bribery cases frequently result in suspended jail sentences.[134] The representative of the Estonian judiciary at the on-site visit expressed concerns about the overuse of suspended sentences in corruption cases. This view was confirmed by the statistics provided after the on-site visit. Of the 61 convictions for domestic bribery in 2007, only two resulted in actual jail sentences. Imprisonment sentences were suspended in 50 cases. The remaining nine convictions resulted in fines ranging from EEK 2 000 to EEK 80 000 (EUR 128 to EUR 5 120).[135]

189. It is also unclear whether confiscation is adequately imposed in bribery cases. Estonia does not maintain detailed statistics on confiscation[136] but hopes to remedy this situation. Confiscation was ordered in at least some of the corruption cases referred to above.[137] It should also be noted that confiscation of proceeds of bribery (but not the bribe) is mandatory, subject to residual judicial discretion. As noted earlier, there has been a recent emphasis on seeking confiscation in economic crimes. Yet in the absence of more detailed statistics, the examiners cannot evaluate the success of this policy in corruption cases.

190. As for legal persons, detailed statistics were also unavailable, though the statistics project mentioned above may ameliorate the situation. Some anecdotal information was available, however. Officials at the on-site visit stated that prosecutions have mainly been in the Northern District (which includes Tallinn). Most concerned tax offences, though at least two involved bribery. In one case, a construction company was fined EEK 120 000 (EUR 7 680) for giving a television set as a bribe to an

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132 In 1999, a customs inspector received a 2-year suspended sentence and EEK 1 250 fine for accepting a bribe of nearly EEK 30 000. In 2000, a former finance ministry chancellor and a former deputy chancellor received one-year suspended sentence and a fine of EEK 24 000. In 2006, the former head of the State Chancellery's IT service took a bribe from a private company and received a 2.5-year suspended sentence, 18 months' probation, and confiscation of the bribe. In May 2006, a construction consultant was sentenced to 16 months' imprisonment for taking a bribe in a state tender. In June 2006, 15 customs officials were found guilty of taking bribes. Their sentences ranged from 3 months' prison to 2-3 years' probation (*Nations in Transit 2001* at p. 181; U.S. Department of State (2006), *Country Reports on Human Rights Practices: Estonia*).

133 For instance, see Decisions 3-1-1-99-06 and 3-1-1-59-07; see also Penal Code, Sections 73-74.

134 See the cases referred to in footnote 132.

135 Estonian officials also stated after the on-site visit that, in 2004-2007, 28 persons served sentences for corruption that ranged from 1 to 41 months. In an additional case after the on-site visit, a judge was sentenced to 3.5 years' imprisonment for taking a EEK 1.1 million (EUR 70 400) bribe.

136 The same problem arose during GRECO's Second Round Evaluation (GRECO (2004), *Second Round Evaluation Report: Estonia*, GRECO, Strasbourg, para. 17.

137 See the cases referred to in footnote 132.

official in order to secure an EEK 10 million (EUR 640 000) contract. The television was also confiscated. In the second case, another construction company was fined EEK 170 000 (EUR 10 880) for offering free home renovations to an official in return for a EEK 15 million (EUR 960 000) contract. The sentences in both cases were lower because they were the result of plea bargains. Prosecutors at the on-site visit were not sure whether the contracts obtained by the bribers were annulled, or whether the proceeds of bribery were confiscated from the briber.

191. The lead examiners are unsure that the sanctions against legal persons in these cases were adequate. The fines appear low compared to the value of the contracts. Even more troubling is that the bribery-tainted contracts do not appear to have been annulled after conviction, nor were the proceeds of bribery (*e.g.* the revenue or profits derived from the contract) confiscated. The examiners do note, however, that there has been limited practice in this area.

192. In sum, the examiners cannot conclude that the actual sanctions for corruption in Estonia meet the Convention, though there are signs that they may not. They recognise that information based on domestic bribery cases does not necessarily reflect the sanctions in foreign bribery cases. For instance, the majority of domestic bribery offences likely involve petty bribery of low ranking officials.[138] Estonia was also unable to provide the detailed statistics, *e.g.* the length of jail sentences, the amount of fines, the amount and frequency of confiscation, and the values of the bribe and the benefit to the briber. Nevertheless, the limited statistics provided by Estonia and information available from other sources suggest that the sanctions may not be effective, proportionate and dissuasive. As well, the extensive use of suspended sentences and fines in domestic corruption cases raises at least the possibility that similar sentences would be meted out for foreign bribery. The relatively small fines against legal persons, coupled with an absence of confiscation of the proceeds of bribery, raise similar concerns.

Commentary

The lead examiners recommend that Estonia maintain detailed statistics on the sanctions (including confiscation) imposed against natural and legal persons for false accounting, money laundering, domestic bribery, and foreign bribery. They also recommend that the Working Group monitor the sanctions imposed in Estonia for foreign bribery as practice develops.

(b) Administrative Sanctions

(i) Public Procurement

193. The Public Procurement Act (PPA) governs public procurement in Estonia. Under the Act, procuring authorities in each state ministry or body conducts its own procurement process, subject to the rules and procedure laid out in the PPA. The Public Procurement Office is in turn responsible for verifying that public procurement complies with the applicable legislation.[139]

194. Estonia may impose a ban on public procurement as an administrative sanction for foreign bribery. A ban may be applied if a contractor, its representative or its subcontractor committed money laundering or an offence in office, which includes foreign bribery. A contractor is required to affirm in writing that he/she does not have such a conviction. In case of doubt, the procuring authority may demand a certificate from the relevant penal authorities or search the criminal record registry. A participant may

[138] See *Mid-term Study of Phase 2 Reports*, paras. 216-217.

[139] Public Procurement Act, Sections 104 and 107.

also be excluded for making a false statement in the application.[140] Estonian officials added that, for contractors who are legal persons, the legal person and its managers must affirm in writing that they have no convictions. Foreign contractors may be required to provide the written affirmation under oath. No bans have been imposed for bribery as of January 2008.

(ii) Official Development Assistance (ODA)

195. Estonian officials at the on-site visit stated that, if an ODA-funded project involves bribery of foreign public officials, then Estonia will cancel support for the project and seek recovery of disbursed funds from the contractor. However, the standard contract used by the Ministry of Foreign Affairs (MFA) does not contain a clause to this effect. Estonian officials also stated that contractors who have been convicted of foreign bribery would be banned from participating in ODA-funded projects. But as noted above, the MFA does not have an anti-corruption policy. There is thus no clear rule on whether contractors with foreign bribery convictions would be banned. A written policy could add transparency and consistency, as well as raise awareness of foreign bribery among staff and contractors.

196. As noted earlier, the Ministry is preparing amendments to its standard contract for ODA-funded projects. One of the amendments would require the contract to be annulled in case of bribery. Contractors would also be required to declare that they had not been previously convicted of foreign bribery. Guidelines will be prepared for ODA staff on how to verify whether a contractor has a previous conviction.

(iii) Officially Supported Export Credits

197. KredEx may also deny support as a sanction for foreign bribery. Under its Guidelines for Investment Guarantees, KredEx is released from liability if the guarantee's holder (an Estonian investor) bribes a foreign public official. As noted earlier, all applicants for support must sign a Declaration of Non-bribery. The Declaration stipulates that, if the applicant or his/her representative engages in bribery, then the applicant forfeits the right to compensation under the guarantee and must reimburse KredEx for any funds received.

198. As with ODA, it is less clear whether applicants who have been convicted of foreign bribery would be denied officially supported export credits. KredEx indicated that it would deny support if an applicant has been convicted by a court. However, there does not appear to be a written policy to this effect, nor does KredEx's Web site provide any information.

Commentary

The lead examiners recommend that Estonia establish formal, written policies for denying ODA contracts and export credit support to legal and natural persons who have been convicted of foreign bribery.

[140] Public Procurement Act, Section 38.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

199. Based on its findings regarding Estonia's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Estonia under Part I; and (2) will follow up the issues in Part II when there is sufficient practice.

I. Recommendations

Recommendations for Preventing and Detecting Bribery of Foreign Public Officials

1. Regarding awareness-raising in the public sector, the Working Group recommends that Estonia take steps to

   (a) Raise the level of awareness of the Convention and foreign bribery within overseas diplomatic representations, law enforcement, prosecutor's offices, the judiciary, as well as the Ministries of Justice, Internal Affairs, Finance (including tax officials), and Economic Affairs and Communications, and

   (b) Provide training to personnel in these bodies on relevant issues where appropriate (Revised Recommendation I).

2. Regarding measures in the private sector, the Working Group recommends that Estonia:

   (a) Raise awareness of the Convention and foreign bribery among the public generally, as well as specifically within the business sector, and the accounting and auditing professions (Revised Recommendation I).

   (b) Take steps to assist the business community to prevent and detect foreign bribery, including by developing tools to that end (Revised Recommendation I).

3. Regarding whistleblower protection, the Working Group recommends that Estonia strengthen measures for protecting whistleblowers, in order to encourage public and private sector employees to report acts of foreign bribery without fear of reprisals or dismissal (Revised Recommendation I).

4. Regarding the reporting of foreign bribery, the Working Group recommends that Estonia:

   (a) Ensure that suspicions of foreign bribery detected by employees of KredEx are reported to law enforcement (Revised Recommendation I).

   (b) Require auditors to report indications of a possible illegal act of bribery to management and corporate monitoring bodies, and consider requiring auditors to report such indications to the competent authorities (Revised Recommendation V.B.iii and iv).

5. Regarding official development assistance (ODA), the Working Group recommends that Estonia:

   (a) Further raise awareness of foreign bribery among staff and project partners involved in ODA, including by providing training (Revised Recommendation I).

   (b) Incorporate an anti-bribery declaration in its standard contract for ODA-funded projects (Revised Recommendation I).

6. Regarding taxation, the Working Group recommends that Estonia make additional efforts to train tax officials on bribery detection and reporting, and to raise their awareness of foreign bribery (Revised Recommendation I).

Recommendations for Effective Investigation and Prosecution of Foreign Bribery and Related Offences

7. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Estonia:

(a) Train new and practising prosecutors, police officers and judges on the offence of foreign bribery and the investigation of legal persons (particularly in bribery cases) (Convention Article 5; Revised Recommendation I).

(b) Take steps to ensure (i) prosecutorial independence in foreign bribery cases, (ii) that terminations of foreign bribery prosecutions under Section 204 of the Criminal Procedure Code are consistent with Article 5 and Commentary 27 of the Convention, and (iii) that plea bargaining and the provision of immunity to co-operating offenders do not impede the effective enforcement of the foreign bribery offence (Convention Article 5).

(c) Amend its legislation to make special investigative techniques available for all cases of foreign bribery where appropriate (Convention, Article 5; Revised Recommendation I).

(d) Transmit as soon as possible information in foreign bribery cases to the competent authorities in foreign states whenever such information could be relevant to an investigation in that state (Convention, Article 9(1); Revised Recommendation VII.i).

8. Regarding the offence of foreign bribery, the Working Group recommends that Estonia:

(a) Amend its Penal Code to define an autonomous foreign bribery offence that fully complies with the requirements of the Convention (Convention, Article 1).

(b) Amend its Penal Code to expressly cover bribery of foreign public officials who perform legislative functions (Convention, Article 1).

(c) Ensure that it covers all acts in relation to the performance of an official's duties, including any use of the public official's position, whether or not within the official's authorised competence (Convention, Article 1).

9. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Estonia:

(a) Amend its Penal Code to broaden the criteria for the liability of legal persons in order to make prosecution of legal persons that commit foreign bribery more likely and more effective (Convention, Articles 2 and 3(2)).

(b) Establish nationality jurisdiction to prosecute legal persons for foreign bribery (Convention, Articles 2, 3(2) and 4(2)).

10. Regarding the limitation period for prosecuting foreign bribery, the Working Group recommends that Estonia consider whether the limitation period allows adequate time for the investigation and

prosecution of this offence, especially in light of the fact that the making of an MLA request does not interrupt or suspend the limitation period (Convention, Article 6).

11. Regarding money laundering, the Working Group recommends that Estonia:

(a) Examine why it has a low number of convictions for money laundering; and

(b) Clarify whether its money laundering offence covers the laundering of a bribe, and whether the predicate offence for money laundering must be a crime at the place where it occurred (Convention, Article 7).

12. Regarding false accounting, the Working Group recommends that Estonia (a) amend the Penal Code to ensure that the false accounting offences cover all of the activities described in Article 8(1) of the Convention, and (b) take steps to ensure that sanctions for false accounting are effective, proportionate and dissuasive (Convention, Article 8).

13. Regarding sanctions for foreign bribery, the Working Group recommends that Estonia:

(a) Take steps to ensure that sanctions for arranging a bribe and arranging a gratuity are effective, proportionate and dissuasive (Convention, Article 3).

(b) Establish formal, written policies for denying ODA contracts and export credit support to legal and natural persons who have been convicted of foreign bribery (Convention, Article 3(4); Revised Recommendation VI).

14. Regarding statistics, the Working Group recommends that Estonia:

(a) Maintain more consistent statistics on investigations, prosecutions, convictions and sanctions involving the money laundering offence, including the identification of predicate offences for money laundering (Convention, Articles 7 and 8).

(b) Maintain statistics on the sanctions (including confiscation) imposed against natural and legal persons for false accounting, money laundering, domestic bribery, and foreign bribery (Convention, Article 3).

II. Follow-up by the Working Group

15. The Working Group will follow up the issues below as practice develops:

(a) Termination of proceedings under Section 202 of the Criminal Procedure Code, plea bargaining, and granting immunity to co-operating offenders (Convention, Article 5).

(b) Prosecutorial independence in foreign bribery cases (Convention, Article 5).

(c) Whether Estonia considers the factors listed in Article 5 and Commentary 27 of the Convention when denying extradition or MLA (Convention, Article 5).

(d) Impact of cross-references between the foreign bribery offence and other Estonian statutes on the enforcement and visibility of the offence (Convention, Article 1; Revised Recommendation I).

(e) Dual criminality requirement on nationality jurisdiction to prosecute natural persons for foreign bribery, and the absence of nationality jurisdiction to prosecute legal persons for foreign bribery (Convention, Article 4(2)).

(f) Limitation period for investigating and prosecuting foreign bribery (Convention, Article 6).

(g) The number of convictions for money laundering (Convention, Article 7).

(h) Whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred (Convention, Article 7).

(i) Sanctions against natural and legal persons for foreign bribery (Convention Article 3).

ANNEX 1. LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Accounting Standards Board of the Ministry of Finance
- Bank of Estonia
- Estonian Tax and Customs Board
- Financial Intelligence Unit of the Central Criminal Police
- Financial Supervision Authority
- Ministry of Economic Affairs and Communications
- Ministry of Finance
- Ministry of Foreign Affairs
- Ministry of Internal Affairs
- Ministry of Justice
- National Audit Office
- Northern Circuit Prosecutor's Office
- Police Board
- Public Procurement Office
- Public Prosecutor's Office
- Security Police Board

Government-Funded Bodies

- Enterprise Estonia
- Estonian Credit and Export Guarantee Fund (KredEx)

Judiciary

- One judge of the District Court

Legislators

- One member of parliament (Riigikogu)

Private Sector

Private Enterprises

- IBM Estonia
- Rautakesko AS
- Rimbaltie AS

Business Associations

- Estonian Association of Small and Medium-Sized Businesses (EVEA)
- Estonian Chamber of Commerce and Industry (ECII)
- Estonian Employers' Confederation (ETTK)
- OMX / Tallinn Stock Exchange / Estonian CSD

Financial Institutions

- Hansabank
- Nordea Pank

Legal Profession

- Estonian Bar Association
- Estonian Company Lawyers Association (EEJÜ)

Accounting and Auditing Profession

- AAB Audiitorteenused OÜ
- Board of Auditors of Estonia
- KPMG AS
- Rödl & Partner OÜ
- Vallaste ja Partnerid OÜ

<u>Civil Society</u>

- Estonian Business School
- Jaan Tonisson Institute
- Open Estonia Foundation
- Transparency International Estonia (Corruption-Free Estonia)

<u>Other Participants</u>

- Resident Twinning Advisor and Expert, Estonian-Finnish Anti-Corruption Project

ANNEX 2. LIST OF ABBREVIATIONS AND ACRONYMS

ACA	Anti-Corruption Act
APA	Administrative Procedure Act
CCP	Central Criminal Police
CPC	Criminal Procedure Code
CPP	Chief Public Prosecutor
DPO	District Prosecutor's Office
EE	Enterprise Estonia
EEK	Estonian kroons
EU	European Union
EUR	Euro
FDI	Foreign direct investment
FIU	Financial Intelligence Unit
FSA	Financial Supervision Authority
GAAP	Generally Accepted Accounting Standards
GDP	Gross domestic product
IFRS	International Financial Report Standards
ISAs	International Standards on Auditing
KredEx	Credit and Export Guarantee Fund of Estonia
LP	Leading Prosecutor
LPP	Leading Public Prosecutor
MLA	Mutual legal assistance in criminal matters
MLTFPA	Money Laundering and Terrorist Financing Prevention Act 2007
MFA	Ministry of Foreign Affairs
NAO	National Audit Office
NGO	Non-governmental organisation
ODA	Official development assistance
PEP	politically-exposed person
POA	Prosecutor's Office Act
PPA	Public Procurement Act
PPO	Public Prosecutor's Office
STR	Suspicious transaction report
UN	United Nations

ANNEX 3. EXCERPTS FROM RELEVANT LEGISLATION

Note: English translation of most Estonian legislation is available at www.legaltext.ee/indexen.htm.

Penal Code

§ 14. Liability of legal persons

(1) In the cases provided by law, a legal person shall be held responsible for an act which is committed by a body or senior official thereof in the interest of the legal person.

(2) Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence.

(3) The provisions of this Act do not apply to the state, local governments or to legal persons in public law.

§ 83. Confiscation of object used to commit offence and direct object of offence

(1) A court may apply confiscation of the object used to commit an intentional offence if it belongs to the offender at the time of the making of the judgment or ruling.

(2) In the cases provided by law, a court may confiscate the substance or object which was the direct object of the commission of an intentional offence, or the substance or object used for preparation of the offence if these belong to the offender at the time of the making of the judgment and confiscation thereof is not mandatory pursuant to law.

(3) As an exception, a court may confiscate the objects or substance specified in subsections (1) and (2) of this section if it belongs to a third person at the time of the making of the judgment or ruling and the person:

1) has, at least through recklessness, aided in the use of the objects or substance for the commission or preparation of the offence,

2) has acquired the objects or substance, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price, or

3) knew that the objects or substance was transferred to the person in order to avoid confiscation thereof.

(4) In the absence of the permission necessary for the possession of an object or substance, such object or substance shall be confiscated.

(5) In the cases provided for in subsection (4) of this section, a device, object or substance may be confiscated if the person has committed at least an unlawful act.

(6) In the cases provided for in subsections (1), (2) and (4) of this section, the object used to commit a misdemeanour or the substance or object which was the direct object of a misdemeanour may be confiscated by the extra-judicial body prescribed by law.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

§ 83^{1}. Confiscation of assets acquired through offence

(1) A court shall confiscate of the assets acquired through an offence object if these belong to the offender at the time of the making of the judgment or ruling.

(2) As an exception, a court shall confiscate the assets or substance specified in subsection (1) this section if these belong to a third person at the time of the making of the judgment or ruling, and if:

1) these were acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price, or

2) the third person knew that that the assets were transferred to the person in order to avoid confiscation.

(3) The court may decide not to confiscate, in part or in full, property acquired through offence if, taking account of the circumstances of the offence or the situation of the person, confiscation would be unreasonably burdensome or if the value of the assets is disproportionably small in comparison to the costs of storage, transfer or destruction of the property. The court may, for the purpose of satisfaction of a civil action, decrease the amount of the property or assets to be confiscated by the amount of the object of the action.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

§ 83[2]. Extended confiscation of assets acquired through criminal offence

(1) If a court convicts a person of a criminal offence and imposes imprisonment for a term of more than three years or life imprisonment, the court shall, in the cases provided by this Code, confiscate a part or all of the criminal offender's assets if these belong to the offender at the time of the making of the judgment, and if the nature of the criminal offence, the legal income, or the difference between the financial situation and the standard of living of the person, or another fact gives reason to presume that the person has acquired the assets through commission of the criminal offence. Confiscation is not applied to assets with regard to which the person certifies that such assets have been acquired out of lawfully received funds.

(2) As an exception, a court may confiscate the assets of a third person on the bases and to the extent specified in subsection (1) this section if these belong to the third person at the time of the making of the judgment or ruling, and if:

1) these were acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price, or

2) the third person knew that that the assets were transferred to the person in order to avoid confiscation.

(3) Assets of a third party which has been acquired more than five years prior to the commission of a criminal offence shall not be confiscated.

(4) Upon extended confiscation of assets acquired through criminal offence, the court shall take account of the provisions of subsection 83[1] (3) of this Code.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

§ 84. Substitution of confiscation

If assets acquired by an offence have been transferred, consumed or the confiscation thereof is impossible or unreasonable for another reason, the court may order payment of an amount which corresponds to the value of the assets subject to confiscation.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

§ 288. Definition of official

(1) For the purposes of the Special Part of the Penal Code, “an official” means a person who holds office in a state or local government agency or body, or in a legal person in public law, and to whom administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets, or functions of a representative of state authority have been assigned.

(2) In the criminal offences specified in §§ 293–298 of this Code, "an official" is also a person who directs a legal person in private law or acts on behalf of such person or acts on behalf of another natural person, provided that the person has the authority and duties specified in subsection (1) of this section and the criminal offence has been committed in the course of the economic activity of the corresponding legal or natural person.

(3) The definition of an official provided for in subsections (1) and (2) of this section also extends to officials working in foreign states or international organisations.

(24.01.2007 entered into force 15.03.2007 - RT I 2007, 13, 69)

§ 293. Accepting of gratuities

(1) An official who consents to a promise of property or other benefits or who accepts property or other benefits in return for a lawful act which he or she has committed or which there is reason to believe that he or she will commit, or for a lawful omission which he or she has committed or which there is reason to believe that he or she will commit and, in so doing, takes advantage of his or her official position shall be punished by a pecuniary punishment or up to 3 years' imprisonment.

(12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350)

(2) The same act, if committed:

1) at least twice;

2) by demanding gratuities; (12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350)

3) by a group, or

4) on a large-scale basis,

is punishable by up to 5 years' imprisonment.

(3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

§ 294. Accepting bribe

(1) An official who consents to a promise of property or other benefits or who accepts property or other benefits in return for an unlawful act which he or she has committed or which there is reason to believe that he or she will commit, or for an unlawful omission which he or she has committed or which there is reason to believe that he or she will commit and, in so doing, takes advantage of his or her official position shall be punished by 1 to 5 years' imprisonment.

(12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350)

(2) The same act, if committed:

1) at least twice;

2) by demanding bribe;

(12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350)

3) by a group, or

4) on a large-scale basis,

is punishable by 2 to 10 years' imprisonment.

(3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

(4) An act provided for in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment or compulsory dissolution.

(5) For the criminal offence provided in this section, the court shall impose extended confiscation of assets or property acquired by the criminal offence pursuant to the provisions of § 83^2 of this Code.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

§ 295. Arranging receipt of gratuities

(1) Arranging a receipt of gratuity is punishable by a pecuniary punishment or up to one year of imprisonment.

(2) The same act, if committed:

1) at least twice, or

2) by taking advantage of an official position,

is punishable by a pecuniary punishment or up to 3 years' imprisonment.

(3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

§ 296. Arranging bribe

(1) Arranging a bribe is punishable by a pecuniary punishment or up to one year of imprisonment.

(2) The same act, if committed:

1) at least twice, or

2) by taking advantage of an official position,

is punishable by a pecuniary punishment or up to 3 years' imprisonment.

(3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

§ 297. Granting of gratuities

(1) Granting or promising a gratuity is punishable by a pecuniary punishment or up to 3 years' imprisonment.

(12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350)

(2) The same act, if committed at least twice, is punishable by up to 5 years' imprisonment.

(3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

§ 298. Giving bribe

(1) Giving or promising a bribe is punishable by 1 to 5 years' imprisonment.

(12.06.2002 entered into force 01.09.2002 - RT I 2002, 56, 350)

(2) The same act, if committed at least twice, is punishable by 2 to 10 years' imprisonment.

(3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

(4) An act provided for in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment or compulsory dissolution.

§ 298^1. Influence peddling

(1) A person who consents to a promise of property or other benefits or who accepts property or other benefits in return for illegal use by the person of his or her actual or presumed influence with the objective of achieving a situation where an official performing public administration duties commits an act or omission in the interests of the person handing over the property or giving the benefit, or a third person shall be punished by a pecuniary punishment or by up to 3 years' imprisonment.

(2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.

(19.04.2006 entered into force 25.05.2006 - RT I 2006, 21, 160)

§ 381. Failure to submit information or submission of incorrect information concerning financial situation of or other verifiable circumstances relating to company

A founder, member of the management board or substituting body, supervisory body or liquidator of a company who fails to submit essential information or submits of incorrect information concerning the financial situation of or other verifiable circumstances relating to the company to the founders, shareholders, members, auditor or special auditor of the company shall be punished by a pecuniary punishment or up to one year of imprisonment.

(24.01.2007 entered into force 15.03.2007 - RT I 2007, 13, 69)

§ 381[1]. Violation of obligation to maintain accounting

(1) Knowing violation of the requirements for maintaining accounting or knowing and unlawful destruction, concealment or damaging of accounting documents, or failure to submit information or submission of incorrect information in accounting documents if the possibility to obtain an overview of the financial situation of the accounting entity is thereby significantly reduced is punishable by a pecuniary punishment or up to one year of imprisonment.

(2) The same act, if the court has announced the bankruptcy of the accounting entity or terminated bankruptcy proceedings due to abatement, is punishable by a pecuniary punishment or up to 3 years' imprisonment.

(3) An act specified in subsection (1) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

(24.01.2007 entered into force 15.03.2007 - RT I 2007, 13, 69)

§ 394. Money laundering

(1) Money laundering is punishable by a pecuniary punishment or up to 5 years' imprisonment.

(2) The same act, if committed:

1) by a group;

2) at least twice;

3) on a large-scale basis, or

4) by a criminal organisation,

is punishable by 2 to 10 years' imprisonment.

(3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

(4) An act provided for in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment or compulsory dissolution.

(5) A court may, pursuant to the provisions of § 83 of this Code, apply confiscation of a property which was the direct object of the commission of an offence provided for in this section.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

(6) For the criminal offence provided in this section, the court shall impose extended confiscation of assets or property acquired by the criminal offence pursuant to the provisions of § 832 of this Code.

(13.12.2006 entered into force 01.02.2007 - RT I 2007, 2, 7)

Criminal Procedure Code

Division 2
Settlement Proceedings

§ 202. Termination of criminal proceedings in event of lack of public interest in proceedings and in case of negligible guilt

(1) If the object of criminal proceedings is a criminal offence in the second degree and the guilt of the person suspected or accused of the offence is negligible, and he or she has remedied or has commenced to remedy the damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses, and there is no public interest in the continuation of the criminal proceedings, the Prosecutor's Office may request termination of the criminal proceedings by a court with the consent of the suspect or accused.

(2) In the event of termination of criminal proceedings, the court may impose the following obligation on the suspect or accused at the request of the Prosecutor's Office and with the consent of the suspect or the accused within the specified term:

1) to pay the expenses relating to the criminal proceedings or compensate for the damage caused by the criminal offence;

2) to pay a fixed amount into the public revenues and to be used for specific purposes in the interest of the public;

(17.01.2007 entered into force 18.02.2007 - RT I 2007, 11, 51)

3) to perform 10 to 240 hours of community service. The provisions of subsections 69 (2) and (5) of the Penal Code apply to community service.

(3) The term for the performance of obligations listed in subsection (2) of this section shall not exceed six months.

(4) A request of a Prosecutor's Office shall be adjudicated by a ruling of a judge sitting alone. If necessary, the prosecutor and the suspect or accused and, at the request of the suspect or accused, also the counsel shall be summoned to the judge for the adjudication of the request of the Prosecutor's Office.

(5) If the judge does not consent to the request submitted by the Prosecutor's Office, he or she shall return the criminal matter on the basis of his or her ruling for the continuation of the proceedings.

(6) If a person with regard to whom criminal proceedings have been terminated pursuant to subsection (2) of this section fails to perform the obligation imposed on him or her, the court, at the request of the Prosecutor's Office, shall resume the criminal proceedings by an order. In imposition of a punishment, the part of the obligations performed by the person shall be taken into consideration.

(17.01.2007 entered into force 18.02.2007 - RT I 2007, 11, 51)

(7) If the object of criminal proceedings is a criminal offence in the second degree for which the minimum rate of imprisonment is not prescribed as punishment or only a pecuniary punishment is prescribed as punishment by the Special Part of the Penal Code, the Prosecutor's Office may terminate the criminal proceedings and impose the obligations on the grounds specified in subsections (1) and (2) of this section. The Prosecutor's Office may resume terminated criminal proceedings by an order on the grounds specified in subsection (6) of this section.

(19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329)

§ 204. Termination of criminal proceedings concerning criminal offences committed by foreign citizens or in foreign states

(1) A Prosecutor's Office may terminate criminal proceedings by an order if:

1) the criminal offence was committed outside the territorial applicability of this Code;

2) the criminal offence was committed by a foreign citizen on board a foreign ship or aircraft located in the territory of the Republic of Estonia;

3) an accomplice to the criminal offence committed the criminal offence in the territory of the Republic of Estonia but the consequences of the criminal offence occurred outside the territorial applicability of this Code;

4) a decision concerning extradition of the alleged criminal offender to a foreign state has been made;

5) the person has been convicted and has served the sentence in a foreign state and the punishment applicable in Estonia is not significantly more severe than the punishment served, or if the person has been acquitted in a foreign state.

(2) A Prosecutor's Office may, by an order, terminate criminal proceedings concerning a criminal offence which was committed in a foreign state but the consequences of which occurred in the territory of the Republic of Estonia if the proceedings may result in serious consequences for the Republic of Estonia or are in conflict with other public interests.

§ 205. Termination of criminal proceedings in connection with assistance received from person upon ascertaining facts relating to subject of proof

(1) The Public Prosecutor's Office may, by its order, terminate criminal proceedings with regard to a person suspected or accused with his or her consent if the suspect or the accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence which is important from the point of view of public interest in the proceedings and if, without the assistance, detection of the criminal offence and collection of evidence would have been precluded or especially complicated. Criminal proceedings shall not be terminated in respect of the suspect or the accused who has committed a criminal offence for which the lightest punishment is prescribed as at least six years' imprisonment or the most severe punishment is prescribed as life imprisonment in the Penal Code.

(2) The Public Prosecutor's Office may, by its order, resume proceedings if the suspect or the accused has discontinued facilitating the ascertaining of facts relating to a subject of proof of a criminal offence or if he or she has intentionally committed a new criminal offence within three years after termination of the proceedings.

(19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329)

§ 239. Grounds for application of settlement proceedings

(1) A court may adjudicate a criminal matter by way of settlement proceedings at the request of the accused or the Prosecutor's Office.

(2) Settlement proceedings shall not be applied:

1) in the case of criminal offences in the first degree for which the lightest punishment is prescribed as at least four years' imprisonment or the most severe punishment is prescribed as life imprisonment in the Penal Code;

(19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329)

2) if the accused, his or her counsel or the Prosecutor's Office does not consent to the application of settlement proceedings;

3) in the case of a criminal matter where several persons are accused and at least one of the accused does not consent to the application of settlement proceedings;

4) if the victim or the civil defendant does not consent to the application of settlement proceedings.

(3) The accused and the prosecutor may submit a request for the application of settlement proceedings to the court until the completion of examination by the court in the county court.

(15.06.2005 entered into force 01.01.2006 - RT I 2005, 39, 308)

(4) Settlement proceedings shall be applied pursuant to the provisions of Chapter 10 of this Code, taking into account the specifications provided for in this Division.

§ 244. Negotiations in settlement proceedings

(1) After preparation of the reports specified in §§ 241 and 243 of this Code, the Prosecutor's Office shall commence negotiations with the suspect or accused and his or her counsel in order to conclude a settlement.

(2) If a Prosecutor's Office and the suspect or accused and his or her counsel reach a settlement concerning the legal assessment of the criminal offence and the nature and extent of the damage caused by the criminal offence, negotiations shall be commenced concerning the type and the category or term of the punishment which the prosecutor requests in court for the commission of the criminal offence.

(3) If a Prosecutor's Office and the suspect or accused and his or her counsel fail to reach a settlement concerning the legal assessment of the criminal offence and the nature and extent of the damage caused by the criminal offence or the type or the category or term of the punishment, the criminal proceeding shall be continued pursuant to the general procedure.

§ 245[1]. Prosecution in settlement proceedings

(1) A judge who receives a criminal file shall verify the jurisdiction over the criminal matter pursuant to the provisions of §§ 24–27 of this Code and shall make a ruling on:

1) the prosecution of the accused pursuant to the provisions of § 263 of this Code.

2) the return of the criminal file to the Prosecutor's Office if there are no grounds for application of settlement proceedings;

3) the return of the criminal file to the Prosecutor's Office granting the possibility to conclude a new settlement if the court does not consent to the legal assessment of the criminal offence, the amount of the civil action or the type or the category or term of the punishment;

4) the return of the criminal file to the Prosecutor's Office and continuation of the proceedings if the court does not consent to the adjudication of the criminal matter by way of settlement proceedings.

(2) If the grounds provided for in § 258 of this Code become evident, the court shall organise a preliminary hearing which shall be held pursuant to §§ 259–262 of this Code.

(19.04.2006 entered into force 25.05.2006 - RT I 2006, 21, 160)

§ 247. Court hearing in settlement proceedings

(1) A judge shall announce the commencement of the hearing of a settlement and make a proposal to the prosecutor to present the settlement.

(2) After the presentment of a settlement, the judge shall ask whether the accused understands the settlement and consents thereto. The judge shall make a proposal to the accused to explain the circumstances relating to the conclusion of the settlement and shall ascertain whether conclusion of the settlement was the actual intention of the accused.

(3) The judge shall ask the opinions of the counsel and the prosecutor concerning the settlement and whether they will adhere to the settlement.

(4) The judge may question the participants in the proceedings.

(5) After completion of the hearing of a settlement, the court shall announce the time of pronouncement of the court decision and withdraw to the chambers.

§ 248. Court decisions in settlement proceedings

(1) The court shall make one of the following decisions in chambers:

1) a ruling on the return of the criminal file to the Prosecutor's Office if there are no grounds for application of settlement proceedings;

(19.04.2006 entered into force 25.05.2006 - RT I 2006, 21, 160)

2) a ruling on the return of the criminal file to the Prosecutor's Office granting the possibility to conclude a new settlement if the court does not consent to the legal assessment of the criminal offence, the amount of the civil action or the type or the category or term of the punishment;

3) a ruling on refusal to apply settlement proceedings and on the return of the criminal file to the Prosecutor's Office if the court has doubts regarding the circumstances specified in § 306 of this Code;

(19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329)

4) a ruling on termination of the criminal proceeding if the grounds listed in clauses 199 (1) 1)–5) of this Code become evident;

5) a court judgment on the conviction of the accused and on imposition of the punishment agreed upon in the settlement on the accused.

(19.04.2006 entered into force 25.05.2006 - RT I 2006, 21, 160)

(2) After a court has made a ruling specified in clause (1) 1) or 2) of this section, the court shall return the criminal file to the Prosecutor's Office for continuation of the criminal proceeding.

(19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329)

Anti-Corruption Act

§ 23. Duty to give notification of an act of corruption

(1) An official and a public servant are required to notify the head of the agency, the Security Police, the Police, or the Prosecutor's Office, of every act of corruption which becomes known to him or her.

(2) According to the wish of the person specified in subsection (1) of this section, his or her anonymity shall be guaranteed, except where the notification has been motivated by self interest or other base motives, or if a criminal procedure is commenced on the basis of the notification, and hearing the person is necessary for proving the offence.

(3) Failure to perform a duty set out in subsection (1) of this section shall constitute the basis for the release of the person from service or office if he or she has been punished according to § 264 of this Act.

[Entered into force 29.10.2004 – RT I 2004, 71, 504]

Money Laundering and Terrorist Financing Prevention Act 2007

§ 4. Money laundering

(1) Money laundering means:

1) concealment or maintenance of the confidentiality of the true nature, origin, location, manner of disposal, relocation or right of ownership or other rights of property acquired as a result of a criminal activity or property acquired instead of such property;

2) conversion, transfer, acquisition, possession or use of property acquired as a result of a criminal activity or property acquired instead of such property with the purpose of concealing the illicit origin of the property or assisting a person who participated in the criminal activity so that the person could escape the legal consequences of his or her actions.

(2) Money laundering also means a situation whereby a criminal activity as a result of which the property used in money laundering was acquired occurred in the territory of another state.