



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

MARCH 2013

This Phase 3 Report on Denmark by the OECD Working Group on Bribery evaluates and makes recommendations on Denmark's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 15 March 2013.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
A. INTRODUCTION	7
1. The On-site Visit	7
2. Summary of the Monitoring Steps Leading to Phase 3	7
3. Outline of the Report	7
4. Economic Background.....	8
5. Overseas Territories.....	8
6. Cases Involving the Bribery of Foreign Public Officials.....	8
(a) Concluded Cases Resulting in Sanctions.....	9
(b) Terminated Cases without Sanctions or Prosecutions	9
(c) Ongoing Foreign Bribery Cases	11
(d) Concluded Oil-for-Food Cases	11
B. IMPLEMENTATION AND APPLICATION BY DENMARK OF THE CONVENTION AND THE 2009 RECOMMENDATIONS	12
1. Foreign Bribery Offence.....	12
(a) Defence of Small Facilitation Payments.....	13
(b) Definition of a Foreign Public Official.....	15
(c) Application of the Convention in Greenland and the Faroe Islands.....	16
2. Responsibility of Legal Persons	17
3. Sanctions for Foreign Bribery and Related Offences	19
(a) Maximum Sanctions Available for Foreign Bribery	19
(b) Sanctions Imposed in Practice.....	20
(c) Sanctions for False Accounting.....	20
4. Confiscation of the Bribe and the Proceeds of Bribery	21
5. Investigation and Prosecution of the Foreign Bribery Offence	22
(a) Enforcement Agencies and Co-ordination.....	22
(b) Prosecutorial Discretion and the Prosecution of Related Natural Persons	23
(c) Absence of Corporate Prosecutions.....	25
(d) Out-of-Court Settlements	25
(e) Additional Issues Concerning Specific Foreign Bribery Enforcement Actions	27
(f) Statute of Limitations	30
(g) Jurisdiction to Prosecute.....	30
(h) Priority, Resources and Expertise.....	32
(i) Investigative Techniques	33
(j) Article 5 of the Convention	34
6. Money Laundering.....	34
(a) The Money Laundering Offence	34
(b) Money Laundering Reporting	35
(c) Authorities and Expertise to Combat Money Laundering	35
(d) Anti-Money Laundering in Greenland and the Faroe Islands	36
7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes	37
(a) Accounting Standards.....	37
(b) Detection of Foreign Bribery by External Auditors	37
(c) Reporting of Foreign Bribery by External Auditors.....	37
(d) Corporate Compliance, Internal Controls and Ethics	39

8.	Tax Measures for Combating Bribery	40
(a)	Non-Tax Deductibility of Bribes	40
(b)	Detection and Awareness-Raising	40
(c)	Reporting and Sharing of Information by SKAT of Foreign Bribery	41
9.	International Co-operation	42
(a)	Mutual Legal Assistance	42
(b)	Extradition	43
10.	Public Awareness and the Reporting of Foreign Bribery	43
(a)	Awareness of the Convention and the Offence of Foreign Bribery	43
(b)	Reporting Suspected Acts of Foreign Bribery	44
(c)	Whistleblowing and Whistleblower Protection	46
11.	Public Advantages	47
(a)	Official Development Assistance	47
(b)	Prevention and Detection within the Danish International Investment Funds	48
(c)	Public Procurement	48
(d)	Officially Supported Export Credits	49
C.	RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP	50
1.	Recommendations of the Working Group	51
2.	Follow-up by the Working Group	54
ANNEX 1	PREVIOUS WORKING GROUP RECOMMENDATIONS TO DENMARK AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION	55
ANNEX 2	PARTICIPANTS AT THE ON-SITE VISIT	58
ANNEX 3	LIST OF ABBREVIATIONS AND ACRONYMS	60
ANNEX 4	EXCERPTS OF RELEVANT LEGISLATION	61
	Criminal Code	61
	Administration of Justice Act	63
	Act on Approved Auditors and Approved Audit Firms	63
	Danish Tax Assessment Act	65
	Danish Tax Administration Act	65
	Danish Financial Statements Act	65
	Executive Order on the Danish Financial Statements Act	65
ANNEX 5	STATISTICS ON THE ENFORCEMENT OF BRIBERY AND FALSE ACCOUNTING OFFENCES	67

EXECUTIVE SUMMARY

The Phase 3 report on Denmark by the OECD Working Group on Bribery evaluates and makes recommendations on Denmark's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in Denmark's legislative and institutional framework, as well as progress made since Denmark's Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

While the Working Group welcomes Denmark's recent efforts to implement the Convention, it has serious concerns about the lack of enforcement of the foreign bribery offence. Only 13 foreign bribery allegations have surfaced, and sanctions have been imposed in just one case that falls within Article 1 of Convention. The lone case that was prosecuted resulted in a settlement with a company, but not for foreign bribery. The individuals responsible for the crime escaped prosecution. Of the nine remaining cases that have been terminated without prosecution, several were closed without adequate investigation or sufficient efforts to secure foreign evidence. The Working Group thus recommends that SØIK thoroughly investigate and prosecute foreign bribery allegations. SØIK should routinely and promptly co-ordinate with foreign law enforcement authorities, and make greater efforts to obtain evidence from these authorities. Foreign bribery cases should be investigated and prosecuted even in the absence of parallel investigations in foreign jurisdictions. Both natural and legal persons in the same case should be prosecuted whenever appropriate. Denmark should enhance the usage of, and train law enforcement authorities on, the corporate liability provisions in foreign bribery cases. The guidelines on corporate prosecutions should be revised to eliminate several ambiguities. Denmark should also review its overall approach to foreign bribery enforcement.

The report identifies additional areas for improvement. The Working Group is very concerned that many of Denmark's Phase 2 recommendations remain unimplemented. It therefore reiterates its earlier recommendation that Denmark promptly increase the maximum sanctions available for foreign bribery and false accounting. In addition, it should take immediate and conclusive steps to ensure that its small facilitation payments defence is clearly defined, has the force of law, and is consistent with Article 1 of the Convention. The government should send a co-ordinated and consistent message to the private sector to prohibit or discourage the making of small facilitation payments. Appropriate measures to protect whistleblowers in the public and private sectors are needed. The Working Group is extremely disappointed that Denmark has not extended the Convention to Greenland and the Faroe Islands. Denmark should adopt a concrete roadmap to rectify this deficiency as a matter of priority.

The report also highlights positive aspects of Denmark's efforts to fight foreign bribery. The Working Group is encouraged by mechanisms for obtaining bank and tax information, and that secrecy rules have not posed difficulties in SØIK's investigations. Efforts have been taken to raise awareness of foreign bribery and to promote corporate social responsibility. The Working Group also notes that suspicious money laundering transaction reports have increased and sanctions have been imposed for failure to report.

The Report and its recommendations reflect findings of experts from Finland and the Slovak Republic, and were adopted by the Working Group on 15 March 2013. It is based on legislation and other

materials provided by Denmark and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its three-day on-site visit to Copenhagen on 25-27 September 2012, during which the team met representatives of Denmark's public and private sectors, legislature, judiciary, and civil society. Within one year of the Working Group's approval of this report, Denmark will make a follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years.

A. INTRODUCTION

1. The On-site Visit

1. On 25-27 September 2012, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Copenhagen as part of the Phase 3 evaluation of Denmark's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Finland and the Slovak Republic as well as members of the OECD Secretariat.¹ Before the on-site visit, Denmark responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Danish public and private sectors, judiciary, civil society, and media.² The evaluation team expresses its appreciation to the participants for their openness during the discussions, and to Denmark for its co-operation throughout the evaluation.

2. Summary of the Monitoring Steps Leading to Phase 3

3. The Working Group has previously evaluated Denmark in Phase 1 (December 2000), Phase 2 (June 2006) and the Phase 2 Written Follow-Up Report (July 2008). As of July 2008, Denmark had fully implemented 2 out of 13 Phase 2 Recommendations (see Annex 1 at p. 55). The outstanding Recommendations cover a range of issues such as awareness-raising, whistleblower protection, reporting obligations of officials, tax, accounting and auditing, investigative techniques, training of law enforcement officials, corporate prosecutions, and the Convention's application to Greenland and the Faroe Islands.

3. Outline of the Report

4. This report is structured as follows. Part B examines Denmark's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

¹ Finland was represented by: Ms. Krista Soukola, District Prosecutor, Head of Investigation, Office of the Prosecutor General; and Mr. Juuso Oilinki, Detective Inspector, Finnish Police, National Bureau of Investigation, Anti-Corruption. The Slovak Republic was represented by Mr. Vladimír Turan, Prosecutor, Head of Section of the Fight against Organised Crime, Terrorism and International Crime, Office of the Special Prosecutor, General Prosecutor's Office; and Mrs. Silvia Matulova, Accounting and Auditing Senior Expert, Accounting Legislation and Methodology Department, Tax and Customs Section, Ministry of Finance. The OECD Secretariat was represented by Mr. William Loo, Ms. Melissa Khemani and Ms. Elisabeth Danon, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

² See Annex 2 for a list of participants.

4. Economic Background

5. Denmark is a mid-sized economy in the Working Group. In 2011, it was the 24th largest economy and 23rd largest exporter of goods and services among the 40 Working Group members. The top export sectors were: machinery and instruments; meat and meat products; dairy products; fish; pharmaceuticals; furniture; and wind turbines. Denmark also ranked 16th in the Working Group in outward foreign direct investment stocks in 2011. The top trade partners and investment destinations were the EU and the US.³

6. Denmark's trade and investment with emerging economies are relatively low but are expected to increase. In 2010, imports from and exports to China amounted to 5.3% and 3% of the total respectively. Imports and exports with Russia were lower, amounting to just 1% and 1.6%. The main exports were pharmaceutical products; photographic and optical equipment; shipping services; and prepared food. Investment in China and Russia was less than 2% and 1% of the total, while 7% was in Southeast Asia.⁴ The Danish government expects trade and investment with emerging economies to grow, as demand from these countries evolves to match the strengths of Danish industry.⁵

5. Overseas Territories

7. The Kingdom of Denmark consists of Denmark, Greenland, and the Faroe Islands. Neither Greenland nor the Faroe Islands is a significant economy. However, some companies in fishing and manufacturing from these territories do operate internationally, according to participants at the on-site visit. To date, the Anti-Bribery Convention does not apply to Greenland or the Faroe Islands. When Denmark ratified the Convention, it made a reservation that the Convention would not apply to these territories until further notice. This issue is discussed in detail at p. 16.

6. Cases Involving the Bribery of Foreign Public Officials

8. Denmark has taken additional steps to implement the Convention since Phase 2. Most notably, Denmark has convicted and sanctioned one company for foreign bribery, though the Danish authorities disagree over whether the case falls within the Convention. The authorities have also received reports of other foreign bribery allegations. Other positive developments include increases in suspicious money laundering transaction reports and sanctions imposed for failure to report; mechanisms to obtain tax and bank information; and an increased awareness of foreign bribery in Denmark.

9. Despite these positive developments, concerns remain in other areas, particularly over the adequacy of criminal enforcement of the foreign bribery offence. Just 1 out of 13 foreign bribery allegations has resulted in prosecution. Of the remaining cases, nine cases have been terminated while three are ongoing. These allegations are discussed in detail in this report, with case names anonymised at the request of the Danish authorities. These cases raise issues such as whether sufficient inquiries were made before the cases were closed, the lack of prosecution of legal persons, over-reliance on investigations by foreign authorities, inadequate efforts to secure foreign evidence and co-operation, and the scope of the facilitation payments defence. The overall number of allegations that have surfaced is also low, considering the exposure of Danish companies to the risk of committing foreign bribery. Many of the Working Group's Phase 2 Recommendations also remain unimplemented.

³ IMF World Economic Outlook, UNCTAD and WTO Trade Statistics. GDP measured in current prices. Outward FDI was targeted at the US, UK, New Zealand and other OECD countries.

⁴ UNCTAD and WTO Trade Statistics.

⁵ Danish Trade Council (2012), "BRIK Analyse".

(a) Concluded Cases Resulting in Sanctions

10. There is one concluded foreign bribery case that has resulted in sanctions in Denmark. In the *Development Aid Procurement Case (Case #1)*, a Danish pharmaceutical company in 2005 bribed two Dutch consultants employed by a private company that had been retained by the United Nations Development Programme (UNDP). UNDP had hired the company to prepare a call for tenders for drugs that would be delivered to the Republic of Congo as development aid. The company also evaluated the tenders received and advised UNDP on selecting the winning bid. The values of the bribe and contract won by the defendant through bribery were USD 1 million and USD 143 million respectively. The charges were ultimately resolved “out-of-court” in June 2011. Under the settlement, the defendant admitted to committing private corruption, a less serious offence than foreign bribery. The Danish authorities explained that they chose a charge of private corruption because they could not prove that the bribed consultants were foreign public officials under the Criminal Code. The defendant agreed to pay a fine of DKK 2.5 million (USD 436 000 or EUR 335 000) and DKK 20 million (USD 3.5 million or EUR 2.7 million) in confiscation. The amount of confiscation reflected the estimated profits that the defendant earned from the bribery-tainted contract, according to the Danish authorities.

11. The *Development Aid Procurement Case* is a foreign bribery case that falls within the Convention, even though the matter was settled on charges of private corruption. Under Article 1(4) of the Convention, a foreign public official includes officials and agents of public international organisations such as UNDP. Furthermore, the Convention adopts a functional test of whether an individual is a foreign public official. As commentators have noted, officials of a public international organisation include individuals who “carry out activities related to [the organisation’s] decision-making functions. [...] Temporary agents employed by [these organisations] or project-based workers are included.”⁶ In the *Development Aid Procurement Case*, the company employing the bribed consultants was responsible for preparing the terms of reference for a procurement of drugs that would be delivered by UNDP as development aid. The company also evaluated the tenders received and gave advice on the selection of the winning bid. The company thus performed functions of a public nature that were core to UNDP’s mission as a public international organisation. This is sufficient to bring the case within the Convention’s functional definition of a foreign public official. That bribes were paid to consultants of a private company and not employees hired directly by UNDP is immaterial.

(b) Terminated Cases without Sanctions or Prosecutions

12. *Case #2 - Power Station Case*: Company A is a state-controlled power generation company in an EU Country Z. In 2005, it invited tenders for a EUR 200 million contract to build a new power station and hired Company B, a company in a second EU Country G, for advice on which tender to accept. Company A ultimately relied on Company B’s advice and awarded the contract to Company D, a Danish company. Several irregularities in the tendering process were later reported by the media, Country Z’s Auditor General, the European Commission and a competitor company. The case was handled by the Public Prosecutor for Serious Economic and International Crime (SØIK).⁷ Before closing this case in May 2010, SØIK obtained a statement from Company D. It also requested information from the authorities in Country Z but did not receive any response. SØIK ultimately followed up its request for information by contacting the authorities in Country Z by telephone. The case is discussed in greater detail at p. 27.

13. *Case #3 - Trips for Doctors Case*: Company E is a Danish pharmaceutical company. In 2006, its overseas subsidiary in EU Country Y bribed medical professionals by financing trips to supposed

⁶ Zerbes, I. (2007), “Article 1. The Offence of Bribery of Foreign Public Officials”, in Pieth M., Low L. and Cullen P. (eds.), *The OECD Convention on Bribery – A Commentary*, pp. 76-77.

⁷ Prior to 1 January 2013, SØIK was known as the Public Prosecutor for Serious Economic Crime (SØK).

conferences that were actually tourism visits. The subsidiary was fined in Country Y. The authorities in Country Y informed SØIK that the bribery only involved nationals of Country Y and that no links were established to the Danish parent company. SØIK thus terminated the case in January 2011. However, it confirmed at the on-site visit that it did not conduct any investigations into whether the Danish parent Company E directed or authorised the bribery committed by its subsidiary in Country Y. SØIK also did not examine whether the practice of bribing medical professionals with trips was used by the Company E or its other subsidiaries.

14. *Case #4 - Consultancy Case:* Company F is an international consultancy with offices in Denmark as well as Europe, Asia and Africa. In 2006, an employee of Company F attempted to bribe an official of Country X in the Middle East to win a consulting contract from the government of Country X. The employee was convicted in Country X and served a one-year sentence of imprisonment. SØIK interviewed the employee upon his return to Denmark. The employee stated that the company did not know about the bribe attempt. He also claimed that his conviction in Country X had been wrongful. SØIK obtained some documentation from the consulate of Country X in Denmark. SØIK requested further information from Country X (including a copy of the court order), but terminated the case in 2009 when it did not receive a response. SØIK did not make a formal MLA request. Company F was not prosecuted in Denmark.

15. *Case #5 - African Port Case:* SØIK was informed by the Ministry of Foreign Affairs of payments made by a Danish logistics company in a western African port. A Danish liaison officer attended the port and interviewed the company's local director and employees. The officer confirmed that the company had made small payments to the local harbour master to "keep competitors away" from the harbour. Additional payments were also made to local police officers. SØIK terminated the case in August 2010.

16. *Case #6 - Motor Vehicle Case:* This case was referred to SØIK by the Danish Ministry of Foreign Affairs. A subsidiary of a Danish company in African Country P was suspected of irregularities in obtaining an order of over EUR 4 million for a fleet of luxury motor vehicles. In December 2011, a court in Country P dismissed the case due to lack of evidence ("no case to answer"). SØIK accordingly terminated its case.

17. *Case #7 - World Bank Contract Case:* In June 2010, the World Bank informed SØIK of information from an employee of a UK firm that his/her company paid bribes to obtain contracts in Africa. A Danish company was allegedly the intermediary that channelled the corrupt payments. SØIK liaised with the UK authorities, which confirmed that there was no substance in the accusations. SØIK then terminated the case in May 2012.

18. *Case #8 - Water Project Case:* SØIK received information that a Danish company agreed in 2007 to pay a 1% fee to a foreign, state-owned company from an Asian country operating as a tendering agency if it won a tender for a water supply project. SØIK interviewed the employees of the Danish company and was informed that the 1% fee had not been paid. The case was then terminated in November 2010. The Danish authorities did not advance the investigation on the basis of the information that the company merely offered a bribe.

19. *Case #9 - Aircraft Case:* Danish company A is a minority shareholder of Company B, which was located in Africa. An agent of Company B reportedly bribed officials in an African country to secure a contract for farm equipment and aircrafts. The bribe was deposited in an African branch of a bank based in Country P. Upon a demand from the Country P authorities, a Danish citizen was interrogated and information provided to the police in Country P. SØIK stated that it did not find anything that could justify charges for corruption, money laundering, or other illegal acts. The case was terminated in December 2007.

20. *Case #10 - Paint Product Case:* In May 2012, the sales director of Company V, a paint producer, was quoted in the media as saying that the company had paid its partner in Asia for taking care of corruption risks. SØIK applications for search warrants to seize evidence were rejected by the courts. SØIK then interviewed the CEO of Company V and was informed that the media had misquoted the sales director. SØIK then terminated the case.

(c) Ongoing Foreign Bribery Cases

21. *Case #11 - Transport Equipment Case:* A Danish transport equipment maker allegedly paid a USD 150 000 bribe to foreign public officials in 2008 to secure a EUR 7 million contract. Other bribes may also have been paid. SØIK learned of the allegations in spring 2012. It has searched the company's premises and was examining the seized material as of September 2012. The case was detected through an anonymous tip with internal mail correspondence enclosed.

22. *Case #12 - Medical Equipment Case:* Company S is a Danish subsidiary of Company T, a US company. A September 2011 company report revealed that distributors of Company S made payments in excess of what they owed to Company S, and directed that Company S transfer the excess to unknown beneficiaries for unknown purposes. Payments have also been used to finance doctors' attendance in medical conferences. Some of the suspicious payments were made as early as 2003. Companies S and T self-reported the matter to the Danish and US authorities simultaneously in October 2011. By September 2012, no investigative steps had been taken; SØIK was still reviewing the case.

23. *Case #13 - Intermediary Case:* Company H was a Danish consulting firm that allegedly channelled bribes from the offices of a company in Country M that were located in Country N to public officials in Country O. The alleged bribery occurred in spring 2007. Company and house searches were carried out in Denmark in August 2011. Other companies may also have used Company H as an intermediary. At the time of this report, however, SØIK is only considering tax-related charges against Company H. SØIK does not consider that it could bring foreign bribery charges against Company H because Country N has terminated its investigation without charges.

(d) Concluded Oil-for-Food Cases

24. The Danish authorities have also concluded 14 cases of sanctions evasion relating to the UN Iraq Oil-for-Food Programme. Five of these cases were referred to in this evaluation since they are illustrative of issues such as confiscation. The Danish authorities did not seek to impose fines for sanctions evasion in these cases because of the statute of limitations.

25. *Case #14 - Bukkehave Corporation:* In 2000-2002, Bukkehave Corporation secretly paid a special 10 % after sales service fee to the Iraqi government to obtain contracts of over DKK 100 million (EUR 13.4 million) for trucks. The payment was contrary to a UN embargo. Fines for sanctions evasion were time-barred because of the statute of limitations. The Danish authorities sought confiscation, which was subject to a longer limitations period. In August 2012, the Danish Supreme Court ordered confiscation in the amount of DKK 10 million against the company.

26. *Case #15 - Novo Nordisk:* Between 2001 and 2003, Novo Nordisk (a pharmaceutical company) paid approximately USD 1.4 million to the former Iraqi government by inflating the price of contracts by 10%. The contracts were submitted to the UN for approval but the kickbacks were concealed. In June 2009, SØIK reached an out-of-court settlement under which Novo Nordisk paid DKK 30 million (approximately USD 5 million and EUR 4 million) in confiscation. Fines for sanctions evasion were time-barred because of the statute of limitations. Following the principle of *ne bis in idem*, the settlement

amount took into account the amount paid by Novo Nordisk in settlements with the authorities in other jurisdictions.

27. *Case #16 - AGCO Denmark:* AGCO Denmark A/S is a Danish subsidiary of AGCO, a Georgian-based agricultural equipment firm. In 2000-2003, AGCO Denmark made approximately USD 5.9 million in kickback payments to the Iraqi government in connection with sales of equipment to Iraq under the UN Oil-for-Food Programme. SØIK reached an out-of-court settlement under which AGCO Denmark would pay confiscation (the amount has not been disclosed to the public). Fines for sanctions evasion were time-barred because of the statute of limitations. The settlement took into account the amount paid by AGCO Denmark in other jurisdictions.

28. *Cases #17 and #18 - Kosan Crisplant and Kosan Teknova:* These cases involve two companies paying kickbacks to the Iraqi government as part of the Oil-for-Food Programme. More specific details were not available. Both companies reached out-of-court settlements with SØIK and agreed to pay confiscation. SØIK stated that special consideration was given to a so-called third party clause whereby SØIK undertook to pay possible compensation to third parties out of the amount confiscated. Fines for sanctions evasion were time-barred due to the statute of limitations.

Commentary

The lead examiners are seriously concerned about the low number of foreign bribery enforcement actions in Denmark. The Danish authorities have not been sufficiently proactive and have closed several foreign bribery cases prematurely. There are further concerns that Denmark has made little progress in implementing a number of Phase 2 recommendations.

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

29. This part of the report considers Denmark's approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Denmark's progress on weaknesses identified in Phase 2, or from changes to Denmark's domestic legislative or institutional framework.

1. Foreign Bribery Offence

30. Denmark's foreign bribery offence is in Section 122 of its Criminal Code:

Section 122 – Any person who unlawfully grants, promises or offers some other person exercising a Danish, foreign or international public office or function a gift or other privilege in order to induce him to do or fail to do anything in relation to his official duties shall be liable to a fine or imprisonment for any term not exceeding three years.

31. Denmark reiterates two general principles of statutory interpretation. First, Danish criminal legislation is not characterised by lengthy explanations or the presence of details and definitions. The details may instead be found in the *travaux préparatoires* (preparatory works) of a bill. Courts are required to consider – but are not bound by – the preparatory works when interpreting legislation. According to the Danish authorities, the preparatory works “carry a high degree of legal weight. [...] If a provision is open

to alternative interpretations the courts will normally use the preparatory works as the most important interpretative aid.” Second, the courts will normally interpret a statutory provision in a way that is in accordance with the Danish constitution and relevant international obligations such as the Convention and EU law.

32. This part of the report addresses the defence of small facilitation payments, an issue which the Working Group has decided to follow up.⁸ It also addresses outstanding Phase 2 Recommendations regarding the application of the Convention to Greenland and the Faroe Islands, two Danish overseas territories.

(a) Defence of Small Facilitation Payments

33. Denmark’s small facilitation payments defence is found not in the Criminal Code but in the Code’s *travaux préparatoires*. The defence permits the paying of “token gratuities” to a foreign public official in a country with “very special conditions”:

Even though the actus reus of the proposed amendment is the same as bribery of foreign public officials, etc., as bribery of Danish public officials, it cannot be precluded that in some countries such very special conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark. This might even be imagined although the gratuities may have been granted to make the foreign public official act in breach of his duties. Whether such occurrences are non-criminal (not “unlawful”) must depend on a concrete assessment in each case, including an assessment of the purpose of granting the gratuity.

As this quotation shows, the defence allows the payment to a foreign public official to act in breach of his duties. The *travaux préparatoires* give an example of paying a prison officer to induce him/her to breach his/her duties by allowing a visit of an incarcerated family member.

34. In Phase 2, the Working Group noted that a payment to induce a foreign public official to breach his/her duties would not be permitted under Commentary 9 of the Convention. Phase 2 Recommendation 6(a) thus asked Denmark to clarify that all small facilitation payments that induce a foreign public official to act in breach of his/her duties in the context of an international business transaction are illegal under the Danish Criminal Code. In 2007, Denmark’s Ministry of Justice (MOJ) issued a booklet entitled “How to Avoid Corruption” (MOJ Booklet) which stated that “paying sums of money in connection with international business relationships for the purpose of making public employees breach their duties will always be undue and thus constitute a criminal offence”. The MOJ Booklet has been distributed to the private sector, police, courts, and local authorities. It is also available on the MOJ’s website. The Working Group found that this was sufficient to implement Recommendation 6(a) but that it would monitor the Danish court’s interpretation of the facilitation payments defence (Written Follow-Up Report para. 8).

35. Since Phase 2, Danish courts have yet to consider the facilitation payments defence but additional concerns have arisen. The 2009 Anti-Bribery Recommendation para. VI.ii, which was adopted after Phase 2, provides that small facilitation payments “must in all cases be accurately accounted for in [the paying] companies’ books and financial records”. Denmark’s defence does not so require. Lawyers at the on-site visit stated that they had given legal advice concerning facilitation payments, but they have not advised clients to record such payments. One external auditor added that he had seen companies with systems for dealing with facilitation payments, but in reality most such payments are not recorded. Furthermore, the *travaux préparatoires* do not expressly limit the defence to payments made to secure the performance of routine governmental action. They also do not expressly exclude payments made to obtain or retain

⁸ Denmark: Phase 2 Written Follow-up Report, Summary and Conclusions of the Working Group, para. 8.

business advantages from the defence as required in Commentary 9 of the Convention. In these respects, Denmark's defence on its face may be broader than what is permitted under the Convention and 2009 Recommendation.

36. A further concern is the lack of a clear, concise and comprehensive definition of the defence. To apply the defence, reference must be made to three sources: Section 122 of the Criminal Code, the *travaux préparatoires*, and the MOJ Booklet. Each of these sources carries different legal weight. The Criminal Code is of course binding. The *travaux préparatoires* are not, though courts are required to consider them when interpreting legislation. Of even less weight is the MOJ Booklet which was produced after the legislation's enactment and hence does not directly reflect the legislator's intent. As Denmark points out in the Phase 3 questionnaire responses, the Booklet "is not legally binding in the same way as the wording of the statute or the *travaux préparatoires*, but it is an interpretative aid in cases where the *travaux préparatoires* are unclear." In 2009, the Council of Europe concluded that the MOJ Booklet was not sufficient to allay its concerns about the facilitation payments defence, and recommended that Denmark take steps to "put [this issue] beyond doubt".⁹

37. The absence of a single, authoritative definition may have contributed to widespread confusion over the defence's scope. Since Phase 2, small facilitation payments were addressed in at least five anti-corruption policies and guidelines issued by Danish authorities and one business organisation.¹⁰ Two of the documents limit facilitation payments to those made to secure routine governmental action. One document excludes payments made to obtain or retain a business advantage. Two other documents do not refer to either element at all. A fifth cited definitions from the OECD and Transparency International. Three of the five documents do not mention a requirement to maintain records of facilitation payments. Some of these documents, such as the MOJ Booklet, also do not discourage the making of small facilitation payments. Many corporate policies on facilitation payments also contain inconsistent definitions (see p. 39). At the on-site visit, numerous representatives of the Danish private sector and legal profession agreed that the defence's definition lacked clarity. One auditor stated that some companies confuse facilitation payments with payments made under duress. Many participants would like to see additional guidance including specific examples in a business context.

38. In response to concerns about the facilitation payments defence, the Danish authorities reiterate that the defence would be narrowly interpreted. Only situations involving necessity or attempts to avoid the consequences of breaches of fundamental rights would attract the defence. The difficulty, however, is that this position is not borne out in practice. There is no case law supporting a narrow interpretation of the defence. To the contrary, as described above, other governmental bodies, Danish companies, and business organisations have adopted broader and divergent definitions of the defence. Furthermore, however narrowly interpreted, the current defence will not require companies to account for facilitation payments in their books and financial records.

39. The Ministry of Justice also proposed to issue new guidelines to rectify the current situation. The effectiveness of this proposal is doubtful, however. Like a narrow interpretation of the current defence, guidelines cannot impose a legal requirement on companies to record facilitation payments in their books and records. Moreover, the Ministry has already issued guidelines in 2007. The guidelines also have less legal weight than the Criminal Code or the *travaux préparatoires*.

⁹ GRECO (2009), *Third Evaluation Round Report on Denmark on Incriminations*, para. 67.

¹⁰ These documents are: (1) Ministry of Justice booklet "How to Avoid Corruption"; (2) Confederation of Danish Industries publication "Avoid Corruption"; (3) Danish Trade Council's Anti-Corruption Policy; (4) Danish Investment Funds Anti-Corruption Guidelines; and (5) Danida's Anti-Corruption Code of Conduct. Danida's Code was replaced in 2011 by the Ministry of Foreign Affairs' Anti-Corruption Policy which does not mention facilitation payments.

40. Finally, the facilitation payments defence is available only if “very special conditions” are present in the country where the payment was made. According to Denmark, this involves a consideration of local customs and laws. This may thus be inconsistent with Commentary 7 of the Convention.¹¹ Furthermore, once a defendant provides *prima facie* proof that “very special conditions” may exist, the prosecution has the onus of disproving the existence of such conditions beyond a reasonable doubt. This could be challenging in practice.

Commentary

Danish law presently permits a defence of paying “certain token gratuities” to a foreign public official in a country with “very special conditions”. The lead examiners have significant concerns that this defence permits bribes to foreign public officials that are prohibited under Article 1 of the Convention. The lead examiners therefore recommend that Denmark take immediate and conclusive steps to ensure that this defence is clearly defined, has the force of law, and is consistent with Article 1 of the Convention and the 2009 Recommendation.

Furthermore, the absence of a single, clear definition of the defence has led to widespread confusion. The lead examiners therefore recommend that the relevant Danish authorities (including MOJ, Trade Council, Danida, and the Danish Investment Funds) send a co-ordinated and consistent message on facilitation payments to the private sector. This communication should include a consistent definition of the scope of the facilitation payments defence. It should also encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies’ books and financial records. Denmark should also periodically review its policies and approach on small facilitation payments in order to effectively combat the phenomenon.

(b) Definition of a Foreign Public Official

41. Denmark’s foreign bribery offence applies to a bribe given to a person who “exercis[es] a Danish, foreign or international public office or function”. In determining whether this element of the offence has been proven, Danish courts may take into account all relevant information, including information or statements from foreign authorities. At the on-site visit, Denmark explained that information from foreign authorities may not be necessary where the functions of a bribed official are obvious. In less clear-cut cases (*e.g.* where the official works for a foreign state-owned enterprise), it may be necessary to seek clarification from the foreign authorities. SØIK stated that it settled the *Development Aid Procurement Case* on charges of private corruption because it could not prove that the bribed consultants were foreign public officials under the Criminal Code. However, as described at p. 9, the case involves a foreign bribery offence within the meaning of Article 1 of the Convention.

Commentary

The lead examiners recommend that Denmark provide guidance to investigators and prosecutors on the definition of foreign public officials, including those of public international organisations.

¹¹ Commentary 7 states that, “It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.”

(c) *Application of the Convention in Greenland and the Faroe Islands*

42. As mentioned at p. 8, the Kingdom of Denmark consists of Denmark, Greenland, and the Faroe Islands. Denmark retains responsibility for foreign and security policy for both territories but has steadily devolved other powers. Home rule was granted to Greenland and the Faroe Islands in 1979 and 1948 respectively. The Faroe Islands has responsibility for its criminal law, some financial regulation and supervision, company law, and accounting and auditing since 2005. Both territories have been granted the opportunity to acquire responsibility for police, prosecution service and the administration of justice.

43. To date, the Anti-Bribery Convention does not apply to Greenland or the Faroe Islands. When Denmark ratified the Convention, it made a reservation that the Convention would not apply to these territories until further notice. Phase 2 Recommendation 6(b) thus suggested that Denmark, “within the rules governing its relationship with Greenland and the Faroe Islands, (i) extend the OECD Convention to Greenland at the earliest possible date; and (ii) assist the authorities of the Faroe Islands in adopting the necessary legislation in order to extend ratification of the OECD Convention to the islands at the earliest possible date”. Similar reservations are in force excluding Greenland and the Faroe Islands from the application of the UN Convention against Corruption (UNCAC) and the Council of Europe Criminal Law Convention against Corruption (CoE Convention).¹²

44. On several previous occasions, Denmark has expressed to the Working Group an intention to extend the Anti-Bribery Convention to Greenland. In Phase 1 in 2001 (Report pp. 1-2), Denmark stated that extension was pending a review of Greenland’s foreign bribery offence. The 2006 Phase 2 Report (para. 14) stated that the Danish Government would present a bill to Parliament in 2006-07 to extend the Convention to Greenland. In the end, the bill ultimately submitted to Parliament was to create a new Greenland Criminal Code, and not to extend the Convention *per se*. In 2008, the Danish authorities informed the Working Group that, after this new Criminal Code entered into force, the Ministry of Justice would contact the Greenlandic authorities about Convention extension (Written Follow-Up Report p. 17). This did not occur, even though the Criminal Code entered into force on 1 January 2010. Section 38 of the new Code creates a specific offence that criminalises foreign bribery. According to the preparatory works, this offence aims to meet the international obligations under the Convention.¹³

45. Denmark has also made similar statements of intention to extend the Anti-Bribery Convention to the Faroe Islands. It stated in 2001 that Convention extension could occur only after a foreign bribery offence was in place (Phase 1 Report pp. 1-2). In 2006, it indicated that the Danish Government had recently requested the Faroese Home Rule Government to extend the Convention but had not yet received a response (Phase 2 Report para. 15). The 2008 Written Follow-Up Report (p. 17) did not refer to any dialogue with the Faroese Government. Instead, it stated that the Danish government was planning to enact a decree to apply the foreign bribery offence in the Danish Criminal Code to the Faroe Islands. On 4 December 2009, Royal Decree No. 1139 brought into force “a large number of changes in the Criminal Code of the Faroe Islands.”¹⁴ The Faroe Islands now has the same foreign bribery offence as Denmark,

¹² UN Treaties Collection (treaties.un.org); GRECO (2009), *Third Evaluation Round Report on Denmark on Incriminations*, para. 8.

¹³ Section 38 of the Greenlandic Criminal Code creates an offence of active bribery of persons exercising a public office or function. The wording of Section 38 is all but identical to Section 122 of the Danish Criminal Code. The only significant difference is that the offences in the Greenland Code do not specify the sanctions for each offence. Instead, any offence may be subject to a range of sanctions such as cautions, fines, suspended imprisonment, supervision, community service, and imprisonment of up to 10 years. This is consistent with Greenland’s legal tradition (GRECO (2011), *Third Evaluation Round Compliance Report on Denmark*, para. 25). The preparatory works also provide a facilitation payments defence.

¹⁴ GRECO (2011), *Third Evaluation Round Compliance Report on Denmark*, para. 25.

according to participants at the on-site visit. Yet, the Danish authorities did not follow up this development with efforts to extend the Convention to the Faroe Islands.

46. At the time of this report, Denmark no longer intends to extend the Convention to Greenland or the Faroe Islands. At the on-site visit, Denmark stated that it was not considering a withdrawal of its reservation under the Convention. No concrete plans to extend the Convention were described. The authorities from Greenland and the Faroe Islands said there was no urgency to Convention extension since the foreign bribery offences in both territories are now up-to-date. However, there is no information on these territories' compliance with other aspects of the Convention (apart from anti-money laundering measures (see p. 36)). The Greenlandic authorities added that fighting domestic bribery is a priority but not foreign bribery. The Faroe Islands indicated that it generally tries to comply with "international regimes", usually after some delay. It would not confirm, however, that it intends to seek extension of the Convention. In May 2011, however, Denmark indicated to the Council of Europe that it would consider lifting the territorial reservation to the CoE Convention in respect of Greenland and the Faroe Islands.¹⁵

Commentary

The lead examiners are extremely disappointed that Denmark has not extended the Convention to Greenland and the Faroe Islands. Since 2001, Denmark has repeatedly stated that it would take steps to extend the Convention after foreign bribery offences were in place in both territories. This condition has been met, but Denmark has now changed its position and no longer considers Convention extension a priority. The lead examiners are also dismayed that Denmark would consider extending the CoE Convention but not the Anti-Bribery Convention to Greenland and the Faroe Islands.

In sum, the lead examiners believe that Denmark must take a much more proactive approach to extending the Convention to Greenland and the Faroe Islands. They therefore reiterate Phase 2 Recommendation 6(b), and recommend that Denmark promptly adopt as a matter of priority a roadmap setting forth specific goals, concrete steps and deadlines for implementing the Convention at the earliest possible date in Greenland and the Faroe Islands.

2. Responsibility of Legal Persons

47. Since Phase 2, Danish statutory provisions and guidelines on the criminal liability of legal persons for foreign bribery have not changed. The Criminal Code provides that a legal person may be punished by a fine if such punishment is authorised by law or applicable rules (Sections 25 and 306). Liability arises if one or more persons "connected" to a legal person, or the legal person itself, commits a crime such as foreign bribery (Section 27). Liability may thus result from acts committed by an agent or employee of a company (Phase 2 Report para. 209). Liability may be imposed on a wide range of legal persons including joint-stock companies, co-operative societies, partnerships, associations, foundations, estates, municipalities, state authorities, and one-person businesses of comparable size and organisation (Section 26). The Danish authorities add that the conviction of a natural person is not a prerequisite for the liability of a legal person.

48. Guidelines issued by the Director of Public Prosecutions (DPP) qualify the scope of liability. A legal person can be held liable only for an offence that has been committed by an individual "in the course of [the company's] business". Offences committed by an employee in connection with "purely private acts" do not give rise to corporate liability. As well, liability arises even if the perpetrator "acted in conflict with explicit instructions from management, but totally abnormal actions exempt the legal person from

¹⁵ *Ibid.*

responsibility”. “Totally abnormal actions” are “extreme situations” and are not relevant to foreign bribery (Phase 2 Report paras. 209-210 and 216; DPP Notice No. 5/1999, p. 3).

49. In Phase 2, the DPP Guidelines provoked concerns over foreign bribery committed by a subsidiary. The Guidelines specifically provided that, “If an offence is committed in a subsidiary, the liability must be asserted against the subsidiary and not against the parent company” and vice versa for offences committed by a parent. This led the Working Group to express concerns that the Guidelines would exclude from Danish jurisdiction “a number of foreign bribery acts committed by Danish companies” and discourage Danish law enforcement agencies from investigating such cases (Phase 2 Report para. 221). Phase 2 Recommendation 6(c) thus asked Denmark to “ensure that the application of the DPP Guidelines on the liability of legal persons is in no way an impediment to using the full scope of the jurisdictional rules as provided by the Danish Criminal Code”.

50. In Phase 3, Denmark explained that parent companies can be held liable for foreign bribery committed by a subsidiary or joint venture on the basis of complicity. A parent company “would be liable for foreign bribery if [its] officer authorises the subsidiary to commit the bribery”. In addition, under the general provisions of the Criminal Code, a parent company would be liable if it “contributed to the execution of an offence by instigation, advice or action”. Instigation can be established on the basis of “an implied agreement or consent”. A parent company could also be held liable if “its officers accept that its subsidiary commits bribery,” according to the Danish authorities. The Danish authorities confirmed that they have not prosecuted parent companies on these bases.

51. The Danish authorities also stated that a legal person (including a parent company) could be held liable for failing to prevent foreign bribery. In their view, a legal person “could be held accountable for not taking reasonable measures”. An example is where a company fails to “react if it has reasons to believe that bribery will happen if it is not prevented from doing it.” A company that is aware that bribery has occurred would also have a duty to prevent future offences. However, liability would not arise if a parent company is merely aware that a subsidiary has inadequate corporate compliance programmes to address foreign bribery risks. The Danish authorities have not prosecuted a company for failing to prevent bribery.

52. These more nuanced approaches to the liability of a parent company based on complicity and failure to prevent are not reflected in the DPP Guidelines. Denmark explained that the Guidelines are of a general nature and that the doctrine of complicity is well-known. Nevertheless, the Guidelines currently contain a blanket statement that liability for an offence committed in a subsidiary must be asserted against the subsidiary and not the parent company. An express qualification of this position that refers to liability based on complicity and failure to prevent would seem appropriate.

Commentary

In Phase 2, the Working Group raised concerns over whether Denmark would effectively investigate and prosecute Danish companies for foreign bribery committed by their subsidiaries or joint ventures. These concerns remain, given the absence of both practice under and amendments to the Criminal Code and DPP Guidelines. The lead examiners therefore reiterate Phase 2 Recommendation 6(c), and recommend that Denmark ensure that the application of the DPP Guidelines on the liability of legal persons does not reduce the scope of the jurisdictional rules provided by the Criminal Code.

The lead examiners also note that the current DPP Guidelines explicitly state, without qualifications, that a parent company cannot be held liable for crimes committed by a subsidiary. This does not accurately reflect the views expressed by the Danish authorities in this evaluation. The lead examiners thus recommend that the DPP Guidelines be amended to

expressly state that a parent company may be held liable for crimes committed by a subsidiary and joint venture when the parent company authorises or accepts an offence, or contributes to an offence by instigation, advice or action. The Guidelines should also explain the circumstances under which a company may be held liable for the failure to prevent an offence. Such amendments to the Guidelines would ensure that Danish investigators and prosecutors routinely consider these bases of corporate liability in foreign bribery cases.

Finally, the lead examiners reiterate Phase 2 Follow-up Issue 8(e)(i) and recommend that the Working Group continue to follow up “whether in practice legal or procedural obstacles are encountered in proceeding against a legal person where the natural person who bribes a foreign public official has not been or cannot be proceeded against”.

3. Sanctions for Foreign Bribery and Related Offences

(a) Maximum Sanctions Available for Foreign Bribery

53. Phase 2 Recommendation 7(a) asked Denmark to “increase the level of the penalty of imprisonment against natural persons for foreign bribery as provided by Section 122 of the Danish Criminal Code, and ensure that they are effective, proportionate and dissuasive.” Natural persons who committed foreign bribery were punishable by a fine or imprisonment of up to three years. By contrast, a Danish or foreign official who accepted a bribe was punishable by a fine or six years’ imprisonment. Penalties for aggravated fraud and tax fraud were eight and four years respectively. (The maximum penalty for tax fraud has since been raised to eight years.) The Council of Europe has also recommended that Denmark increase sanctions for active foreign bribery.¹⁶

54. Fines are fixed having regard to factors such as the gravity of the offence, the offender’s ability to pay, and the actual or intended financial gain or amount saved. Fines against natural persons are calculated using “day fines”. The court imposes between 1 to 60 day fines. One day fine is equivalent to the offender’s average daily earnings at the time of sentencing. Where an offence is committed for financial gain and the day fine system results in an unreasonably low penalty, the court may impose another type of fine (Criminal Code Section 51). As for legal persons, Criminal Code Section 25 states that a fine may be imposed. There is no statutory limit on the fine. The Danish authorities explained that a fine against a legal person would not in practice be in the form of a day fine. Instead, legal persons are subject to “sum fines” which take into account the company’s turnover, as well as the factors mentioned above.

55. The maximum sanctions for foreign bribery have not been increased since Phase 2, though the Danish authorities have signalled an intention to do so for some time. In its 2008 Written Follow-Up Report (p. 20), Denmark undertook to thoroughly consider the Working Group’s recommendation by the end of 2008. In 2011, Denmark reported to the Council of Europe that legislative amendments to increase the maximum penalty to six years were expected to be introduced into Parliament in late 2011 or early 2012.¹⁷ At the on-site visit, Denmark stated that the timetable for submitting the amendment to Parliament had slipped to the end of 2012. In the end, a bill was introduced into Parliament in February 2013 which, if enacted, would enter into force in July 2013.

Commentary

The lead examiners are encouraged that Denmark has submitted a bill to increase the maximum sanctions against natural persons for foreign bribery. Nevertheless, they note this

¹⁶ GRECO (2009), *Third Evaluation Round Report on Denmark on Incriminations*, para. 69.

¹⁷ GRECO (2011), *Third Evaluation Round Compliance Report on Denmark*, para. 13.

issue has been outstanding for some time. They therefore reiterate Phase 2 Recommendation 7(a) and urge Denmark to promptly amend Criminal Code Section 122 to implement this Recommendation.

(b) Sanctions Imposed in Practice

56. In Phase 2, the Working Group decided to follow up the sanctions that would be imposed for foreign bribery in practice (Follow-up Issue 8(b)). As described in the Phase 2 Report (para. 236), Denmark conducted eight active domestic bribery prosecutions in 2002-2004 which produced three convictions, all of which resulted in suspended jail sentences. For passive domestic bribery in 2002-2003, nine prosecutions resulted in five convictions, all of which again led to suspended jail sentences. Statistics on fines against legal persons for intentional economic crimes were not provided.

57. In Phase 3, Denmark has imposed sanctions in only one case that falls within Article 1 of the Convention, namely *the Development Aid Procurement Case*. Pursuant to an out-of-court settlement (see p. 25), the defendant paid DKK 2.5 million (USD 436 000 or EUR 335 000) in fines and DKK 20 million (USD 3.5 million or EUR 2.7 million) in confiscation. These sanctions appear to be low when compared to the values of the bribe and the contract won by the defendant, which were USD 1 million and USD 143 million respectively. The Danish authorities explained that the size of the fine (but not confiscation) took into account the defendant's ability to pay as evidenced by its earnings. However, they did not provide any details of how the precise settlement figure was calculated. SØIK added that the sanctions had not been reduced because the company admitted to committing the less serious offence of private corruption, which is punishable by 18 months' imprisonment as opposed to 3 years for foreign bribery. In addition, both SØIK and the company stated at the on-site visit that a major motivation for reaching the settlement was because the case had been dragging on for some time. Denmark also provided statistics on sanctions for active domestic bribery under Section 122 of the Criminal Code (see Annex 5 at p. 67). From 2000-2011, 82 charges for this offence resulted in 13 sentences of imprisonment, 11 suspended sentences and 2 fines. The average length of imprisonment was approximately 3 months.

Commentary

The lead examiners note that Denmark has imposed sanctions in only one case that falls within Article 1 of Convention, namely the Development Aid Procurement Case. These sanctions appear to be low when compared to the values of the bribe and the contract won by the defendant. The lead examiners therefore recommend that the Working Group continue to follow up sanctions imposed for foreign bribery as practice develops.

(c) Sanctions for False Accounting

58. As in Phase 2, two Criminal Code offences may apply to false accounting. Both offences have been amended since Phase 2. Section 296(1)(2) prohibits the giving of false or misleading information concerning the conditions of legal persons in various communications such as public announcements concerning financial conditions, financial statements required by law, or reports, accounts and declarations to certain bodies or individuals. Section 302 prohibits the violation "in particularly aggravating circumstances" of legal requirements concerning, among other things, bookkeeping, registration of transactions and preparation of accounting material; and storage of accounting records, including descriptions of bookkeeping and systems for keeping and finding material.

59. The Phase 2 Report (paras. 229-232) found that Denmark's maximum sanctions for these offences were inadequate. Both offences are punishable by a fine or imprisonment of up to 18 months. The Working Group recommended that Denmark "seriously consider to further increase the sanctions" under

these provisions. It also recommended that Denmark compile relevant statistics on the sanctions imposed for these offences (Phase 2 Recommendation 7(b)).

60. In Phase 3, the Danish authorities stated that they have considered but have rejected increasing the maximum sanctions for false accounting:

The Ministry of Justice has considered this recommendation thoroughly in collaboration with the Director of Public Prosecutions and the Public Prosecutor of Serious Economic Crime. For that purpose a memorandum has been prepared with arguments and relevant case law. The authorities have on this basis considered the matter carefully and held several meetings on the recommendation but found no substantive reasons for taking steps to amend the provisions.

Denmark did not provide a copy of the case law or memorandum referred to above. Denmark added that false accounting is less serious because it is a “preventative offence”, i.e. an offence to prevent other offences such as foreign bribery or fraud.

61. Danish prosecutors agree that the current sanctions for false accounting are too low. In January 2013, two political parties laid a motion before Parliament urging the government to increase the sanctions under Section 302. In reply, the government stated that a number of test cases were pending and that it saw no need to take action regarding the sanctions for this offence. Just before this report was adopted, Danish prosecutors explained that it was their decision to bring the test cases. The prosecutors had considered that the current sanctions imposed for false accounting are too low, and hoped to convince the court to impose heavier sanctions for this crime in these test cases. A total of seven test cases are expected to be resolved in High Court in the next 6 to 12 months.

62. Denmark provided statistics (see Annex 5 at p. 67) which showed that in 2000-2011 there were 139 charges and 80 convictions for false accounting under Section 302. These resulted in 17 sentences of imprisonment, 20 suspended prison sentences, and 43 fines. The average length of imprisonment was 4.54 months. There was no information on the size of the fines. In addition, SØIK brought four minor cases under Section 302 to court in the autumn of 2012. Only one of those cases resulted in a conviction. The individual concerned was given a 7-day suspended sentence of imprisonment.

Commentary

The lead examiners remain concerned that the maximum sanctions available for false accounting in Denmark are not effective, proportionate and dissuasive. They also note that the maximum penalty for false accounting (18 months) is much lower than that for crimes such as aggravated tax fraud and aggravated fraud (both eight years). They therefore recommend that Denmark amend its legislation to increase the maximum sanctions for false accounting.

4. Confiscation of the Bribe and the Proceeds of Bribery

63. Criminal Code Sections 75-76 provide for confiscation, including in foreign bribery cases. Confiscation is discretionary, and may be ordered *vis-à-vis* proceeds of crime. Proceeds include all economic benefits obtained through a criminal offence and include indirect proceeds and income, profits or other benefits from the proceeds. Confiscation may be ordered against a person to whom the proceeds have directly passed. Confiscation would be ordered only if the acquirer knew of the connection between the property and the criminal act, displayed gross negligence in this respect, or received the property gratuitously. Confiscation also applies to objects used or intended to be used in a crime, objects produced

by a crime, and objects with respect to which a crime has been committed. In lieu of confiscation, a sum of equivalent value may be confiscated instead.¹⁸

64. A criminal conviction is not a prerequisite to confiscation. In the *Bukkehave Case* involving the UN Oil-for-Food Programme, the statute of limitations for an offence of breaching UN sanctions had expired. The Danish authorities thus could not seek to impose fines for this offence but were able to obtain confiscation against the defendant, which is subject to a longer limitation period. An August 2012 Supreme Court decision allowed confiscation of the net profit derived by the defendant from the contract in question. The net profit was calculated as the value of the contract minus certain allowable expenses, such as the cost of maintaining an agent and an office that were involved in the defendant's other legitimate activities.

65. In Phase 2, Denmark provided statistics indicating that DKK 132 million (EUR 17.7 million) had been confiscated in 2002-2004. The Working Group decided to follow up the issue of confiscation imposed in practice (Follow-up Issue 8(c)). In Phase 3, Denmark stated that it could not provide comprehensive statistics on confiscation. The FATF has recommended that Denmark "gather meaningful statistics and use them to regularly review the effectiveness of its confiscation regime."¹⁹

Commentary

The lead examiners recommend that Denmark maintain detailed statistics on confiscation imposed in practice. They also recommend that the Working Group continue to follow up Denmark's application of confiscation in practice.

5. Investigation and Prosecution of the Foreign Bribery Offence

66. In Phase 2, the Working Group decided to follow up the number, sources, and processing of foreign bribery allegations in Denmark, as well as the application of the foreign bribery offence (Follow-up Issues 8(a) and 8(b)). This section examines Denmark's legal and institutional framework for prosecuting and investigating foreign bribery, as well as Denmark's actual foreign bribery enforcement actions. The enforcement of the foreign bribery offence in Denmark may be inadequate due to a number of factors, such as insufficient inquiries before cases are closed, a general absence of corporate prosecutions for intentional economic crimes, over-reliance on investigations by foreign authorities, and inadequate efforts to secure foreign evidence and co-operation.

(a) Enforcement Agencies and Co-ordination

67. As in Phase 2, the Danish Public Prosecutor for Serious Economic and International Crime (SØIK) is the body principally responsible for foreign bribery cases. The unit consists of prosecutors, police officers, and support staff which include experts in financial and accounting matters. SØIK's mandate, as set out in a ministerial order, is to handle cases of economic crime that are complex, are linked to organised crime, or involve the use of special methods to commit the crime. Apart from foreign bribery, SØIK may also investigate other offences such as fraud, embezzlement, tax offences and extortion. Economic crime cases not taken on by SØIK would be dealt with by the authorities in the 12 local police districts.

¹⁸ FATF (2006), *Denmark: Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism*, para. 239 and 245; Phase 2 Report para. 246.

¹⁹ FATF (2006), *Denmark: Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism*, paras. 266 and 271-272.

68. SØIK does not necessarily have conduct of every foreign bribery case, however. Denmark states that local authorities, which have specialised prosecutors dealing with financial crime, have the power to investigate and prosecute foreign bribery. If the local police come across a foreign bribery case, it would inform the local prosecutor who would likely refer the matter to SØIK. However, the local authorities are not obliged to refer all foreign bribery cases to SØIK and have not been explicitly instructed to do so. If the local authorities maintain conduct of a foreign bribery case, SØIK may provide assistance and advice. At the on-site visit, SØIK stated that in reality it would conduct most - if not all - foreign bribery cases. Nevertheless, it agreed that guidelines centralising reporting of all foreign bribery cases to SØIK would formalise the situation.

Commentary

The lead examiners recommend that Denmark take steps to ensure that local law enforcement authorities refer all foreign bribery cases to SØIK.

(b) Prosecutorial Discretion and the Prosecution of Related Natural Persons

69. Upon the completion of an investigation, the prosecution service must decide whether to prosecute. Section 96(2) of the Administration of Justice Act (AJA) requires a prosecutor to “ensure that guilty persons are held responsible, but also that prosecution of innocent persons does not occur” (principle of objectivity). AJA Section 721(1) adds that a prosecution may be fully or partly withdrawn if the charge is groundless, or if further proceedings cannot be expected to produce a guilty verdict. In practice, prosecutions would thus proceed only when there is sufficient evidence.²⁰ As described at p. 27, there are concerns that SØIK may have closed several foreign bribery cases for insufficient evidence before making sufficient inquiries to confirm the allegations.

70. If the evidentiary test is met, the prosecutor may nevertheless decide not to prosecute in certain circumstances, *e.g.* if the costs of prosecution are disproportionate to the case’s importance or the expected punishment; if a fine is the only available punishment and the offence is of a minimal nature; where an accused has already been sentenced abroad (AJA Sections 721-722). However, there is no general discretion not to proceed where prosecution would not be in the public interest.²¹ A decision not to prosecute may be appealed to a higher-ranking body of the prosecution service. A Police Commissioner’s decision not to prosecute can be appealed to a State Prosecutor. A similar decision by a State Prosecutor, including SØIK, can be appealed to the DPP (AJA Sections 99(3) and 101(2)).

71. Additional discretion is available in cases involving companies. The DPP Guidelines on liability of legal persons (see p. 17) deals with cases where a legal person and one or more natural persons may be prosecuted in respect of the same offence. In these cases:

- (a) The general rule is to prosecute the company. Corporate liability is the “principal liability” in many fields, particularly where the offence is committed for financial reasons. Some limited exceptions may apply, such as where the company is a sole proprietorship, in which case the owner may be prosecuted instead.
- (b) Corporate management and executive employees, including the manager, are prosecuted (along with the company) only if they have acted with intent or gross negligence.

²⁰ Langsted, L.B., Garde P., Greve, V. (2010), *Criminal Law in Denmark*, para. 346.

²¹ *Ibid.*, para. 350a.

- (c) Subordinate employees (i.e. those below management in the corporate hierarchy) are generally not prosecuted unless special circumstances apply, e.g. an aggravated offence committed with intent by the subordinate employee, possibly at his/her own initiative.

72. The last category regarding subordinate employees raises concerns. The Convention does not permit subordinate employees to be generally excluded from prosecution. In response, Denmark stated that the Guidelines are of a general nature covering all types of offences. When in doubt, the Criminal Code prevails over the Guidelines. While this is undoubtedly true, the Criminal Code does not specifically address the liability of subordinate employees, or expressly contradict the Guidelines on this issue.

73. In its questionnaire responses, Denmark further stated that the guideline regarding subordinate employees applies only to “minor, negligent offences” and not foreign bribery:

As a general rule the prosecution applies its “principle of choice” for not indicting inferior employees who have been engaged in only minor, negligent offences. Since cases of bribery involve intentional activities, it is presumed that the relevant individuals will also be held criminally responsible, irrespective of their charge. This is the interpretation generally given in Danish criminal law and it is explicitly referred to in the general comments to the bill introducing section 306 into the Criminal Code. [Underlining added.]

This statement raises two additional questions. First, it is inconsistent with the DPP Guidelines, which state plainly that subordinate employees are generally exempted from prosecution. Second, exempting subordinate employees from prosecution for “minor” bribes to foreign public officials would also be inconsistent with the Convention.

74. There are questions over how these Guidelines were applied in the *Development Aid Procurement Case*. As described above, the defendant company admitted guilt and settled the charges out-of-court. The settlement did not specifically provide immunity to the company’s officers or employees from prosecution. Nevertheless, individuals were not prosecuted. At the on-site visit, SØIK stated that it had to choose between prosecuting both the company and the director, and settling the case with only the company. It opted for the latter because of the age of the case. After the on-site visit, SØIK stated that prosecutions against company management were not taken because they were unlikely to lead to convictions. However, this does not explain why non-management employees were not prosecuted. To justify the settlement with the company, one or more individuals connected with the company must have had committed bribery.

Commentary

The lead examiners acknowledge the Danish authorities’ explanation that subordinate employees would not escape prosecution in foreign bribery cases. Nevertheless, they are concerned that the DPP Guidelines continue to provide an unqualified exception for subordinate employees. They therefore recommend that Denmark amend the DPP Guidelines to remove this exception. They also recommend that SØIK prosecute both natural and legal persons in a foreign bribery case whenever appropriate.

(c) *Absence of Corporate Prosecutions*

75. Liability of legal persons under the Criminal Code is discretionary (Section 306 and Phase 2 Report para. 212). Nevertheless, the DPP Guidelines state that prosecutors will generally exercise their discretion in favour of prosecuting a company:

[C]orporate liability is considered the principal liability in many fields. This applies in particular where the offence is committed for financial reasons, but also if the negligence is not grave, or if the offence is committed by subordinate staff of the company. The general rule is thus to prosecute the company as such.

76. Despite this Guideline, corporate prosecutions for intentional economic crimes have been infrequent. The Phase 2 Report (Commentary after para. 223) noted that, six years after their enactment, the Criminal Code corporate liability provisions had yet to result in any prosecutions or sanctions against legal persons for active bribery. The Working Group accordingly decided to follow up this matter in Phase 3 (Phase 2 Follow-up Issue 8(e)). Of the cases referred to by Denmark in Phase 3, only the *Development Aid Procurement Case* has resulted in a corporate prosecution. The four on-going foreign bribery cases have yet to produce charges against legal persons. The companies in the 14 Oil-for-Food cases were not charged with substantive criminal offences of sanctions evasion because the statute of limitations had expired; proceedings were commenced only for confiscation. Denmark could not provide statistics on the number of investigations, prosecutions and sanctions of legal persons for intentional economic crimes. A judge at the on-site visit stated that corporate prosecutions usually concern occupational safety and environmental offences, not intentional economic crimes. SØIK said that its regular training courses on economic crime cover corporate liability and international bribery.

Commentary

The lead examiners are concerned that Denmark may not adequately prosecute companies for foreign bribery, given that its provisions on corporate liability have not produced sufficient criminal prosecutions or convictions in cases of intentional economic crime. They therefore recommend that Denmark take steps to enhance the usage of the corporate liability provisions where appropriate, and provide on-going training to law enforcement authorities on the enforcement of corporate liability in foreign bribery cases. Denmark should also review its approach to enforcement, especially regarding corporations, in order to effectively combat international bribery of foreign officials.

(d) *Out-of-Court Settlements*

77. The Danish authorities may settle foreign bribery cases with an accused out of court if the penalty does not exceed a fine. Under Section 832 of the Administration of Justice Act, a prosecutor may issue a “penalty notice” with a specified fine. The prosecution will then be withdrawn if the accused admits guilt and pays the fine by a certain time. This procedure is available if an offence is expected to attract a fine or a less severe penalty. Legal persons can only be fined and are thus always eligible for out-of-court settlements.

78. Denmark states that the size of the fine in an out-of-court settlement is determined based on the same rules that apply to sentences imposed by a court. As described at p. 20, SØIK stated that it set the fine in the settlement in the *Development Aid Procurement Case* having regard to the factors generally applicable to sentencing, including the defendant’s ability to pay. Nevertheless, the agreed fines appeared low compared to the value of the bribe and the contract won by the defendant. The defendant also admitted to committing private corruption rather than the more serious offence of foreign bribery.

79. The provisions also do not provide for settlement terms other than a fine or a detailed framework for reaching settlements. The DPP has issued Notice No. 11/1998 on the “mitigation of sentence in case of evidence against co-perpetrators”. However, the Notice does not provide “precise sentencing guidelines”, according to the Danish authorities. There are also no detailed provisions on the credit given to the company’s co-operation; the nature and degree of co-operation expected of a company; and the prosecution of natural persons related to the company. The settlement in the *Development Aid Procurement Case* did not require the company to co-operate with the authorities in the prosecution of individuals. Written plea agreements are also not used.

80. Furthermore, unlike cases decided by the courts, out-of-court settlements cannot require a company to improve its corporate compliance programmes to prevent further offences. Under the current law, only a fine can be imposed under a settlement. If a case is resolved in court, however, then a judge can impose a suspended sentence with conditions designed to prevent re-offending. The Danish authorities are not aware of a case in which these provisions have been used to require a company to improve its compliance programmes. However, these provisions could in theory be used for this purpose, acknowledged the Danish authorities.

81. A further matter is transparency. Settlements under these provisions are concluded between the prosecutor and the defendant; the court does not review or endorse the settlement. At the on-site visit, SØIK stated that it would usually publish the amount of the fine but not the other terms of a settlement. In the *Development Aid Procurement Case*, SØIK prepared but ultimately did not issue a press release on the settlement. SØIK stated that this was because the press had already widely publicised the case. However, the media reports presumably did not explain SØIK’s choice of the settlement’s terms. SØIK added that it is “self-evident” that an out-of-court settlement is less transparent since one of the purposes of the process is “to end the prosecution in a more silent way”. But as the Working Group has observed in other evaluations, settlements in foreign bribery cases must be sufficiently transparent so as to instil public and judicial confidence.²²

Commentary

The lead examiners are concerned that many key details about SØIK’s out-of-court settlement in the Development Aid Procurement Case remain private. They could not ascertain whether the sanctions in this case are consistent with the Convention. In short, the settlement process is opaque, lacks accountability, and thus fails to instil public and judicial confidence.

The lead examiners therefore recommend that Denmark adopt a clear framework for out-of-court settlements. Where appropriate and in conformity with the applicable procedural rules, Denmark should make public in a more detailed manner sufficient information for determining whether out-of-court settlements of foreign bribery cases are consistent with the Convention. This should include relevant key facts, court documents, and the settlement agreement in each case.

Finally, regardless of whether a settlement is discussed or reached with a corporate defendant, SØIK should also prosecute the responsible natural persons in the same case where appropriate.

²² See Phase 3 Reports on the UK (paras. 64-73) and US (paras. 108-117 and Commentary after para. 128).

(e) *Additional Issues Concerning Specific Foreign Bribery Enforcement Actions*

82. This section examines additional issues raised by specific foreign bribery enforcement actions in Denmark. Summaries of these and other foreign bribery enforcement actions are at pp. 8-12.

(i) *Inquiries before Termination of an Investigation*

83. Some of Denmark's foreign bribery cases raise questions over the inquiries that were made before these cases were closed. The *Power Station Case* concerns Company A, a state-controlled power generation company in Country Z in the EU. In 2005, Company A invited tenders for a EUR 200 million contract to build a new power station. It hired Company B, a company in a second EU Country G, for advice on which tender to accept. Company A ultimately relied on Company B's advice and awarded the contract to Company D, a Danish company, ahead of three other tenders.

84. According to widespread media reports in Denmark and Country Z, there may have been several irregularities in the tendering process. Company B had been blacklisted by the World Bank because of corruption in another country. Company D paid a EUR 4 million commission to an agent in Country Z who was a former employee of both Companies A and B. This agent described to Company D of the need "to tap another source higher up in the political hierarchy" before submitting the tender. In April 2010, the Auditor General in Country Z published a report which found irregularities and recommended that the tender be withdrawn and issued again. In particular, the report noted that Company A departed from the original tender document specifications when the contract was awarded to Company D. The European Commission noted that the government in Country Z changed its emissions laws before the tender closed to benefit Company D's bid. A competitor company that had also bid for the contract stated that it lost the tender even though its bid was cheaper. It also offered a product that was proven reliable, while Company D proposed an untested prototype. A Parliamentary Committee in Country Z also conducted hearings into the tender in 2011. The outcome of these hearings is unclear.

85. SØIK took two steps before closing this case, according to its questionnaire responses. It obtained a statement from Company D. It also requested information from the authorities in Country Z but did not receive any response. At the on-site visit, SØIK stated that it had in fact telephoned the authorities in Country Z, who replied that they had "no hard evidence of bribery in the case" and that the "allegations were not precise". The latter comment is curious, given the detailed factual allegations that had been widely published. SØIK was not informed of the steps taken by Country Z authorities to investigate and verify the allegations. Nor did SØIK take steps to verify the alleged irregularities itself. Before terminating the case in May 2010, SØIK did not consider the Auditor General's April 2010 report which identified irregularities in the tender. After the on-site visit, SØIK stated that it had considered this report and concluded that the concerns raised therein related to "post-award negotiations between the relevant parties".

86. The *Trips for Doctors Case* also illustrates the inquiries that SØIK would make before terminating a foreign bribery case. Company E is a Danish pharmaceutical company. Its overseas subsidiary in EU Country Y bribed medical professionals with paid tourist trips disguised as conferences. The subsidiary was fined in Country Y. The authorities in Country Y informed SØIK that the bribery only involved nationals of Country Y and that no links were established to the Danish parent company. SØIK thus terminated the case in January 2011. However, SØIK confirmed at the on-site visit that it did not conduct any investigations into whether the Danish parent Company E directed, authorised, or failed to prevent the bribery committed by its subsidiary in Country Y. As noted at p. 17, these are grounds, if proven, for holding a parent liable for foreign bribery committed by its subsidiary. SØIK also did not examine whether parent Company E or its other subsidiaries had a practice of bribing medical professionals with trips.

87. Some aspects of the *Development Aid Procurement Case* were also uninvestigated. As explained at p. 8, the defendant paid two consultants employed by a private company retained by UNDP USD 1 million to win a tender. SØIK traced the bribes to the consultants but did not examine whether the bribes were further transferred to other individuals, such as UNDP officials. Whether there were additional co-conspirators in the case is thus unknown. After the on-site visit, Denmark stated that this aspect of the case had been investigated by foreign authorities. It remains unclear, however, whether the investigation by foreign authorities determined conclusively that no additional entities were implicated or should have been charged by the Danish authorities.

88. The *African Port Case* also raises similar questions. A Danish logistics company made small payments to the local harbour master in West Africa to “keep competitors away” from the harbour. Additional payments were also made to local police officers. While the harbour master held out that he could keep the company’s competitors away, he did not in fact have the power to do so. By the time of the investigation, the company had ceased paying the harbour master. For these reasons, SØIK discontinued the investigation and did not prosecute the company.

89. Finally, in two cases interviewing the suspects in the case were the only investigative steps taken. In the *Water Project Case*, a Danish company allegedly agreed in 2007 to pay a 1% fee to a foreign company if it won a tender for a water supply project. SØIK interviewed the employees of the Danish company and was informed that the fee had not been paid. The case was then terminated in November 2010. The Danish authorities did not advance the investigation on the basis of the information that the company merely offered a bribe. In the *Paint Product Case*, the sales director of Company V was quoted in the media in May 2012 as saying that the company had paid its overseas partner for taking care of corruption risks. SØIK applications for search warrants to seize evidence were rejected by the courts. SØIK then interviewed the CEO of Company V and was informed that the media had misquoted the sales director. The case was then terminated.

Commentary

The lead examiners are seriously concerned that SØIK may have terminated certain foreign bribery cases before thoroughly investigating the allegations. They therefore recommend that SØIK take sufficient steps to ensure that cases involving foreign bribery allegations are not prematurely closed. They further recommend that Denmark proactively gather information from diverse sources to increase the number of allegations and to enhance investigations.

(ii) Efforts to Secure Foreign Evidence and Co-operation

90. As with their counterparts in other parties to the Convention, SØIK has had to seek evidence from overseas in many of its foreign bribery investigations. In the *Development Aid Procurement Case*, a joint-investigative team was established with the UK authorities which produced satisfactory results, according to SØIK. In the *Intermediary Case*, SØIK has co-ordinated with the authorities in two other EU countries which conducted parallel investigations. SØIK also liaised with the UK authorities and the World Bank in the *World Bank Contract Case*.

91. Other cases have been more challenging. In the *Power Station Case* described above, SØIK initially requested but did not receive information from the authorities in the foreign country. When it followed up its request by telephone, it did not receive any additional information or confirmation that the allegations in the media had been properly investigated by the foreign authorities. SØIK also did not consider seeking co-operation through other channels such as Eurojust or a formal MLA request.

92. In the *Consultancy Case*, Company F was an international consultancy with offices in Denmark as well as Europe, Asia and Africa. In 2006, an employee of Company F attempted to bribe an official of Country X in the Middle East to win a consulting contract from the government of Country X. The employee was convicted in Country X and served a one-year sentence of imprisonment. The principle of double jeopardy precluded the prosecution of the employee but not Company F in Denmark. SØIK interviewed the employee upon his return to Denmark. The employee stated that Company F did not know about the bribe attempt (which would not exempt Company F from liability (see p. 17)). He also claimed that his conviction in Country X had been wrongful. Some documentation was obtained from the consulate of Country X in Denmark. SØIK requested further information from Country X (including a copy of the court order) but terminated the case against Company F when it did not receive a response. SØIK did not seek the assistance of the Danish Ministry of Foreign Affairs or the Danish embassy in Country X to obtain the requested information. It also did not send a formal MLA request, e.g. under the UN Convention against Corruption to which both Country X and Denmark are States Parties.

93. In the *Medical Equipment Case*, Company S is a Danish subsidiary of Company T, a US company. A September 2011 company report revealed that distributors of Company S made payments in excess of what they owed to Company S, and directed that Company S transfer the excess to unknown beneficiaries for unknown purposes. Payments have also been used to finance doctors' attendance in medical conferences. Companies S and T self-reported the matter to the Danish and US authorities simultaneously in October 2011. By September 2012, SØIK was still reviewing the case; it had not taken any investigative steps or contacted the US authorities. In February 2013, the Danish authorities stated that an investigation has been opened and that co-operative arrangements with the US have been made.

Commentary

The lead examiners recommend that SØIK make greater efforts to obtain evidence and information from foreign authorities before terminating foreign bribery cases. For instance, SØIK should seek the assistance of Danish embassies overseas where possible. It should also routinely explore channels of information such as Eurojust and formal treaty-based MLA requests where appropriate. The lead examiners also recommend that SØIK ensure that it routinely and promptly liaises and co-ordinates with foreign law enforcement authorities in foreign bribery cases. They further note that obtaining effective MLA in foreign bribery cases is a horizontal issue that affect many Parties to the Convention.

(iii) Absence of Parallel Investigations in Foreign Jurisdictions

94. At the on-site visit, SØIK stated that the absence of investigations in foreign jurisdictions (e.g. against a foreign official for accepting a bribe) has impeded its foreign bribery investigations. This was cited as one reason for terminating the *Power Station Case* described above. In the *Intermediary Case*, Company H was a Danish consulting firm that allegedly channelled bribes from the offices of a company in Country N to public officials in Country O. Office and house searches were carried out in Denmark in August 2011. Other companies may also have used Company H as an intermediary. At present, however, SØIK is only considering tax-related charges against Company H. It considered that foreign bribery charges are not viable merely because Country N has terminated its investigation without charges.

95. The *Motor Vehicle Case* raises similar issues. A subsidiary of a Danish company in Country P in Africa was suspected of irregularities in obtaining an order for a fleet of luxury motor vehicles at a price of over EUR 4 million. In December 2011, a court in Country P dismissed the case due to lack of evidence ("no case to answer"). SØIK accordingly closed its case. It did not, however, take any steps to investigate whether there was evidence of foreign bribery located in Denmark. It is also unclear whether SØIK sought evidence through MLA from Country P.

Commentary

It is an unfortunate reality that foreign bribery cases are often not prosecuted by the authorities of the country whose official has been bribed. The lead examiners appreciate that this could make foreign bribery prosecutions difficult. Nevertheless, prosecutions may still be viable in these cases, as sufficient evidence may be available locally or in a third country. Alternate charges of false accounting or money laundering may also be possible. The lead examiners therefore recommend that SØIK make greater efforts to investigate and prosecute foreign bribery cases in these situations.

(f) Statute of Limitations

96. The foreign bribery offence is subject to a statute of limitations of five years. Time begins to run when the offence has been completed (Criminal Code Sections 93(1)(ii) and 94). The limitation period is suspended only when an offender is charged with the offence, or when the prosecutor requests legal proceedings charging the offender with the offence (Criminal Code Section 94(5)). The limitation period is not suspended during an investigation conducted pre-charge, even if the investigation requires evidence to be gathered abroad through an MLA request. The limitation period would also run if an offender is unidentified (and hence could not be charged).

97. Practice shows that this five-year limitation period may be insufficient. Some of the bribes in the ongoing *Medical Equipment Case* were paid in 2003 and may already be well outside the limitation period. The bribes in the *Transport Equipment Case* may have been paid in 2008; prosecution of these payments may also soon be time-barred. It is unclear whether the evidence would support an argument that the bribes in these cases are continuous offences or are part of a larger offence that would bring these payments back within the limitation period. The five Oil-for-Food cases referred to by the Danish authorities were all subject to a two-year statute of limitations (which has since been increased to five years). Since the limitation period had expired in these cases, the Danish authorities could not seek criminal convictions but only confiscation (which is subject to a 10-year statute of limitations).

98. As noted at p. 19, the Danish authorities have submitted a bill to increase the maximum sanctions for foreign bribery to six years' imprisonment. If this amendment is adopted, then the statute of limitations for foreign bribery would automatically be increased to 10 years. This would help ensure that the statute of limitations allows adequate time for foreign bribery cases. Along the same vein, Denmark could suspend the statute of limitations when an investigation is conducted pre-charge, especially when an MLA request to gather foreign evidence is outstanding.

Commentary

The lead examiners recommend that Denmark take steps to ensure that the statute of limitations for foreign bribery allows adequate time for investigating and prosecuting this offence.

(g) Jurisdiction to Prosecute

99. Denmark has jurisdiction to prosecute foreign bribery that is committed wholly or partly on its territory (territorial jurisdiction) (Criminal Code Sections 6(i) and 9(4)). As for jurisdiction to prosecute foreign bribery committed wholly outside Denmark (i.e. extraterritorial foreign bribery), the Phase 2 Report identified two issues.

(i) *Jurisdiction over Natural Persons for Extraterritorial Foreign Bribery*

100. A gap in Denmark's jurisdiction to prosecute extraterritorial foreign bribery was identified in Phase 2 and persists in Phase 3. Denmark has jurisdiction to prosecute an individual for an offence committed wholly outside Denmark if, when the charge is laid, (a) the individual is a Danish national or resident, and (b) the act is considered a crime in the country where it occurred (i.e. dual criminality) (Criminal Code Section 7(1); Phase 2 Report para. 189 and footnote 153). The provision applies to all criminal offences. In the context of foreign bribery, this provision means that Denmark cannot prosecute a Danish national who bribes a foreign public official of Country A while in Country B, if the act in question is not an offence in Country B.

101. Alternative bases of jurisdiction identified by Denmark address this concern only partially, if at all. Under legislative amendments to Section 7(1)(ii)(b) in 2008, dual criminality is not required if a Danish national or resident commits foreign bribery that is aimed at another Danish national or resident. Foreign bribery cases are unlikely to meet this condition. Denmark also states that it would have jurisdiction if foreign bribery is prepared, approved or ordered in Denmark. However, the crime in these cases cannot be said to have occurred wholly outside Denmark. The concern remains that Denmark cannot prosecute its nationals for extraterritorial foreign bribery when the crime is not prepared, approved or ordered in Denmark.

102. After the on-site visit, Denmark advanced a further basis for exerting jurisdiction over the factual situation described above. Under Section 9(2) of the Criminal Code as amended in 2008, an act is also deemed to have been committed at the place where the consequence occurred or was intended to occur. Hence, if a Danish national bribes a foreign public official of Country A while in Country B, and intends the consequence of the offence to occur in Country A, then Denmark would have jurisdiction if Country A considers bribery of its own official to be an offence. The only situation in which Denmark would not have jurisdiction is where the Danish national intends the consequence of the bribery to occur in a country that does not consider the act in question a crime.

103. Denmark also referred to Article 8(v) of the Criminal Code after the on-site visit. The provision states that, "Any act committed outside the territory of the Danish state is subject to Danish criminal jurisdiction, irrespective of the nationality of the offender, where [...] the act is covered by an international provision pursuant to which Denmark is obliged to have criminal jurisdiction". In Denmark's view, this provision allows it to take jurisdiction over all foreign bribery cases as required by the Convention. Previous evaluations show that the view of the WGB is that Denmark would be required to exercise jurisdiction where a Danish national commits foreign bribery wholly outside Denmark provided both the country of the bribed official and the country where the bribery took place has criminalised domestic bribery.

104. The Council of Europe (CoE) has recommended that Denmark consider removing the dual criminality requirement for nationality jurisdiction. In 2011, Denmark reported that its Ministry of Justice, DPP and SØIK have considered the issue and decided against any changes. The CoE expressed regret at Denmark's decision.²³

105. A related issue concerns the available sanctions. Even when there is nationality jurisdiction to prosecute, the punishment imposed may not exceed what is provided by the law of the state where the offence took place (Criminal Code Section 10(2)). If the maximum punishment available under the laws of this state is insufficient, then Denmark likewise would be unable to adequately punish the crime.

²³ GRECO (2009), *Third Evaluation Round Report on Denmark on Incriminations*, para. 71; GRECO (2011), *Third Evaluation Round Compliance Report on Denmark*, paras. 21-23.

Commentary

The lead examiners recommend that Denmark ensure that it prosecutes all cases where a Danish national commits foreign bribery wholly outside Denmark if both the country of the bribed official and the country where the bribery took place have criminalised domestic bribery. They further recommend that Danish law enforcement authorities thoroughly explore territorial links to Denmark in foreign bribery cases, so as to rely on territorial jurisdiction to prosecute whenever possible.

(ii) Jurisdiction over Legal Persons for Extraterritorial Foreign Bribery

106. The Working Group also expressed concerns in Phase 2 that Denmark could not prosecute a Danish company whose employee or agent commits foreign bribery wholly outside of Denmark for the company's benefit. Denmark only had jurisdiction to prosecute legal persons for crimes committed in Denmark (i.e. territorial jurisdiction). This was the case even if a legal person was registered or incorporated in Denmark, since nationality jurisdiction was available over natural but not legal persons (Phase 2 Report (para. 222 and Follow-up Issue 8(e)(ii)).

107. This issue is now resolved since Denmark states that it has nationality jurisdiction over legal persons. Article 7(1) of the Criminal Code described above applies to both natural and legal persons.²⁴ This means that Denmark has jurisdiction over a Danish legal person for extraterritorial foreign bribery if the act is a crime in the country where it occurred (i.e. dual criminality). Denmark states that dual criminality is met if the impugned act is a crime for the natural person at the place where the act occurred; whether a legal person is punishable for the act in the foreign jurisdiction is irrelevant. The dual criminality requirement raises the same issue described in the previous section. In other words, a Danish company also cannot be punished for bribing a foreign public official of Country A, if the act occurred in Country B and bribery of a foreign public official is not an offence in Country B.

(h) Priority, Resources and Expertise

108. The Phase 2 Report (para. 162) states that the Danish government, through the Minister of Justice, identifies law enforcement priorities that are conveyed to the police and prosecutors. At the time of Phase 2, the Minister had not identified foreign bribery as a priority. This remains the case in Phase 3. In addition, Denmark's questionnaire responses state that SØIK prioritises foreign bribery cases. The responses cite SØIK's 2011 Annual Report in support, but this document only describes the prosecutions of UN Oil-for-Food cases which, strictly speaking, involve sanctions evasion, not foreign bribery.

109. In terms of resources, SØIK consists of 25 prosecutors, 55 police officers, and 25 other employees. This staffing level has remained relatively stable since at least 2009. SØIK's current staff budget is approximately DKK 56 million (EUR 7.5 million). Foreign bribery is not handled by a specific unit in SØIK, and there are no resources earmarked for foreign bribery. Denmark states that SØIK has expended considerable resources on foreign bribery cases in recent years. This statement likely includes Oil-for-Food cases, however. SØIK stated at the on-site visit that it has sufficient resources for foreign bribery cases. However, SØIK usually assigns just one lead prosecutor and one police officer to each case

²⁴ The explanatory notes to the 2008 amendment of the Criminal Code state, "Danish jurisdiction over legal persons is decided under the same rules that apply to jurisdiction over natural persons, pursuant to Sections 6-9 of the Criminal Code. [...] Whether a legal person has its seat in Denmark or abroad is decided in accordance with the rules of company law. If an act (or effect) can only be localised to a foreign country, then Danish jurisdiction over legal persons with a connection to Denmark can, depending on the circumstances, instead be based on Section 7 of the Criminal Code" (unofficial translation).

that has been accepted for investigation. On average, each prosecutor is in charge of four to five cases at any one time. The human resources assigned to a particular foreign bribery case may thus be too low, given the complexity of many of these cases. SØIK disagrees with this conclusion, given the relatively low number of reported foreign bribery cases.

110. A further issue is specialised expertise. SØIK staff figures described above include experts in financial and accounting. Several tax auditors are also stationed in SØIK. At the on-site visit, SØIK stated that only three forensic accountants are available. There have also been bottlenecks in some cases that required expertise in information technology to analyse large amounts of seized electronic data.

111. Phase 2 Recommendation 5(b) asked the Danish National Police College to provide “intensified training of police officers and prosecutors on investigating foreign bribery, including on the practice aspects of bribery investigations”. The Working Group noted that the College offered a three-year training course for new recruits and specialised courses (e.g. accountancy and economic crime) to practising officers and prosecutors. Since Phase 2, the College began offering a new three-year degree programme for police recruits in November 2011. There was no information on whether there was training specific to foreign bribery or the practice aspects of bribery investigations. SØIK does not train its investigators specifically on foreign bribery issues, but only on general investigation techniques and issues related to special sectors e.g. bank, tax, real estate. Additional training may be provided when the need arises in a specific investigation.

Commentary

The lead examiners are concerned that SØIK assigns only one prosecutor and one police officer to each foreign bribery case. They therefore recommend that Denmark increase the allocation of human resources in this regard. They also recommend that Denmark take steps to ensure that sufficient experts in forensic accounting and information technology are available for SØIK’s foreign bribery investigations. Finally, Denmark should train SØIK and other law enforcement officials specifically on foreign bribery and related issues.

(i) Investigative Techniques

112. Denmark has not implemented Phase 2 Recommendation 5(a), which suggested that it “make special investigative means, such as interception of communications, video surveillance and undercover operations, available in foreign bribery investigations where appropriate”. These special investigative techniques are only available for investigating offences punishable by imprisonment of six years or more (AJA 750-807d). As noted at p. 19, Denmark is considering a legislative amendment that would increase the maximum punishment for foreign bribery from three to six years’ imprisonment.

113. SØIK states that bank and tax secrecy rules have not posed difficulties in their investigations. A court order is required to obtain secret bank information. The tax authorities have provided information to SØIK upon request. SØIK has also received 20 reports of suspected tax crimes from the tax authorities in 2009-2011 (see p. 41).

114. Limited information is available on asset freezing. The 2006 FATF Report (paras. 248-254) explained that available measures include seizure (where the authorities take possession of the property) and restraint (where a private individual retains possession). Seizure is available to secure property subject to confiscation or victim compensation, or to preserve evidence. It is usually ordered by a court except in urgent situations where it may be carried out by the police with subsequent judicial confirmation. A court may order seizure if it is shown that a person is reasonably suspected of an offence and that a less intrusive measure would not suffice. Denmark could not provide statistics on seizure and restraint.

Commentary

The lead examiners are encouraged that bank and tax secrecy rules have not posed difficulties in SØIK's investigations. They recommend that Denmark maintain statistics on asset seizure and restraint so that the effectiveness of these measures can be properly evaluated. Denmark should also raise the maximum penalty for foreign bribery to six years as currently planned to make special investigative techniques available for investigating this offence.

(j) Article 5 of the Convention

115. Denmark reiterates its earlier position that it implements Article 5 of the Convention through the Administration of Justice Act (AJA) which requires the authorities to act objectively and impartially when investigating and prosecuting foreign bribery. Prosecutors must also proceed in accordance with that Act to ensure that the guilty are held responsible. Denmark adds that Danish authorities would “to the extent possible” interpret and apply Danish legislation in compliance with international conventions to which Denmark is party. However, Denmark has not raised awareness of Article 5 among prosecutors and investigators. Awareness appears low, given that legislation and guidelines do not refer to the Article.

116. The Minister of Justice may also play a role in foreign bribery cases. The current Minister is an elected Member of Parliament. AJA Section 98 allows the Minister to direct prosecutors in specific cases, including on whether a prosecution should be commenced or terminated.²⁵ The Minister is required to notify the President of Parliament of any directions. However, notification may be delayed “if so warranted by special considerations including relations to foreign powers and the security of the State” (AJA Section 98(3)). The provision does not explicitly prohibit notification from being delayed indefinitely. The Minister has not used his power of direction in a foreign bribery case or since Phase 2. The Phase 2 Report (footnote 158) referred to a 1995 case in which the Minister overruled the DPP and directed the commencement of a prosecution. The Minister’s power of direction has attracted cautious criticism from commentators.²⁶

Commentary

The lead examiners recommend that Denmark issue guidelines to raise awareness and to ensure that the factors enumerated in Article 5 of the Convention do not influence foreign bribery investigations and prosecutions.

6. Money Laundering

(a) The Money Laundering Offence

117. Denmark’s money laundering offence in Section 290 of the Criminal Code has not been amended since Phase 2. The offence takes an “all crimes” approach and therefore includes foreign bribery as a predicate offence. It also covers laundering the proceeds of a predicate offence that is committed outside of Denmark, so long as the acts constituting the predicate offence would be a crime under Danish law if they were committed in Denmark. The offence also covers both laundering of the bribe and the proceeds of

²⁵ Denmark adds that the prosecution of certain offences such as sanctions evasion (but not foreign bribery) may be commenced only with the consent of the Minister of Justice.

²⁶ In Langsted, L.B., Garde P., Greve, V. (2010), *Criminal Law in Denmark* at para. 270, the authors noted that the Minister’s power of direction “has been criticized because of the potential political implications. [...] In practice, however, both Government and Parliament have acted with great restraint”.

bribery. A conviction for the predicate offence is not a prerequisite to punishment for money laundering. However, the law does not cover self-laundering.

118. Money laundering is punishable by a fine or imprisonment for up to 18 months. The maximum term of imprisonment increases to six years if the “handling of stolen goods is particularly aggravating, particularly due to the commercial nature of the offence or as a result of the gain obtained or intended, or where a large number of such offences have been committed” (Criminal Code Section 290(2)). According to the 2009 Annual Report of the Money Laundering Secretariat (MLS), Denmark’s financial intelligence unit (FIU), decisions in money laundering cases were reached against 153 persons of which 37 involved “fiscal crime”. However, MLS indicated that these decisions are “not representative of the whole picture” due to limited international feedback, on-going investigations, and other reporting and statistical uncertainties.²⁷ Updated statistics on decisions in money laundering cases since 2009 are not available.

(b) Money Laundering Reporting

119. The Act on Measures to Prevent Money Laundering and Terrorist Financing (2006 Act) entered into force shortly before Denmark’s Phase 2 report was adopted. Accordingly, the Working Group decided to follow-up on (1) the application of the 2006 Act, including the sanctions for failure to report suspicious transactions; and (2) the Danish authorities’ development of specific standards for suspicious transaction reporting, including for example, typologies, guidelines and training materials (Follow-up Issue 8(f)).

120. The 2006 Act requires regulated financial institutions and other entities to file suspicious transactions reports (STRs) to MLS, which is located within SØIK. STRs have increased more than six-fold since 2005. As of August 2012, 3 632 STRs have been filed, with 1 132 filed in the first quarter of 2012 alone. In 2011, MLS sent 309 and 289 intelligence reports to local police and tax authorities respectively for further investigation. The corresponding figures in 2010 were 228 to police and 109 to tax authorities. None of these STRs has led to an investigation concerning either domestic or foreign bribery.

121. An entity may be fined if it intentionally or with gross negligence violates certain provisions of the 2006 Act, such as by failing to file an STR (Section 37(1)). Particularly gross or extensive violations are punishable by up to six months’ imprisonment (Section 37(2)). SØIK indicated that in 2010-2011, four cases have been brought for failing to comply with the reporting requirements. One case involving the deliberate failure to file an STR by a financial institution was settled out-of-court and resulted in a fine of DKK 650 000 (EUR 84 500 or USD 110 500). A second case against a financial institution for having an inadequate anti-money laundering system yielded in a DKK 2 million fine. Denmark did not provide information on the sanctions imposed in the remaining two cases.

(c) Authorities and Expertise to Combat Money Laundering

122. MLS is the central collection point for all intelligence relating to money laundering. SØIK, the Danish Financial Supervisory Authority (FSA), the Danish Business Authority (DBA), and the Council of the Danish Bar and Law Society share responsibility for enforcement of STR requirements. The FSA regulates and supervises all financial institutions, except undertakings and persons that commercially carry out activities involving currency exchange or transfer of money and other assets, which are overseen by the DBA. The Council of the Danish Bar and Law Society supervises lawyers covered by the 2006 Act. The FSA and DBA are both part of the Ministry of Business and Growth. MLS shares information with foreign authorities through the Egmont Secure Web system (“FIU-NET”), and through general mutual legal assistance. SØIK normally handles criminal cases against institutions for breaches of anti-money laundering responsibilities, including STR obligations.

²⁷ Money Laundering Secretariat, *Annual Report 2009*, p. 34 (www.politi.dk).

123. In terms of resources, MLS is staffed by four prosecutors, eight police officers, three administrative staff members and three embedded tax officers. According to Denmark, MLS prosecutors and police officers are specialised in economic crime and have the requisite expertise to handle STRs and detect criminal acts. MLS staff are also given continuous practical training. During the on-site visit, MLS stated that its available resources do not match its caseload, and that more resources would lead to more thorough analyses of the increasing number of STRs. As MLS is embedded within SØIK, SØIK management may decide to allocate staff from SØIK to MLS.

124. Since Phase 2, the MLS, FSA and DBA have issued a number of guidance on anti-money laundering.²⁸ These include guidelines on money laundering risk indicators and information on filing STRs. Updated guidance taking into account legislative changes since 2010 is expected in February 2013. At the on-site visit, MLS officials also highlighted the importance of training, awareness-raising, and efforts to exchange experiences with other financial institutions to review trends and develop a case feedback system. Foreign bribery issues have been addressed indirectly through training provided on politically exposed persons (PEPs). However, training, typologies or other types of awareness-raising specifically on foreign bribery as a predicate offence to money laundering, either within MLS itself or for reporting entities, have not been developed. This could explain why, in part, there have not been money laundering cases predicated on foreign bribery in Denmark.

(d) Anti-Money Laundering in Greenland and the Faroe Islands

125. Greenland and the Faroe Islands have adopted some, but not all, aspects of Denmark's anti-money laundering law. Recent FSA Regulations, *e.g.* on PEPs, currency exchange providers and remitters, and high risk countries and territories, have yet to be fully replicated in both territories.²⁹ Their respective anti-money laundering frameworks include both regulation by central Danish authorities and self-governance measures. Some reporting entities in Greenland and the Faroe Islands report to local authorities, while others report to the Danish FSA. Reporting entities covered by both local and Danish anti-money laundering laws must file STRs with SØIK in Denmark. Both undertakings and persons covered by realm regulation and self-governance regulation on anti-money laundering and counter terrorist financing report STRs to MLS. During the on-site visit, the FSA stated that they are working with Greenland and the Faroe Islands to update their laws to comply with the most recent amendments to the 2006 Act, which they expected to complete in early 2013. At the time of this report, however, this work has been delayed and it is uncertain when it will be completed.

Commentary

The lead examiners recommend that Denmark raise awareness of foreign bribery as a predicate offence to money laundering and develop foreign bribery-related anti-money laundering measures, such as typologies and training on the laundering of bribes and the proceeds of bribery, for MLS officials, as well as for reporting entities. They also recommend that Denmark take steps to ensure that MLS is adequately resourced to effectively detect money laundering cases predicated on foreign bribery. The Working Group should also follow up whether anti-money laundering legislation in Greenland and the Faroe Islands is updated.

²⁸ Danish Business Authority (January 2007), "What Does the Money Laundering Act Require of You?"; Monday Laundering Secretariat (2008), "Indicators of Possible Money Laundering or Terrorist Financing"; Financial Supervisory Authority (2010), "Guidelines on the 2006 Act"; Financial Supervisory Authority (2011), "National Risk Matrix Report".

²⁹ FSA Regulations 712/2008, 1197/2008 and 990/2010. See: FATF (October 2010), *Mutual Evaluation of the Kingdom of Denmark: 3rd Follow-up Report*, paras. 17-22.

7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes

(a) Accounting Standards

126. Denmark has implemented the EU rules and adopted the International Financial Reporting Standards (IFRS).³⁰ Listed companies other than financial institutions must prepare annual financial statements in accordance with IFRS if they do not prepare consolidated accounts. If they do prepare consolidated accounts, they are permitted (but not required) to use IFRS. Listed financial institutions are permitted to use IFRS in their annual accounts, and unlisted companies may choose between IFRS and Danish Accounting Standards. The application of IFRS standards to SMEs is being discussed.

(b) Detection of Foreign Bribery by External Auditors

127. Section 7(2) of the Danish Financial Statements Act and Section 135 of the Executive Order on the Act set out the companies that are required to submit to external audit. These generally include all public and private limited companies that are required to file an annual report, with the exception of small enterprises that meet certain criteria set out in the Executive Order.³¹ Since 2006, the thresholds for audit exemption have been increased, which changed significantly the number of companies that are externally audited. Approximately 149 000 companies are not required to be externally audited, but they must file annual reports with the DBA.

128. The International Standards on Auditing (ISA) are part of good audit practices in Denmark. ISAs have replaced Danish national standards on auditing that were applied in Phase 2. Auditors thus apply ISA 240 to detect material misstatements in financial statements due to fraud. During the on-site visit, Danish auditors stated that foreign bribery could also involve fraud. Risk indicators of foreign bribery are thus also indicative of fraud. They also stated that foreign bribery could result in material misstatements in financial statements due to non-compliance with laws and regulations under ISA 250. One auditor indicated that foreign bribery would likely result in a “qualitative” if not “quantitative” material misstatement in financial statements. To date, foreign bribery cases have not been detected in Denmark through external auditing.

129. Denmark has not taken steps to implement Phase 2 Recommendation 1, which suggested efforts be made to raise awareness of foreign bribery among accountants and auditors. The accounting and auditing professionals at the on-site visit indicated that firms provide internal bribery training every year. They nevertheless would welcome more guidance from the authorities on foreign bribery indicators, and the treatment of small facilitation payments and gifts.

(c) Reporting of Foreign Bribery by External Auditors

130. Phase 2 Recommendation 4 asked that Denmark provide clearer guidance to auditors on the scope of their reporting obligations, including guidance on how the auditing standards relate to the Act on State-Authorised and Registered Public Accountants. In 2008, this Act was replaced by the Act 468/2008 on Approved Auditors and Approved Audit Firms (AAAAAF). The new Act does not materially alter the duty of auditors to report crime, however. Since Phase 2, Denmark has not issued any guidance on an external auditor’s reporting obligations.

³⁰ Regulation (EC) No. 1606/2002 of the European Parliament and the Council of 19 July 2002.

³¹ See Annex 4 for the text of the relevant provisions.

(i) *Internal Reporting to the Audited Company*

131. Section 22(1) of the AAAAAF requires an external auditor to report suspected crimes of a financial nature to management if the alleged crime is committed by one or more members of the company's management, and concerns "significant sums" or is otherwise of a "serious nature". The provision raises two questions. First, on its face, crimes committed by a company's employees and agents need not be reported. Denmark indicated in Phase 2 that this was not the case when this provision is read in conjunction with Danish standard on auditing AS 240(93). However, AS240(93) has been repealed since Phase 2. At the Phase 3 on-site visit, one auditor stated that he would report foreign bribery committed by employees if company management could be held liable for the crime. The legal basis for this statement is unclear, however.

132. A second issue is that Section 22(1) of the AAAAAF requires reporting only of crimes that concern "significant sums" or are otherwise of a "serious nature". Participants at the on-site visit gave very mixed and unclear interpretations of these terms. One auditor differentiated between grand and small-scale corruption but did not explain at what point between these two extremes would reporting be required. Another auditor considered anything illegal under Danish law to be a crime of a "serious nature" but the "seriousness" of the crime would depend on the amount involved. This would appear to contradict a plain reading of Section 22(1) by merging the two tests in the provision into one.

133. Section 7(2) of the Danish Executive Order on Approved Auditors' Reports specifies the information the auditor shall provide on the audit performed pursuant to the AAAAAF. The auditor shall provide supplementary information if there has been a material violation of the legislation on bookkeeping and storage of accounting materials. In addition, the auditor shall provide supplementary information on matters that give him/her reason to assume that members of management may incur criminal liability for actions or omissions that concern the company, affiliated companies, owners, creditors or employees.

134. The ISAs impose additional requirements on an external auditor to report illegality to the audited company. ISA 240(40)-(42) require fraud or suspicion of fraud that results in material misstatements of financial statements to be reported to those charged with the company's governance on a timely basis. ISA 250(22)-(24) require material misstatements resulting from non-compliance with laws to be communicated to those charged with governance unless the matters are "clearly inconsequential." If the non-compliance is intentional and material, the auditor shall report the matter "as soon as practicable".

(ii) *External Reporting to Competent Authorities*

135. The AAAAAF further provides that external auditors must report externally to SØIK under two circumstances. First, if reporting to company management as required by Section 22(1) is not "a suitable measure for the prevention of continued crime", then the auditor should immediately notify SØIK. This provision applies, for example, if management committed or authorised the crime. Second, if an auditor has already reported a crime or suspicion of a crime to management as required under Section 22(1), he/she should further report the crime to SØIK if management fails to provide documentary proof within 14 days that it has "taken the necessary steps to stop any on-going crime and to remedy the damage".

136. There is no clear definition of the "necessary steps" taken by management that would obviate the need to report to SØIK. One auditor expected management to, at a minimum, devise a plan and launch an investigation. Another auditor stated that he would verify whether management has completed an internal investigation. Such an approach seems neither realistic nor effective, since the auditor must decide whether to report to SØIK within 14 days, which may not be enough time to complete an investigation. Furthermore, it is questionable how the damage could be remedied in cases of foreign bribery. Denmark indicates that in 2009-2011, external auditors reported 14 suspicions of crime to SØIK.

137. The ISAs do not deal directly with reporting to competent authorities. Under ISA 240(43) and 250(28), external reporting is governed by local law, i.e. the AAAAAF in the case of Denmark.

Commentary

In Phase 2, the Working Group identified several ambiguities in AAAAAF provisions concerning an external auditor's obligation to report suspicions of crime. In Phase 3, these ambiguities remain. Not surprisingly, on-site visit participants expressed divergent interpretations of these provisions. The lead examiners therefore reiterate Phase 2 Recommendation 4 and recommend that Denmark promptly issue guidance to auditors on the scope of their reporting obligations. The lead examiners also recommend that Denmark raise awareness of foreign bribery among accountants and auditors, including by providing foreign bribery indicators.

(d) Corporate Compliance, Internal Controls and Ethics

138. Since 2009, large, listed and state-owned companies must publish reports on their corporate social responsibility (CSR) policies, including anti-corruption. The reports must also describe how the policies are implemented and assessed. Since 2008, listed and state-owned companies must report whether they have codes of conduct (Financial Statements Act, Sections 99a and 107b-107c). These provisions merely require reporting; a company's CSR policies and codes of conduct are not externally assessed. Listed companies must also state in their annual report how they address the Copenhagen Stock Exchange Recommendations on Corporate Governance ("comply or explain" rule) that have been in place since 2006. The 2012-2015 Danish Action Plan for CSR also introduced new initiatives which, according to Denmark, strengthen efforts to combat foreign bribery. These include expanding the legal obligations for companies to report CSR policies, and establishing an independent mediation and grievance mechanism for responsible business conduct, which Denmark believes could facilitate private sector whistleblowing of foreign bribery.

139. While awareness of foreign bribery is high (see p. 43), a fair number of Danish companies may not have adequate compliance measures and internal controls to prevent foreign bribery. Large Danish companies generally have systems in place, according to a cross-section of representatives from the private sector, business associations and the legal profession. The enforcement of US and UK foreign bribery laws has reportedly had an impact in this regard, as have the CSR reporting requirements discussed above. However, research on publicly available information of 15 Danish companies with exposure to foreign bribery risks showed that only 10 had a corporate policy or code of conduct that addresses anti-corruption, of which only 3 specifically referred to foreign bribery. Just under half of the companies had a policy on small facilitation payments, and only one of which clearly prohibited these payments. Many of these policies contained equivocal or ambiguous definitions of facilitation payments. This may be one consequence of the lack of a clear definition of facilitation payments in the Criminal Code (see p. 14).

140. On-site visit participants also believed that Danish small- and medium-sized enterprises (SMEs) are not sufficiently aware of their risks of committing foreign bribery. SMEs have been targeted by initiatives such as the CSR Kompasset, a free online tool to help companies implement responsible supply chain management and which addresses foreign bribery. The tool was developed in 2005 by the Ministry of Business and Growth (MBG) and Confederation of Danish Industry (DI), Denmark's main business and industry association with over 10 000 member companies. The tool was updated in 2010 and the website now receives on average 2 000 visitors per month, according to DI. Despite the CSR Kompasset's accessibility, SMEs generally do not have adequate compliance measures to prevent foreign bribery, according to on-site visit participants. MBG and DI have evaluated the CSR Kompasset's effectiveness

only by measuring the number of visits to the website, and not whether SMEs have in fact implemented the compliance measures offered on the website.

Commentary

The lead examiners commend Denmark on its efforts to promote CSR. However, they recommend that Denmark also raise awareness of internal controls, ethics and compliance measures to specifically prevent foreign bribery. This should include promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Anti-Bribery Recommendation. Particular efforts should be made to raise awareness among SMEs, which is a horizontal issue among Parties to the Convention.

8. Tax Measures for Combating Bribery

141. This section addresses the tax deductibility of bribe payments and recent developments on detection and the sharing of tax information. It also considers Denmark's implementation of Phase 2 Recommendation 2 regarding guidance, training and statistics.

(a) Non-Tax Deductibility of Bribes

142. In Denmark, bribes paid to foreign public officials are not tax deductible. Section 8D of the Danish Tax Assessment Act (DTAA) prohibits the tax deduction of bribes paid to foreign public officials. This includes small facilitation payments and bribes paid to employees of state-owned or state-controlled enterprises (SOEs) (Phase 2 Report paras. 104 and 107).

143. Denmark has stated that its ability to detect bribes paid to foreign public officials is hampered by tax deductions of private sector bribes, which are allowed under Section E.B.3.15 of the Danish Tax Assessment Guidelines (DTAG) (Phase 2 Report para. 110). Determining whether the recipient of a deducted payment is a public official or private sector employee can be difficult, especially with employees in SOEs. In Phase 3, it is unclear whether private sector bribes remain tax deductible. A 2006 SKAT circular purported to eliminate this deduction, but it is questionable whether the circular can override court jurisprudence on this issue. Furthermore, the DTAG was amended only in 2012, and the amendment left in place conflicting provisions. The Minister of Taxation is expected to propose a change in the legislation to conclusively eliminate the deductibility of private sector bribes. This is welcome.

144. If a taxpayer has been convicted of foreign bribery, SKAT may re-examine a filed tax return to determine whether bribes had been deducted. Re-examinations must normally commence within three years and four months of the end of the corresponding fiscal year. The time period is extended to 10 years and 11 months of the end of the corresponding fiscal year where the bribes had been deliberately concealed in the taxpayer's records.

145. Whether and how tax returns are re-examined in actual foreign bribery cases is less clear. SKAT stated that it would re-examine tax returns for bribes when they learn of a foreign bribery conviction from SØIK or through media reports. In the *Development Aid Procurement Case*, the company deducted the bribes paid in 2005 from its taxes. The case was settled out-of-court in 2011. However, the company's tax return has not been re-examined since its conviction. SKAT did not re-examine the tax returns of the companies implicated in the Oil-for-Food cases because of time limitations.

(b) Detection and Awareness-Raising

146. Phase 2 Recommendation 2 asked Denmark to "provide enhanced guidance and training to tax officials on the detection of bribe payments as legitimate allowable expenses." Between 2008 and 2009,

approximately 100 tax and customs inspectors attended five courses to raise awareness of corruption, bribery, money laundering and the financing of terrorism. The course materials included the OECD Bribery Awareness Handbook for Tax Examiners. The first Nordic Agenda on Tax Crimes Anti-Corruption Conference was held in November 2012. The conference included anti-corruption training for tax inspectors from Nordic countries and established a Danish/Norwegian-led initiative to collect extensive case materials for future trainings and projects. Guidance issued under the DTAG also describes the types of expenses deemed to constitute bribes. The Guidance applies to both tax officials and taxpayers.

(c) Reporting and Sharing of Information by SKAT of Foreign Bribery

147. SKAT may – but is not obliged to – disclose information to law enforcement authorities upon request. SKAT is subject to “unconditional secrecy”. However, it may voluntarily disclose information covered by the DTAA to another administrative authority if there is a concrete suspicion of a crime and if the information is expected to help the offence be detected. Disclosure is also permissible upon request from another authority to disclose information that is necessary to further this procedure (DTAA Section 17). In addition, Section 28(3) of the Public Administration Act states that “confidential information may be passed on to another administration authority only when the information must be assumed to be of essential importance to the performance of that other authority’s activities or for a decision to be made by that other authority” (Phase 2 Report para. 56). SKAT’s internal webpage contains reporting instructions and links to the special forms that must be used to report suspicions of foreign bribery to SØIK.

148. Different rules apply when the criminal law enforcement authorities pass information on to SKAT, according to Denmark. The police and SØIK may provide information to SKAT to allow the latter to decide whether to open a tax examination. However, if there is a certain amount of evidence that a criminal offence has occurred, then the law enforcement authorities must instead conduct a criminal investigation. Yet this procedure was not applied in the *Paint Product Case*. SØIK ultimately terminated the investigation in this case but did not forward the information (e.g. the media article containing the foreign bribery allegation) to SKAT.

149. Phase 2 Recommendation 2 asked Denmark to “maintain detailed statistical information on tax offences and reporting by tax officials to law enforcement agencies.” Denmark agreed to re-evaluate the possibility of maintaining detailed statistical information on tax fraud and reporting (Phase 2 Report footnote 96). During Phase 3, SKAT explains that such statistics remain unavailable because an individual tax inspector and his/hers unit undertake the reporting. It is unclear why such units do not – or cannot – keep a systematic record of the reports made. Following the on-site visit, SØIK stated that it received 20 reports of suspected tax crimes from tax auditors in 2009-2011.

150. Regarding the sharing of information obtained from foreign authorities, Denmark’s draft model bilateral tax treaty incorporates the language from Article 26 of the OECD Model Tax Convention (as amended in 2012). This Article allows tax information to be used in a criminal investigation, including foreign bribery, if certain conditions are met. However, none of the double taxation agreements that are in force contains this optional language. Denmark has been party to the Multilateral Convention Mutual Administrative Assistance in Tax Matters and the 2010 Protocol since 1995 and 2011 respectively. Article 22.4 allows information received by a Party to be used for non-tax purposes, including corruption-related investigations, when certain conditions are met.

Commentary

The lead examiners recommend that the Working Group follow up the application of the non-tax deductibility of bribes in practice, particularly on whether SØIK promptly informs SKAT of convictions related to foreign bribery, and whether SKAT re-assesses the tax returns of

taxpayers convicted of foreign bribery. They also recommend that Denmark promptly implement the Phase 2 Recommendation 2 that SKAT systematically maintain detailed statistics on tax offences and reporting by tax officials to law enforcement authorities.

9. International Co-operation

(a) Mutual Legal Assistance

151. There have not been changes to Denmark's legal framework for mutual legal assistance (MLA) since Phase 2 apart from the entry into force in 2010 of a bilateral MLA treaty with the US. Denmark also has a bilateral MLA treaty with Hong Kong. Denmark is party to several multilateral treaties under which MLA may be sought and provided in foreign bribery cases, including an arrangement with other Nordic States, the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 EU Convention), 1959 European Convention on Mutual Assistance in Criminal Matters (including the 1978 and 2001 protocols), and the UN Convention against Corruption (UNCAC). MLA may also be sought and provided in the absence of an agreement. The Ministry of Justice (MOJ) is the central authority for sending and receiving requests except for those under the 2000 EU Convention, which are generally transmitted directly between judicial authorities. Requests are executed by SØIK, the police, Prosecution Service, and the courts as appropriate. Requests for assistance in Greenland and the Faroe Islands are sent by the MOJ to the authorities in these territories for execution.

152. Denmark does not have specific legislation governing the execution of MLA requests. Instead, all relevant national legislation may be used for this purpose. MLA may be provided if the investigative measure requested can be carried out in corresponding national Danish criminal proceedings. Dual criminality is generally required for coercive measures unless otherwise provided for in an agreement. A court order is required to compel financial institutions to disclose information. As with domestic investigations, bank and tax secrecy may be lifted (see p. 33). Assistance that requires a court order is subject to the statute of limitations for the corresponding offence in Denmark. In other words, Denmark cannot provide MLA if a foreign bribery offence occurred more than five years earlier. This period may be too short, particularly for complex cases. A bill to increase the maximum sanctions for foreign bribery, if enacted, would extend this limitation period to 10 years (see p. 30).

153. Denmark was not able to provide statistics on incoming and outgoing MLA requests, whether in foreign bribery or other cases. It states that that most foreign bribery cases "include either thorough formal MLA requests, informal co-operation or both. The typical request to Denmark includes witness statements, house searches and disclosure of information regarding bank account etc." Statistics were also not available on the average time required to process requests. SØIK states that it generally executes an MLA request within three months, but requests in foreign bribery cases often take longer. SØIK states that it has had difficulty obtaining MLA from foreign authorities in some foreign bribery cases, though greater efforts could be made to overcome these obstacles (see p. 28). On the other hand, a joint investigative team established with the UK authorities in the *Development Aid Procurement Case* worked well.

154. International co-operation may also be sought and provided outside formal MLA channels, such as through the tax authorities (see p. 41). The Financial Supervisory Authority may provide assistance under the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding (MMoU)). SØIK has worked with international organisations in two foreign bribery cases and is considering signing memorandums of understanding with the World Bank and other multilateral development banks. Danish police liaison officers posted in four foreign countries are each responsible for a particular geographic region. Additional liaison officers are posted in Europol and Interpol. An additional arrangement allows Denmark to draw on the assistance of liaison officers from other Nordic countries.

(b) Extradition

155. There have been some changes to Denmark's legal framework for extradition since Phase 2. A bilateral treaty with the US and the Convention on the Nordic Arrest Warrant entered into force in 2010 and 2012 respectively. Denmark is party to the European Convention on Extradition and the first two additional protocols. A bill to ratify the two remaining protocols was introduced into Parliament in January 2013. UNCAC may be used to seek and provide extradition in foreign bribery cases. Extradition within the European Union may be granted pursuant to a European Arrest Warrant (EAW). In the absence of a treaty, Denmark may grant extradition on the basis of reciprocity. Dual criminality is usually required unless an agreement provides otherwise. The Danish Extradition Act applies to extraditions from Greenland and the Faroe Islands, subject to derogations in the Administration of Justice Acts in these jurisdictions.

156. Danish nationals are generally extraditable to countries outside the European Union if they have resided in the requesting state for two years or more prior to the commission of the offence, and if the offence is punishable under Danish law by imprisonment of at least one year. Furthermore, Danish nationals may be extradited – subject to no residence requirements in the requesting state - for an offence that is punishable by imprisonment of at least four years in Denmark if it had occurred there. Foreign bribery is currently punishable by three years' imprisonment and would not meet this criterion. As noted at p. 19, a bill before Parliament, if enacted, would raise the maximum sanctions for foreign bribery to six years' imprisonment. Danish nationals may also be extradited to European Union countries pursuant to an EAW. Danish nationals who are not extradited due to their nationality will be considered for prosecution in Denmark.

157. Denmark has not sought or granted extradition in foreign bribery cases. It was not able to provide statistics on incoming and outgoing extradition requests.

Commentary

The lead examiners recommend that Denmark carry through with its intention to increase the maximum penalty for foreign bribery to six years' imprisonment. This would increase the statute of limitations for providing MLA in foreign bribery cases to 10 years, and also broaden the basis for extraditing Danish nationals in foreign bribery cases. To allow for a proper evaluation of Denmark's framework for international co-operation, the lead examiners also recommend that Denmark maintain statistics on incoming and outgoing MLA and extradition requests, including on the types of offence involved and the time required to execute requests. The statistics should also cover requests to and from Greenland and the Faroe Islands.

10. Public Awareness and the Reporting of Foreign Bribery

158. This section addresses awareness-raising efforts, reporting of foreign bribery, and whistleblowing, all of which were the subject of Phase 2 Recommendations and Follow-up Issues. The reporting obligations of officials involved in tax and the disbursement of public advantages are addressed at pp. 41 and 47 respectively.

(a) Awareness of the Convention and the Offence of Foreign Bribery

159. Phase 2 Recommendation 1 asked Denmark to further raise awareness of the foreign bribery offence and the risks of foreign bribery, including among relevant government officials and Danish companies doing business abroad. To raise awareness within the public sector, the 2007 MOJ Booklet contains explanatory notes and hypothetical scenarios on the Convention and the foreign bribery offence. The Booklet has been disseminated online and also to the police, judiciary, and local authorities. The Trade Council of Denmark (TCD) is the official export and investment promotion agency operating under the

Ministry of Foreign Affairs (MFA). The TCD's 2010 Anti-Corruption Policy addresses in some detail the Convention and Denmark's foreign bribery offence. The MFA's own Anti-Corruption Policy refers to bribery but does not distinguish between domestic and foreign bribery.

160. With regard to the private sector, the MOJ Booklet has also been disseminated to business organisations. The TCD Anti-Corruption Policy focuses on how TCD officials posted overseas should advise companies to prevent foreign bribery. The TCD also developed "Anti-Corruption Counselling and Tools" which promote the TCD's anti-corruption guidance to Danish companies. In 2007, the Confederation of Danish Industry (DI) published a guide entitled "About Corruption" which refers to foreign bribery extensively. As described at p. 39, DI and the Ministry of Business and Growth developed the CSR Kompasset which targets SMEs.

161. Overall awareness of foreign bribery among the Danish private sector is very high but additional targeted measures may be needed. The heightened awareness of foreign bribery is the result of the enforcement of foreign bribery laws in the US and UK, and not efforts by the Danish authorities, according to many on-site visit participants. Furthermore, guidance and awareness-raising may be necessary in specific areas, such as on the facilitation payments defence, and issues concerning the accounting and auditing professions (see pp. 13 and 37). Corporate compliance measures may also need to be strengthened, especially in the SME sector (see p. 39). Participants at the on-site visit generally felt that the Danish authorities could do more to engage with the private sector in developing awareness-raising measures or related guidance.

162. There are some indications that the assistance provided by Danish embassies to Danish companies could be improved. The TCD confirmed that it does not consult with the MOJ or SØIK (whether generally or on a case-by-case basis) before giving guidance to companies. Consultation of this nature could improve the quality of the guidance given. On-site visit participants from the private sector also highlighted the limited involvement of Danish embassies in assisting companies facing foreign bribery risks. One representative of a major company stated that he had "never heard of any instance where a Danish embassy has been useful" in this regard. Companies are also reluctant to request assistance because they feel that the response would be slow, inadequate or expose them to prosecution in Denmark. Several companies were also concerned about the cost of assistance such as the TCD's anti-bribery advisory services. Denmark asserts that these views paint a partial picture, and that its embassies are actively involved in assisting Danish companies.

Commentary

The lead examiners welcome Denmark's efforts since Phase 2 to increase awareness of foreign bribery in Denmark. They recommend that Denmark continue to raise awareness of foreign bribery within the public and private sectors, and engage with the private sector in these efforts. As noted in other parts of this Report, Denmark should also take awareness-raising measures dealing with specific issues such as the facilitation payments defence, issues concerning the accounting and auditing professions, and corporate compliance.

The lead examiners also note that TCD provides anti-corruption guidance to Danish companies. They recommend that TCD consult with the MOJ or SØIK to ensure the soundness of its guidance.

(b) Reporting Suspected Acts of Foreign Bribery

163. Guidance issued by Denmark to public servants on reporting allegations of foreign bribery contains some ambiguities. Phase 2 Recommendation 3(c) asked Denmark to issue clear guidance on this

topic. The 2007 Code of Conduct for the Public Sector requires public servants to report corruption “which involves the public administration”. The provision thus appears to address domestic corruption but not foreign bribery. It also has no legal force. Section 3 of the MOJ Booklet requires a public employee to inform his/her superior if he/she becomes aware that a public or private enterprise has granted or offered a bribe. As bribery of foreign public officials is not explicitly mentioned in section 3, it is not clear whether this provision is restricted to domestic or private sector bribery. Denmark asserts that as domestic and foreign bribery are referred to in earlier sections of the Booklet, the reporting obligations under section 3 apply to both. However, the reporting obligations under section 3 are framed within a domestic bribery context and would benefit from more explicit reference to bribes paid to foreign public officials. The Booklet is not binding, although Denmark highlights that it is a natural part of a public official’s duties to report cases of corruption to his/her superior (Phase 2 Report para. 53). The Booklet indicates that suspicions would be reported to the police “if there are grounds to do so” but does not elaborate on what factors would be considered.

164. Additional reporting obligations and procedures in the MFA Anti-Corruption Policy also contain limitations. The MFA has transmitted two reports concerning foreign bribery allegations to SØIK (see case summaries at pp. 8-12 for details). As mentioned above, the Policy refers to bribery but not foreign bribery specifically. Furthermore, the Policy requires reporting of corruption “involving other staff members, business partners, partners in programmes and projects, and others with whom staff members cooperate”. This would not require the reporting of allegations involving any Danish company, but only those with whom the MFA is partnering in a business, programme or project, or with whom it is co-operating. Finally, MFA officials at the on-site visit stated that credible foreign bribery allegations would be transmitted to SØIK. However, the Policy is framed in a more discretionary manner: “[T]he decision to notify Danish or foreign authorities, including possibly reporting to the police, is taken by the Ministry of Foreign Affairs in Copenhagen on the basis of the available information” (underlining added). This statement also appears to allow the allegations to be reported to foreign authorities in lieu of SØIK.

165. The TCD Anti-Corruption Policy also imposes reporting obligations. TCD staff must “notify the TCD Secretariat if they become suspicious or aware of specific cases of Danish companies using bribery.” The TCD Department for Business Development, in consultation with the MFA International Law Office, then decides “whether to notify Danish or foreign authorities, including possible reporting to the police” (underlining added). Like its MFA counterpart, reporting under the TCD Policy may therefore also be discretionary, and foreign authorities instead of SØIK may be informed. Furthermore, the TCD Policy does not require reporting of foreign bribery committed by an employee who acts “in contradiction to explicit company rules against corruption.” Such cases, however, would result in corporate liability under the Criminal Code (see p. 17) and should therefore be reported. At the on-site visit, the TCD agreed that this exception was problematic. The TCD Policy also appears to exempt from reporting cases where companies “unwittingly become involved in corruption”. The purpose and scope of this exception is unclear.

166. Furthermore, the reporting obligations under the MFA and TCD Anti-Corruption Policies are inconsistent with a 2008 agreement between the MFA and SØIK. The agreement states that where a Danish overseas mission receives documentation or oral information of Danish companies or citizens being involved in corruption in the country in question, it must immediately notify the MFA in Copenhagen, which in turn must contact SØIK. This duty to report to SØIK is not discretionary, unlike the MFA and TCD Anti-Corruption Policies. The agreement with SØIK also covers allegations involving any Danish company or individual, and not only entities with whom the MFA partners or co-operates. Where an overseas mission becomes aware of local rumours of corruption involving Danish companies or citizens, it must also notify the MFA in Copenhagen, which then has discretion on how to proceed.

Commentary

The lead examiners reiterate Phase 2 Recommendation 3(c) and recommend that Denmark take steps to ensure that public servants, including those within the MFA and TCD, are clearly required to report all credible suspicions of foreign bribery involving Danish individuals or companies detected in the course of their work to Danish law enforcement authorities.

(c) *Whistleblowing and Whistleblower Protection*

167. In Phase 2, the Working Group recommended that Denmark adopt stronger measures to protect whistleblowers in the private sector. The Group also decided to follow up the issue of whistleblower protection in the public sector (Phase 2 Recommendation 3(a) and Follow-up Issue 8(d)).

168. At present, Danish law does not provide comprehensive whistleblower protection in the public and private sectors. Denmark indicates that the issue “has traditionally been left to the social partners to regulate the labour market and legislation has mainly been playing a supplementary role.” The Danish authorities refer to the Code of Conduct for Public Servants, but the Code has no legal force. It also only covers the disclosure of “non-confidential information [...] where there may be a question of unlawful administration or other criticisable matters in the public administration” (see p. 45). A plain reading suggests that this covers bribery of Danish but not foreign officials, though the Danish authorities disagree with this interpretation. Denmark also referred to the unfair dismissal provisions under the Act on the Legal Relationship between Employers and Salaried Employees. The provisions apply to both the public and private sectors but only deal with unfair dismissal and not other forms of retaliation, such as demotion or harassment. Furthermore, whistleblowing may amount to a breach of an employee’s loyalty towards his/her employer that would justify dismissal.³² In May 2009, the Ministry of Employment published an *Explanatory Memorandum on Labour Law: Employment Law Protection of Private Sector Employee Speech with Particular Focus on Whistleblowing* (“Code of Guidance”). The Code of Guidance focuses on whistleblowing, the freedom of speech of private sector employees, and relevant factors for determining whether a private sector whistleblower should be protected. Foreign bribery appears to be a form of protected disclosure. Yet, protection is again limited to unfair dismissals and not other forms of reprisals. The Code is also not legally binding and therefore offers little legal recourse to whistleblowers.

169. Danish companies are increasingly adopting whistleblowing mechanisms but whether these schemes protect whistleblowers effectively is unclear. The Confederation of Danish Industries stated that more companies are seeking advice from them on whistleblowing mechanisms. Whistleblowing systems must be approved by the Danish Data Protection Agency (DDPA) to ensure compatibility with data protection laws. The DDPA has approved systems in over 100 companies and the number is rising. To further facilitate reporting, some companies provide measures to protect whistleblowers. At the on-site visit, several Danish companies stated that whistleblower reports are sent anonymously to an external service provider who forwards the reports to the company’s audit committee. Under Danish law, however, anonymity cannot be maintained if a whistleblower testifies at trial, according to a judge. In any event, given the absence of comprehensive legal protection described above, measures taken by companies have limited weight. During the on-site visit, civil society representatives referred to cases of retaliation taken against whistleblowers by companies which reportedly had whistleblower protection measures in place.

³² Bech-Bruun (2006), “Employment Discrimination, Whistleblowing and Related Trends: New Threats for Multinational Employers”, American Bar Association Section of International Law 2006 Spring Meeting (apps.americanbar.org).

Commentary

The lead examiners reiterate Phase 2 Recommendation 3(a) and recommend that Denmark promptly put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities. They further note that the implementation of effective whistleblower protection frameworks is a horizontal issue that confronts other Parties to the Convention.

11. Public Advantages

(a) Official Development Assistance

170. Denmark is a significant contributor of official development assistance (ODA). The Danish International Development Agency (Danida) within the Ministry of Foreign Affairs administers Denmark's ODA. In 2011, Danish ODA amounted to approximately DKK 15.98 bn (EUR 2.13 bn), corresponding to 0.85% of Denmark's Gross National Income. Allocations in 2010 were mainly within Africa (29%), Asia (16%), the European Union (9%) and Latin America (4%).³³

171. In 2010, Danida launched a new risk management initiative to reduce fraud and abuse. Aid Management Guidelines have also been developed to promote transparency in ODA programmes. All MFA staff working with ODA must participate in an anti-corruption e-learning course and dilemma training on bribery and corruption. Danida's procurement rules outline a zero tolerance approach towards corruption that applies to tenderers, contractors, sub-contractors and consultants.³⁴ Any company (both Danish and non-Danish) executing an ODA-funded contract must also comply with the MFA Anti-Corruption Policy, which prohibits the giving and soliciting of bribes. During the on-site visit, participants from civil society working on Danida-funded projects commented on the MFA's rigorous approach to ensuring corruption prevention in its contracts.

172. The rules on reporting bribery in the MFA Anti-Corruption Policy apply to Danida staff. However, the Policy does not refer specifically to foreign bribery and does not require all allegations to be reported to SØIK (see p. 45). To further facilitate detection and reporting by MFA staff and external parties, Danida has set up a confidential and anonymous Anti-Corruption Hotline. Since 2005, the Hotline has received 77 reports, 2 of which involve allegations of bribery but not foreign bribery.

173. Danida's standard contracts include an anti-corruption clause which states that the contract can be terminated if foreign bribery has been involved in relation to its tendering, award or execution. The clause also provides for permanent debarment and additional civil and/or criminal sanctions. While Danida may consult the debarment lists of multilateral development banks as part of its due diligence, a company's listing therein is not grounds for automatic exclusion. During the on-site visit, MFA officials stated that they did not know whether the Danish companies involved in foreign bribery or the Oil-for-Food cases have bid on ODA-funded contracts. The Ministry systematically keeps statistics on reported cases of corruption involving ODA-funded contracts. In 2012, 65 new cases were reported to the National Audit Office and 61 cases were concluded.

³³ Danida, Annual Report 2010 (amg.um.dk).

³⁴ Danida (2007), *General Rules and Guidelines for Procurement under Danish Untied Mixed Credits to Danida's Programme Countries and South Africa* (amg.um.dk).

(b) Prevention and Detection within the Danish International Investment Funds

174. The Danish International Investment Funds (IFU) is a statutory agency that promotes economic activity in developing countries by providing funding for investments in collaboration with Danish business and industry partners. In 2006, the IFU updated its Anti-Corruption Policy. The Policy emphasises the IFU's zero tolerance approach to bribery and corruption, and expressly requires a project company to prohibit bribery of public officials. Additional supporting Guidelines refer to the Convention and provide guidance to IFU officials on how to prevent bribery in project companies. Project companies must make an anti-bribery declaration and inform its suppliers and contractors of its anti-bribery policies. Project companies should avoid making small facilitation payments, or establish a record-keeping procedure for cases where such payments cannot be avoided (see also p. 13). Project companies are also appraised with a CSR due diligence tool developed in association with the UN Global Compact. The IFU's CSR promotion efforts (IFU FOCUS) address foreign bribery, and include training and sharing of best practices on anti-corruption measures. IFU FOCUS has delivered seminars for project companies in China, Vietnam, India and various African countries.

175. The IFU does not have a formal policy of reporting all foreign bribery allegations to Danish law enforcement. According to the IFU Anti-Corruption Guidelines (para. 9), IFU's investment officers must immediately involve IFU's management if there is non-compliance with the IFU's anti-corruption policies. IFU management then assesses the case and may demand repayment of the loan or sell its shares in the project. The IFU may also request an investigation be made by "the relevant National Chapter of Transparency International", or an auditing or law firm. There is, however, no further obligation to report the matter to law enforcement. At the on-site visit, the IFU stated that it had reported two or three cases of corrupt conduct to law enforcement. A legal opinion obtained by the IFU had stated that cases implicating Danish individuals should be reported. The IFU further indicated, however, that it did not have a firm policy of reporting cases of corruption in developing countries. This is problematic, considering that foreign bribery and IFU operations often take place in such countries. The lack of a clear and comprehensive policy to report foreign bribery may also be inconsistent with the IFU's stated "zero tolerance" of corruption.

Commentary

The lead examiners strongly recommend that Danida and IFU establish clear written policies requiring all credible foreign bribery allegations involving Danish companies or individuals to be systematically reported to Danish law enforcement authorities. Such reporting should occur regardless of whether the allegations are also reported to foreign law enforcement authorities.

(c) Public Procurement

176. There have been no major changes to Denmark's public procurement and debarment regime since Phase 2. Government Order 937 incorporated EU Directives 2004/17/EC and 2004/18/EC into Danish law. Accordingly, if a contracting authority is aware that a candidate or tenderer has been convicted of corruption, then the candidate or tenderer shall be excluded from participation in a public contract. The Danish authorities were unable to specify the maximum period of exclusion permitted. Exclusion may be avoided if there are "overriding requirements in the general interest".

177. Denmark's implementation of this regime may be completely ineffective. A candidate or tenderer is required to obtain an "official certificate" from the Danish Business Authority (DBA) containing information on, among other things, its convictions for bribery. However, convictions are purged from the criminal records database to which the DBA can access after two years. In practice, procurement exclusion

due to foreign bribery would therefore be not more than two years. As an aside, some participants at the on-site visit stated that they had difficulties obtaining records of terminated court proceedings.

178. Denmark could not provide information on how exclusion due to foreign bribery convictions has been implemented in practice. The Danish Competition and Consumer Authority (DCCA) has not issued policies or guidelines to the approximately 1 000 contracting authorities. It does not conduct “systematic surveillance” of how these authorities exclude tenderers due to corruption. There is no information on whether contracting authorities consider debarment lists of multilateral development banks. Statistics on exclusions are not maintained. The DCCA does not know whether any companies, including those involved in the *Development Aid Procurement* and *Oil-for-Food* cases, have been excluded on grounds of corruption.

Commentary

The lead examiners recommend that Denmark issue guidance to its contracting authorities to ensure that exclusion from public procurement due to foreign bribery is effectively implemented in practice. Denmark should also specify the maximum period of debarment that can be imposed, and ensure that records of criminal convictions are maintained for at least as long as this period.

(d) Officially Supported Export Credits

179. Eksportkreditfonden (EKF) is Denmark’s officially supported export credit and insurance agency. EKF informs its clients of the legal consequences of bribery through a stand-alone document, its website and its publications. The text refers to the Convention and Denmark’s foreign bribery offence. Applicants for support must declare that they, and anyone acting on their behalf in connection with the transaction, have not engaged in or been convicted of bribery in the past five years. EKF is considering incorporating the declaration into the application form, which would allow problem cases to be identified at the start of the application process.

180. Before EKF provides support for agent commission fees, it always requires details of the commissions associated with the transaction, as well as the amount and the purpose of the commissions. If the fees equal or exceed 5% of the contract value or EUR 4.5 million, then EKF conducts enhanced due diligence which includes requesting additional information on the agent’s assignments and tasks, and checking that the commissions are reasonably proportionate to the value of the product or service provided. However, agent commissions falling below the threshold triggering enhanced due diligence may still be of large absolute value. Such commissions should not be presumed appropriate but should also be subject to enhanced due diligence.

181. EKF also conducts enhanced due diligence if it has credible evidence that bribery was involved in the award of a contract before or after support has been approved. According to EKF, an applicant in one case indicated that a non-Danish company involved in the transaction was under investigation for foreign bribery. EKF nevertheless granted support because the company had co-operated with the law enforcement authorities; dismissed all of the employees involved; and adopted an anti-bribery compliance programme. EKF also received legal advice confirming that the bribery was not connected to the transaction for which support was sought.

182. EKF further indicated that it has procedures to report bribery allegations to law enforcement authorities. According to EKF, “any suspicion must be reported by the relevant EKF employee to his/her superior who, in turn, must report to management. Management then decides to report to law enforcement

authorities if there is credible evidence.” There is no written guidance on what factors are taken into account in determining whether the evidence is credible.

183. EKF states that it checks the debarment lists of the EU and multilateral development banks in all transactions. If an applicant is on such a debarment list, cover will not be granted. If bribery is proven after support has been approved, then EKF may interrupt loan disbursements, invalidate cover, or deny indemnification. However, there are no written guidelines setting out the factors to be taken into account in making this decision.

Commentary

The lead examiners recommend that EKF conduct enhanced due diligence on agent commission fees of large absolute value, even if such fees are less than 5% of the contract value and EUR 4.5 million.³⁵ They further recommend that EKF consider adopting written guidance on factors to be considered when determining (a) whether evidence alleging foreign bribery is credible and (b) whether to interrupt loan disbursements, invalidate cover or deny indemnification, if bribery is proven after support has been approved.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

184. The Working Group welcomes Denmark’s recent efforts to implement the Convention but is seriously concerned about the lack of enforcement of the foreign bribery offence. Only 13 foreign bribery allegations have surfaced, and sanctions have been imposed in just one case that falls within Article 1 of the Convention. The case resulted in a settlement with a company, but not for foreign bribery. The individuals responsible for the crime escaped prosecution. Nine of the remaining cases have been terminated without prosecution. Several were closed without adequate investigation or sufficient efforts to secure foreign evidence. A tendency to terminate cases in the absence of parallel investigations by foreign authorities is troubling. There are concerns that the Danish authorities may not prosecute companies for foreign bribery, given the general lack of corporate prosecutions for intentional economic crimes. The current prosecutorial guidelines on corporate prosecutions raise further questions.

185. The Working Group is also concerned that Denmark has fully implemented only 2 of the 13 Recommendations from Phase 2. To date, Phase 2 Recommendations 1, 3(c), 5(b), 6(b) and 7(b) remain partially implemented. Phase 2 Recommendations 2, 3(a), 4, 5(a), 6(c), and 7(a) have not been implemented.

186. In conclusion, based on the findings in this report on Denmark’s implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group invites Denmark to report orally on its implementation of Recommendations 1(a) and 5 in one year (i.e., by March 2014). It also invites Denmark to submit a written follow-up report on its implementation of all recommendations and on all follow-up

³⁵ The Working Group has made a similar recommendation to at least one other Party to the Convention (see Australia Phase 3 Report (2012), para. 158 and Recommendation 16(b)).

issues within two years (i.e., by March 2015). Denmark is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these reports.

1. Recommendations of the Working Group

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

1. With respect to the foreign bribery offence, the Working Group recommends that Denmark:
 - (a) Take immediate and conclusive steps to ensure that its small facilitation payments defence is clearly defined, has the force of law, and is consistent with Article 1 of the Convention and the 2009 Recommendation [Convention Article 1; 2009 Recommendation VI.ii];
 - (b) Ensure that the relevant authorities (i) send a co-ordinated and consistent message on the facilitation payments defence to the private sector; (ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records; and (iii) periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon [2009 Recommendation III.ii, and VI.i and ii].
2. Regarding the liability of legal persons, the Working Group recommends that Denmark:
 - (a) Enhance the usage of, and train law enforcement authorities on, the corporate liability provisions in foreign bribery cases [Convention Articles 2, 5; Commentary 27; 2009 Recommendation Annex I.D];
 - (b) Ensure that the application of the DPP Guidelines on the liability of legal persons does not reduce the scope of the jurisdictional rules provided by the Criminal Code, and amend the Guidelines to (i) clarify the circumstances under which a company may be held liable for crimes committed by a subsidiary and joint venture, and for failure to prevent foreign bribery, and (ii) ensure that subordinate employees are not exempted from prosecution in foreign bribery cases [Convention Article 2; 2009 Recommendation Annex I.C].
3. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that:
 - (a) Denmark review its overall approach to enforcement, especially with regard to corporate liability, in order to effectively combat the bribery of foreign public officials [Convention Articles 1, 2, 5; 2009 Recommendation V];
 - (b) Denmark take steps to ensure that local law enforcement authorities refer all foreign bribery cases to SØIK [Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D];
 - (c) Denmark adopt a clear framework for out-of-court settlements and make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible [Convention Articles 1, 3, 8];
 - (d) SØIK (i) thoroughly investigate and prosecute foreign bribery allegations, (ii) proactively gather information from diverse sources to increase the number of allegations and to enhance investigations; (iii) routinely and promptly co-ordinate with foreign law enforcement authorities, and make greater efforts to obtain evidence from these authorities,

including through Eurojust and formal treaty-based MLA where appropriate; (iv) make greater efforts to investigate and prosecute even in the absence of parallel investigations in foreign jurisdictions; and (v) ensure that both natural and legal persons are prosecuted in a foreign bribery case whenever appropriate, including when a settlement is discussed or reached with a corporate defendant [Convention Articles 5, 9; Commentary 27; 2009 Recommendation Annex I.D];

- (e) Denmark issue guidelines to raise awareness of Article 5 of the Convention and to ensure that the factors enumerated in the Article do not influence foreign bribery investigations and prosecutions [Convention Article 5];
- (f) Denmark (i) take steps to ensure that the statute of limitations for foreign bribery allows adequate time for investigating and prosecuting the offence; and (ii) increase the statute of limitations for providing MLA and broaden the basis for extraditing Danish nationals in foreign bribery cases [Convention Articles 6, 9];
- (g) Denmark (i) ensure that SØIK has sufficient human resources, including experts in forensic accounting and information technology, to investigate and prosecute foreign bribery cases; (ii) train SØIK and other law enforcement officials specifically on foreign bribery and related issues; (iii) provide guidance to investigators and prosecutors on the definition of foreign public officials, including those of public international organisations; and (iv) allow the use of special investigative techniques in foreign bribery investigations [Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D].

4. Regarding jurisdiction, the Working Group recommends that Denmark:

- (a) Ensure that it prosecutes all cases where a Danish national commits foreign bribery wholly outside Denmark if both the country of the bribed official and the country where the bribery took place have criminalised domestic bribery [Convention Article 4];
- (b) Ensure that its law enforcement authorities thoroughly explore territorial links to Denmark in foreign bribery cases [Convention Article 4].

5. Regarding sanctions, the Working Group recommends that Denmark promptly increase the maximum penalties for (a) foreign bribery committed by natural persons, and (b) false accounting for the purpose of committing or concealing foreign bribery, to ensure that sanctions for these offences are effective, proportionate and dissuasive [Convention, Articles 3, 8; 2009 Recommendation X.A.iii].

6. With respect to statistics, the Working Group recommends that Denmark maintain detailed statistics on (i) asset seizure and restraint; (ii) sanctions including confiscation imposed in practice; (iii) incoming and outgoing MLA and extradition requests, including those to and from Greenland and the Faroe Islands; and (iv) tax offences and reporting by tax officials to law enforcement authorities [Convention Articles 3(3), 5, 9; 2009 Recommendation VIII.i; 2009 Tax Recommendation II].

7. Regarding Greenland and the Faroe Islands, the Working Group recommends that Denmark promptly adopt as a matter of priority a roadmap setting forth specific goals, concrete steps and deadlines for implementing the Convention at the earliest possible date in these territories [Convention Article 1].

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

8. With respect to money laundering, the Working Group recommends that Denmark (i) raise awareness of foreign bribery as a predicate offence to money laundering and develop bribery-related anti-

money laundering measures, such as typologies and training for MLS officials and reporting entities; and (ii) take steps to ensure that the MLS is adequately resourced to effectively detect money laundering cases predicated on foreign bribery [Convention, Article 7; 2009 Recommendation III.i].

9. Regarding accounting and auditing, the Working Group recommends that Denmark promptly issue guidance to auditors on the scope of their reporting obligations, and raise awareness of foreign bribery among accountants and auditors, including by providing foreign bribery indicators [Convention, Article 8; 2009 Recommendation III.i].

10. Regarding awareness-raising, the Working Group recommends that:

- (a) Denmark (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in co-operation with the private sector; and (ii) encourage companies, especially SMEs, to develop and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance [2009 Recommendation III.i, X.C.i and ii, and Annex II];
- (b) TCD consult with the MOJ or SØIK to ensure the soundness of its guidance. [2009 Recommendation III.i].

11. With respect to the reporting of foreign bribery, the Working Group recommends that Denmark:

- (a) Ensure that public servants, including those in the MFA, Trade Council, Danida and Danish International Investment Funds, are clearly required to report all credible suspicions of foreign bribery involving Danish individuals or companies detected in the course of their work to Danish law enforcement authorities [2009 Recommendation IX.i and ii];
- (b) Put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities [2009 Recommendation IX.iii].

12. Regarding public advantages, the Working Group recommends that:

- (a) Denmark (i) issue guidance to its contracting authorities to ensure that exclusion from public procurement due to foreign bribery is effectively implemented in practice; and (ii) specify the maximum period of debarment that can be imposed and ensure that records of criminal convictions are maintained for at least as long as this period [2009 Recommendation XI.i];
- (b) EKF (i) conduct enhanced due diligence on agent commission fees of large absolute value, even if such fees are below both EUR 4.5 million and 5% of the contract; and (ii) consider adopting written guidance on factors to be considered when determining whether evidence alleging foreign bribery is credible; and whether to interrupt support if bribery is proven after support has been approved [2009 Recommendation XI.i; 2006 Export Credit Recommendation].

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as case law and practice develops:
- (a) Whether in practice legal or procedural obstacles are encountered in proceeding against a legal person where the natural person who bribes a foreign public official has not been or cannot be proceeded against [Convention Article 2; 2009 Recommendation Annex I.B];
 - (b) Sanctions and confiscation imposed in practice for foreign bribery [Convention Article 3];
 - (c) Updates made to anti-money laundering legislation in Greenland and the Faroe Islands [Convention Article 7];
 - (d) The application of the non-tax deductibility of bribes in practice, particularly on whether SØIK promptly informs SKAT of convictions related to foreign bribery, and whether SKAT re-assesses the tax returns of taxpayers convicted of foreign bribery [2009 Recommendation VIII.i; 2009 Tax Recommendation I.i and ii].

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

<i>Phase 2 Recommendation</i>	<i>2008 Working Group Evaluation</i>
<i>Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery</i>	
1. Concerning <u>raising awareness</u> of the Convention, the Revised Recommendation and the foreign bribery offence, the Working Group recommends that Denmark take measures to further raise the level of awareness of the Convention, the foreign bribery offence, and the risk that Danish companies engage in bribery abroad (i) among officials in government agencies that could play a role in preventing, detecting and reporting; (ii) among judges and new recruits; (iii) among SMEs and large enterprises doing business abroad, notably by providing guidance and support to the development and adoption of compliance programs; (iv) among accountants and auditors having in mind their reporting obligations; and (v) among business and law school students [1997 Revised Recommendation, Sections I and V.C.i) and following].	Partially implemented
2. Concerning the prevention and detection of foreign bribery through <u>taxation</u> , the Working Group recommends that Denmark provide enhanced guidance and training to tax officials on the detection of bribe payments disguised as legitimate allowable expenses, and maintain detailed statistical information on tax offences and reporting by tax officials to law enforcement agencies [1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials; 1997 Revised Recommendation, Sections I, II.ii) and IV].	Not implemented
3. Concerning <u>detection and reporting</u> of foreign bribery cases, the Working Group recommends that Denmark:	
(a) adopt measures for ensuring stronger whistleblower protection in the private sector in order to encourage private sector employees to report suspected cases of foreign bribery without fear of retaliation [1997 Revised Recommendation, Sections I and V.C.iv)]	Not implemented
(b) take steps to ensure an effective system for reporting, as appropriate, to the Danish and local law enforcement authorities suspicions of bribery of foreign public officials detected in the context of the administration of development funds and export credit guarantees [1997 Revised Recommendation, Sections I, II.v) and VI];	Fully implemented
(c) issue clear guidelines for relevant public servants on how to handle suspicions of foreign bribery offences that they may come across in the course of their duties; this should include providing guidance to diplomatic and trade promotion personnel on the steps that should be taken – including encouraging reporting the matter as appropriate to the Danish and local law enforcement authorities – when there are credible allegations that a Danish company or individual has bribed or taken steps to bribe a foreign public official [1997 Revised Recommendation, Section I].	Partially implemented

4. Concerning detection and reporting of foreign bribery through <u>accounting and auditing</u> , the Working Group recommends that Denmark provide clearer guidance to auditors with regard to the scope of their legal obligation to report suspicions of foreign bribery. This should include guidance on how the rules as provided by the Danish standards on auditing relate to the provisions under the ASARPA with regard to the reporting obligations of auditors [1997 Revised Recommendation, Sections V.B.iii) and iv)].	Not implemented
<i>Recommendations Pertaining to Investigation of Foreign Bribery</i>	
5. Concerning <u>investigation of foreign bribery</u> , the Working Group recommends that Denmark:	
(a) make special investigative means, such as interception of communications, video surveillance and undercover operations, available in foreign bribery investigations where appropriate [Convention, Article 5; 1997 Revised Recommendation, Section I];	Not implemented
(b) ensure that the Danish National Police College provides intensified training of police officers and prosecutors on investigating foreign bribery, including on the practical aspects of bribery investigations [Convention, Article 5; 1997 Revised Recommendation, Section I].	Partially implemented
<i>Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences</i>	
6. Concerning the <u>offence of foreign bribery</u> , the Working Group recommends that Denmark:	
(a) clarify that all instances of small facilitation payments given to induce a foreign public official to act in breach of his/her duties in the context of an international business transaction are illegal pursuant to the Danish Criminal Code [Convention, Article 1; 1997 Revised Recommendation, Section I];	Fully implemented
(b) within the rules governing its relationship with Greenland and the Faroe Islands, (i) extend the OECD Convention to Greenland at the earliest possible date; and (ii) assist the authorities of the Faroe Islands in adopting the necessary legislation in order to extend ratification of the OECD Convention to the islands at the earliest possible date [Convention, Article 1; 1997 Revised Recommendation, Section I];	Partially implemented
(c) ensure that the application of the DPP Guidelines on the liability of legal persons is in no way an impediment to using the full scope of the jurisdictional rules as provided by the Danish Criminal Code [Convention, Article 2; 1997 Revised Recommendation, Section I].	Not implemented
7. Concerning <u>sanctions</u> , the Working Group recommends that Denmark:	
(a) increase the level of the penalty of imprisonment against natural persons for foreign bribery as provided by Section 122 of the Danish Criminal Code, and ensure that they are effective, proportionate and dissuasive [Convention, Articles 3; 1997 Revised Recommendation, Section I];	Not implemented
(b) seriously consider to further increase the sanctions for accounting offences as provided by Sections 296 and 302 of the Danish Criminal Code. It also recommends that Denmark compile relevant statistics on the application of sanctions for accounting offences in view of the follow-up to the Phase 2 evaluation [Convention, Article 8; 1997 Revised Recommendation, Sections I and V].	Not implemented
<i>Follow-up by the Working Group</i>	
8. The Working Group will follow-up the following issues once there has been sufficient practice:	
(a) the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and related offences that are reported to the law enforcement authorities [Convention, Article 5; 1997 Revised Recommendation, Sections I and V.B.iii) and iv)];	Continue to follow up

<p>(b) information on the application of the offence of bribery of foreign public officials, and the level of criminal and administrative sanctions for foreign bribery [Convention, Articles 1, 2 and 3; 1997 Revised Recommendation, Sections I, II.v), and VI];</p>	<p>Continue to follow up</p>
<p>(c) the effectiveness of the provisions on confiscation in foreign bribery cases [Convention, Articles 3 ; 1997 Revised Recommendation, Sections I];</p>	<p>Continue to follow up</p>
<p>(d) the protection of public sector employees collaborating with the law enforcement agencies, notably employees who report in good faith suspected cases of foreign bribery [1997 Revised Recommendation, Section I];</p>	<p>Continue to follow up</p>
<p>(e) the application of the criminal liability of legal persons for the bribery of foreign public officials, including: (i) whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been or cannot be proceeded against, (ii) the application of the rules for establishing Danish jurisdiction over foreign bribery offences committed by legal persons [Convention, Article 2; 1997 Revised Recommendation, Section I];</p>	<p>Continue to follow up</p>
<p>(f) the application of the 2006 Act on Measures to Prevent Money Laundering and Terrorist Financing, including with respect to the application of sanctions for failure to report; and the development of specific standards by the Danish authorities (in the form of typologies, guidelines and training material) for suspicious transaction reporting [Convention, Article 7 ; 1997 Revised Recommendation, Section I].</p>	<p>Continue to follow up</p>

ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

Public Sector

- Ministry of Justice
- Public Prosecutor for Serious Economic and International Crime (SØIK)
- Danish Prosecution Service
- National Police
- Representations of Greenland and of the Faroe Islands in Copenhagen
- Trade Council of Denmark
- State Employer's Authority (Ministry of Finance)
- Ministry of Foreign Affairs
- Danish Tax and Customs Administration
- Danish Business Authority
- Danish Ministry of Employment
- Danish Data Protection Agency
- Ministry of Business and Growth
- Money Laundering Secretariat
- Financial Supervisory Authority (FSA), including the Legal Division
- Danida (Ministry of Foreign Affairs)
- Danish International Investment Funds (IFU and IØ)
- Eksportkreditfonden (EKF)
- Danish Competition Authority

Judiciary

- Assistant Judge, Supreme Court
- High Court Judge, Eastern High Court

Private Sector

Private enterprises

- A.P. Moller-Maersk
- Carlsberg
- Danske Bank
- H. Lundbeck
- Missionpharma
- Novo Nordisk
- Nykredit

Business associations

- Confederation of Danish Industries (DI)
- Danish Bankers Association
- Danish Oil Industry Association
- Danish Securities Council
- Danish Shipowners' Association
- Federation of Danish Companies in Greenland

Legal profession and academics

- Kromann Reumert
- Gorrissen Federspiel
- Copenhagen Business School

Accounting and auditing profession

- Danish Supervisory Authority on Auditing
- KPMG
- PWC

Civil Society

- Børsen Newspaper
- DanChurchAid
- Danish Confederation of Professional Associations (AC)
- Projektrådgivningen (PR)
- Transparency International Denmark

ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AAAAAF	Act 468/2008 on Approved Auditors and Approved Audit Firms	IFU	Danish International Investment Funds
AJA	Administration of Justice Act	IOSCO MMOU	International Organization of Securities Commissions Multilateral Memorandum of Understanding
AML	anti-money laundering	ISA	International Standards on Auditing
CoE	Council of Europe	MBG	Ministry of Business and Growth
CSR	corporate social responsibility	MDB	multilateral development bank
DBA	Danish Business Authority	MFA	Ministry of Foreign Affairs
DCCA	Danish Competition and Consumer Authority	MLA	mutual legal assistance
DDPA	Danish Data Protection Agency	MLS	Money Laundering Secretariat
DI	Confederation of Danish Industries	MOJ	Ministry of Justice
DKK	Danish krone	NGO	non-governmental organisation
DPP	Director of Public Prosecutions	ODA	official development assistance
DTAA	Danish Tax Assessment Act	PEP	politically exposed person
DTAG	Danish Tax Assessment Guidelines	SOE	state-owned or state-controlled enterprise
EAW	European Arrest Warrant	SØIK	Public Prosecutor for Serious Economic and International Crime
EKF	Eksportkreditfonden (Denmark's officially supported export credit and insurance agency)	SKAT	Danish Tax and Customs Administration
EU	European Union	SME	small- and medium-sized enterprise
EUR	euro	STR	suspicious transaction report
FATF	Financial Action Task Force	TCD	Trade Council of Denmark
FCPA	U.S. Foreign Corrupt Practices Act 1977	UN	United Nations
FIU	financial intelligence unit	UNCAC	United Nations Convention against Corruption
FSA	Financial Supervisory Authority	UNDP	United Nations Development Programme
GRECO	Group of States against Corruption (Council of Europe)	USD	United States dollar
IFRS	International Financial Reporting Standards		

ANNEX 4 EXCERPTS OF RELEVANT LEGISLATION

Criminal Code

Section 7. – (1) Any act committed within the territory of another state by a person who is a Danish national or has his abode or other habitual residence within the territory of the Danish state when the charge is preferred is subject to Danish criminal jurisdiction, if:-

(i) the act is also a criminal offence under the legislation of the country in which the act was committed (dual criminality); or

(ii) the offender also had such relations to Denmark when the act was committed, and the act:-

(a) comprises sexual abuse of children or female circumcision; or

(b) is aimed at someone having such relations to Denmark when the act was committed.

(2) Any act committed outside the territory of another state by a person having such relations to Denmark as referred to in subsection (1) hereof when the charge is preferred is also subject to Danish criminal jurisdiction, provided that acts of the kind concerned are punishable by a sentence exceeding imprisonment for four months.

(3) Subsections (1)(i) and (2) hereof apply correspondingly to acts committed by a person who is a national of or has his abode in Finland, Iceland, Norway or Sweden when the charge is preferred, and who is present in Denmark.

Section 7b. – Where the application of Danish criminal jurisdiction to a legal person is subject to dual criminality, criminal liability of a legal person need not be provided for by the legislation of the country in which the act was committed.

Section 8. – Any act committed outside the territory of the Danish state is subject to Danish criminal jurisdiction, irrespective of the nationality of the offender, where:-

(i) the act violates the independence, security, Constitution or public authorities of the Danish state, or official duties to the state;

(ii) the act infringes upon interests, the legal protection of which within the territory of the Danish state depends on particular relations to the Danish state;

(iii) the act violates an obligation which the offender is required by law to observe abroad;

(iv) the act violates an official duty incumbent on the offender towards a Danish ship or aircraft;

(v) the act is covered by an international provision pursuant to which Denmark is obliged to have criminal jurisdiction; or

(vi) extradition of a person charged for the purpose of prosecution in another country is refused, and the act, provided that it was committed within the territory of another state, is a criminal offence under the legislation of the country in which the act was committed (dual criminality), and the act is punishable under Danish law by a sentence of imprisonment for at least one year.

[...]

Section 9. – (1) An act is deemed to have been committed at the place where the offender was present when the act was committed. As regards legal persons, acts are deemed to have been committed at the place where the act(s) implying the liability of the legal persons were committed.

(2) If the criminality of an act depends on or is influenced by an actual or intended consequence, the act is deemed to have been committed also at the place where the consequence occurred or where the offender intended the consequence to occur.

(3) Any attempted or accessory act is deemed to have been committed within the territory of the Danish state, provided that the offender was present in Denmark when the act was committed, regardless of whether the offence was completed or intended to be completed outside the territory of the Danish state.

(4) Where part of an offence was committed within the territory of the Danish state, the full offence is deemed to have been committed in Denmark.

Section 10. – (1) Where an act is prosecuted in Denmark, the decision concerning punishment and other legal consequences of the act must be made according to Danish law.

(2) Where Danish criminal jurisdiction is subject to dual criminality, any punishment imposed may not exceed the punishment provided for by the legislation of the country in which the act was committed.

Section 75 – (1) The proceeds gained from any criminal act, or an amount equivalent thereto, may be confiscated, either in full or part. Where the size of such an amount has not been sufficiently established, an amount thought to be equivalent to the proceeds may be confiscated.

(2) The following objects may also be confiscated where this must be regarded as necessary in order to prevent further offences, or if warranted by special circumstances:

- i) objects which have been used or were intended to be used, in a criminal act;
- ii) objects produced by a criminal act; and
- iii) objects with respect to which a criminal act has otherwise been committed.

(3) In place of confiscation of the objects referred to in Subsection (2) above, a sum may instead be confiscated which is equivalent to their value or a part thereof.

[...]

Section 76 – (1) Confiscation under Section 75(1) of this Act may from any person to whom the proceeds of a criminal act have directly passed.

(2) Confiscation of the objects and amounts referred to in Section 75(2) and (3) of this Act may be from any person who is responsible for the offence and also from someone on whose behalf such a person has acted.

Section 122 – A person who unlawfully grants, promises or offers another person who works in Danish, foreign or international public functions or service a gift or other favour in order to induce that other person to carry out or not carry out an act required by his functions or service, shall be liable to a fine or imprisonment for any term not exceeding three years.

Section 144 – A person who unlawfully receives, demands, or accepts the pledge of a gift or other favour while carrying out Danish, foreign or international public service or functions shall be liable to a fine or imprisonment for any term not exceeding six years.

Section 290 – (1) Any person who accepts or obtains for himself or for others a share in proceeds obtained by any person who unduly, by hiding, storing, transporting, assisting in disposal a criminal offence and or in a similar manner later acts to secure for another proceeds of a criminal offence is guilty of handling stolen goods and is liable to a fine or imprisonment for up to one year and six months.

(2) The punishment may increase to imprisonment for six years where the handling of stolen goods is particularly aggravating, particularly due to the commercial nature of the offence or as a result of the gain obtained or intended, or where a large number of offences have been committed.

(3) A sentence under this provision may not be imposed on any person who accepts the proceeds as ordinary subsistence from his family members or his cohabitant, or on any person who accepts the proceeds as normal remuneration for usual consumer goods, articles for everyday use or services.

[...]

Section 296 - (1) A person who

1) distributes false or misleading information capable of significantly affecting the price of securities or similar assets;

2) gives false or misleading information concerning the conditions of legal persons in:

- a) public announcements concerning financial conditions,
- b) financial statements required by law,
- c) reports, accounts or declarations to a general meeting or similar body or the legal person's management,
- d) notifications to a registration authority, or
- e) offers concerning the legal person's formation or capital increase and a sale of shares or the issue or sale of convertible bonds;

- 3) grossly contravenes the laws governing legal persons in respect of
 - a) injections of fresh capital or
 - b) use of the legal person's funds;
- 4) grossly fails to fulfil requirements of the law governing a legal person's
 - a) keeping of minutes of proceedings,
 - b) keeping of registers and duties of disclosure of ownership interests, or
 - c) duties to take action when a loss of capital has been ascertained;

shall be liable to a fine or to imprisonment for any term not exceeding one year and six months.

(2) If any of the acts or omissions referred to in subsection (1) above has been committed with gross negligence, the penalty shall be a fine or, in aggravating circumstances, imprisonment for any term not exceeding four months.

Section 299 - A person who acts in circumstances that do not make it possible to apply the provisions of section 280 of this Act, and

- 1) inflicts, by neglect of duty, in his capacity of trustee of property of another person, a substantial loss on that other person, which is not redressed prior to judgment in a court of first instance; or who
- 2) receives, claims or accepts the promise of a gift or other favour, in his capacity of trustee of property of another person, by neglect of duty and for the benefit of himself or others, as well as a person who grants, promises or offers such a gift or favour;

shall be liable to a fine or imprisonment for any term not exceeding one year and six months.

[...]

Section 302 – A person, who, in circumstances other than those covered by section 296 of this Act, in particularly aggravating circumstances violates requirements stipulated by law concerning:

- 1) bookkeeping, including registration of transactions and preparation of accounting material;
- 2) storage of accounting records, including descriptions of bookkeeping and systems for keeping and finding material, including access codes etc. and encryption keys;
- 3) access for public authorities to accounting material pursuant to special legislation governing these authorities; as well as
- 4) presentation of annual accounts or similar accounts;

shall be liable to a fine or to imprisonment for any term not exceeding one year and six months.

(2) Where an act or omission referred to in subsection (1) above has been committed with gross negligence, the penalty shall be a fine or imprisonment for any term not exceeding four months.

Section 306 – Companies etc. (legal persons) can be held criminally liable according to the provisions in Chapter 5 for violation of this Act.

Administration of Justice Act

Section 832. (1) In cases concerned with offences that are not estimated to lead to a penalty more severe than a fine the prosecution may by means of a fixed penalty notice inform the defendant that the matter may be settled without trial in case the defendant admits being guilty of the offence and declares acceptance of payment within a prescribed time limit of a fine specified in the penalty notice. Upon request the time limit may be extended by the prosecution service.

(2) The rules set out in section 834(1) para. 2 and 3 and subs. (2) concerned with the requirements as to the contents of indictments shall apply correspondingly to fixed penalty notices.

(3) If the defendant accepts the fine, further prosecution will be withdrawn, but see section 724(2). The acceptance of a fine has the same effect as a judgment in case of repetition.

(4) The Minister of Justice lays down provisions concerning confiscation according to rules similar to those of subsections (1) and (2). The provision in section 724(2) shall apply correspondingly.

Act on Approved Auditors and Approved Audit Firms

20. (1) The auditor shall keep auditors' records in companies in which the financial statements, etc. are audited.

(2) The auditors' records shall be kept for use by the principal unless otherwise required. In companies that have an audit committee, cf. Section 31, the auditors' records shall also be kept for use by the audit committee.

(3) In the auditors' records, the auditor shall account for the nature and extent of the audit work performed and the opinion expressed on the basis hereof. In this connection, the auditor shall, as a minimum, provide information about the following when an audit has been performed:

- 1) Significant issues regarding the audit, including, in particular, material uncertainty, errors, misstatements or omissions in the company's bookkeeping, accounting or internal control,
- 2) matters that must normally be expected to be of importance to the recipient's or principal's assessment of the financial statements, etc.,
- 3) whether the auditor meets the statutory requirements for an auditor's independency and
- 4) whether the auditor has received all the information requested during the audit.

(4) Information in the auditors' records cannot be replaced by other communications.

(5) In parent companies that present consolidated financial statements, the auditors' records shall contain a description of the audit of the consolidated financial statements.

21. (1) In auditors' records that concern financial statements, etc. presented by companies mentioned in (3), the auditor shall, moreover, provide information about the following:

- 1) non-audit services that have been provided for the audited company by the audit firm and its subsidiaries and
- 2) the safeguards that have been applied to mitigate any threats to the auditor's independence as documented by the auditor, cf. Section 24 (6),

(2) In parent companies that present consolidated financial statements, the information provided in pursuance of (1), no. 1, shall also be provided for the Group as a whole.

(3) The following companies shall be covered by (1) until they no longer meet the criteria:

- 1) companies with transferable securities admitted to trading on a regulated market in an EU country or in an EEA country,
- 2) state-owned public limited companies,
- 3) municipalities, joint local authority companies, cf. Section 60 in the Danish Local Government Act, and regions,
- 4) companies that are subject to supervision by the Danish Financial Supervisory Authority, except for companies that are covered by the Danish Insurance Mediation Act and companies that are covered by Part 20 a (investment advisers) of the Danish Financial Business Act, and
- 5) companies that exceed two or more of the following criteria in two consecutive financial years:
 - a) a staff of 2,500 employees,
 - b) a balance sheet total of DKK 5 billion or
 - c) a net turnover of DKK 5 billion.

22. (1) If the auditor realises during the performance of assignments in pursuance of Section 1 (2) and (3) that one or more members of the company's management commit or have committed financial crimes in connection with the performance of their managerial duties, and if the auditor has reason to assume that the crime concerns significant sums or is otherwise of a serious nature, the auditor shall immediately notify each individual member of the management hereof. The notification shall be entered in the auditors' records if the auditor keeps such records. If the management has not documented to the auditor within 14 days at the latest that it has taken the necessary steps to stop any ongoing crime and to remedy the damage that the alleged crime has caused, the auditor shall immediately notify the Public Prosecutor for Serious Economic Crime about the assumed crimes. Sentence 1 and 3 shall not apply to circumstances that are covered by the rules in the Danish Act on Preventive Measures against Money Laundering and Financing of Terrorism.

(2) If the auditor finds that notification of the members of the management will not be a suitable measure for the prevention of continued crime, the auditor shall immediately notify the Public Prosecutor for Serious Economic Crime of the assumed financial crimes. The same shall apply if the majority of the company's members of the management are involved in or have knowledge of the financial crimes.

Danish Tax Assessment Act

8D. In the statement of the taxable income, no tax deduction is allowed for expenses for bribes of the type referred to in Section 144 of the Danish Criminal Code to a person who is employed, appointed or elected to hold office or carry out duties in legislative, administrative and judiciary agencies, be it for Denmark, the Faroe Islands, Greenland, a foreign state, including local authorities or political branches, or for an international organisation established by states, governments or other international organizations.

Danish Tax Administration Act

17. The tax authorities are - under the responsibility of the Criminal Code § 152-152a and 152c-152f – under unconditional secrecy when dealing with unauthorized persons in regards to information on a natural or a legal person's financial, professional or private matters, which the authorities become familiar with through their work. The unconditional secrecy also applies to expert assistants and any other employee who learns of such information through work appointed to him by the authorities. If the agreement is entered with a company, the secrecy obligation applies to anyone who learns of such information through their work.

Danish Financial Statements Act

7(1) The provisions governing the preparation of annual reports laid down in this Act are divided into reporting classes A, B, C and D, cf. Parts II-V. In determining the reporting class to be followed by an enterprise the following shall apply:

1. Enterprises covered by the Act which are not required to present an annual report in pursuance of section 3(1), but which voluntarily present an annual report, cf. section 3(2), shall, as a minimum, follow the rules for reporting class A as set out in Part II.
2. Small enterprises required to present an annual report in pursuance of section 3(1) shall, as a minimum, follow the rules for reporting class B as set out in Part III.
3. Medium-sized and large enterprises required to present an annual report in pursuance of section (1) shall, as a minimum, follow the rules for reporting class C as set out in Part IV.
4. State-owned public limited companies and companies the shares or bonds of which are listed on a stock exchange ("listed companies") in an EU Member State or in another country with which the Community has entered into an agreement, and which are under an obligation to present an annual report in pursuance of section 3(1) paragraph 1), shall, irrespective of their size, follow the rules for reporting class D as set out in Part V.

7(2) 1. Small enterprises:

Enterprises not exceeding two of the following limits as at the balance sheet date in two consecutive financial years:

- a. A balance sheet total of DKK 36 million,
- b. revenue of DKK 72 million, and
- c. an average number of 50 full-time employees during the financial year.

2. Medium-sized enterprises:

Enterprises which are not small enterprises and which do not exceed two of the following limits as at the balance sheet date in two consecutive financial years:

- a. A balance sheet total of DKK 143 million,
- b. revenue of DKK 286 million, and
- c. an average number of 250 full-time employees during the financial year.

3. Large enterprises: Enterprises which are not small or medium-sized enterprises.

Executive Order on the Danish Financial Statements Act

135(1) A company that is under an obligation to prepare an annual report in accordance with the rules for reporting class B, C or D, shall have its financial statements and consolidated financial statements, if applicable, audited by one or more auditors, but see the second sentence. A company covered by reporting class B, cf. Section 7(1)(ii) may omit

to have its financial statements audited if the company at the balance sheet date in two consecutive financial years does not exceed two of the following limits, but see (2) and (3):

(i) a balance sheet total of DKK 4 million,

(ii) revenue of DKK 8 million, and

(iii) an average of 12 full-time employees during the financial year.

(2) The exception in (1), second sentence, shall not apply to commercial foundations, cf. Section 3(1)(iii), as such foundations are under an obligation to have their annual report audited regardless of the size of the foundation.

(3) The exception in (1), second sentence, shall not apply to companies owning equity investments in other companies and exercising considerable influence over the operational or financial management of one or more of these companies.

(4) Section 7(3) shall apply in connection with the calculation of the amounts in (1), second sentence.

(5) Where legislation permits that information to be disclosed in the financial statements or consolidated financial statements may alternatively be included in other documents to which the financial statements or consolidated financial statements refer, the auditing obligation set out in (1), first sentence, shall also apply to the said information in these documents. The auditing obligation set out in (1), first sentence, shall not apply to the management's review and the supplementary reports included in the annual report, cf. Section 2(1) and (2). The auditor shall, however, make a statement about whether the information in the management's review agrees with the financial statements and the consolidated financial statements, if applicable. The second and third sentences shall apply to information included in the management's review and information alternatively published in other places with a corresponding reference in the management's review in pursuance of the Act or provisions adopted after the date of the Act. The Danish Commerce and Companies Agency may lay down requirements for the auditing of supplementary reports forming part of the annual report for all or some of the companies covered by reporting classes C and D.

(6) The exception set out in (1), second sentence, does not apply to a company if the company or its sole proprietor accepts payment of a fine or in connection with a criminal case is sentenced for breach of the Danish Companies Act, the Danish Financial Statements Act or Danish tax laws. In such cases, the company's financial statements for the next financial year shall be audited. The Danish Commerce and Companies Agency may extend the period during which the company's financial statements must be audited by up to two financial years.

(7) If, in connection with a review of the annual report in pursuance of Section 159, the Danish Commerce and Companies Agency notices material errors or defects in relation to the Danish Companies Act or the Danish Financial Statements Act, the Agency may decide that the exemption in (1), second sentence, cannot be used by the company for the following financial year. In such cases, the company's financial statements for the following financial year shall be audited.

ANNEX 5 STATISTICS ON THE ENFORCEMENT OF BRIBERY AND FALSE ACCOUNTING OFFENCES

1. Bribery under Section 122 of the Criminal Code

Statistics on section 122 of the Danish Criminal Code do not distinguish between foreign and domestic bribery offences.

	Charges	Imprisonment	Suspended prison sentence	Fine	Average length of imprisonment (months)	Charges withdrawn by prosecution	Acquitted by court
2000	6	0	2	1	-	0	0
2001	4	0	2	0	-	0	0
2002	3	0	0	0	-	3	2
2003	0	0	2	0	-	0	1
2004	4	0	0	0	-	2	0
2005	29	1	1	0	1.3	0	0
2006*	13	4	1	1	4.5	4	0
2007	5	1	0	0	2.7	1	0
2008	1	2	0	0	2.5	0	0
2009	8	3	1	0	3.2	2	0
2010	4	1	1	0	0.7	0	1
2011	5	1	1	0	2	3	0
Total	82	13	11	2		15	4
Average	6.83	1.08	0.92	0.17	3.02	1.25	0.33

*In addition, in 2006 one person was declared guilty with no penalty being imposed.

2. False Accounting under Section 302 of the Criminal Code

	Charges	Imprisonment	Suspended prison sentence	Fine	Average length of imprisonment (months)	Charges withdrawn by prosecution	Acquitted by court
2000	5	2	1	5	4	1	0
2001	7	1	2	2	2	0	0
2002	13	3	1	2	2.8	1	1
2003	20	3	4	5	2.4	0	0
2004	24	0	2	3	0	1	0
2005	23	4	7	8	6.4	6	2
2006*	15	1	0	4	1	12	0
2007*	7	0	1	3	0	6	0
2008	4	0	0	4	0	3	0
2009	6	2	2	3	8.5	1	0
2010*	9	0	0	1	0	3	1
2011	6	1	0	3	8	1	0
Total	139	17	20	43		35	4
Average	11.58	1.42	1.67	3.58	4.54	2.92	0.33

*In addition one person was declared guilty with no penalty being imposed.