ANDRÉ BIROTTE JR.
United States Attorney
CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division
BRUCE H. SEARBY (SBN 183267)
Assistant United States Attorney
Major Frauds Section
JONATHAN E. LOPEZ (SBN 210513)
Senior Trial Attorney, Fraud Section
United States Department of Justice
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-5423
Facsimile: (213) 894-6269
bruce.searby@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GERALD GREEN and PATRICIA GREEN, Defendants.	CR No. 08-59(B)-GW GOVERNMENT'S MEMORANDUM IN REPLY TO DEFENDANTS GERALD GREEN'S AND PATRICIA GREEN'S FURTHER SENTENCING MEMORANDUM; SUPPLEMENTAL DECLARATION OF CARLOS DEVEZA; EXHIBITS Sent. Date: April 1, 2010 Sent. Time: 8:30 a.m.

Plaintiff United States of America, through its counsel of record, the United States Attorney's Office for the Central District of California, and the Fraud Section, United States Department of Justice, Criminal Division, hereby submits its memorandum (with attached exhibits) in reply to defendant GERALD GREEN's and defendant PATRICIA GREEN's supplemental (or "further") sentencing memorandum, filed on March 11, 2010.

Yesterday, on March 24, 2010, the government also filed separately a notice of errata to its own supplemental sentencing memorandum filed on March 11, 2010.

The government respectfully requests the opportunity to supplement its position as to sentencing as necessary.

DATED: March 25, 2010

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

/s/
BRUCE H. SEARBY
Assistant United States Attorney
JONATHAN E. LOPEZ
Senior Trial Attorney
United States Department
of Justice, Fraud Section

Attorneys for Plaintiff
UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In a supplemental (or "further") sentencing memorandum ("Defs. Supp. Sent. Mem."), filed on March 11, 2010, defendants submitted, (i) as ordered by the Court, an updated position regarding defendant GERALD GREEN's medical condition and the effect custody time will have on the defendant, and (ii) a sur-reply to the government's original sentencing memorandum regarding issues of comparative sentencing in bribery cases. Here, the government replies to defendants' latest arguments, which have no merit.[1]

Defendants' medical submission, read in conjunction with the attached Supplemental Declaration of Carlos Deveza ("Deveza Supp. Decl.") as well as Mr. Deveza's initial declaration ("Deveza Decl.")[2], fails to establish a sufficient basis to believe that a term of imprisonment will adversely impact defendant GERALD GREEN's prognosis (which, according to a letter from the defendant's doctor, is stable but poor) any more than the disease itself will continue to cause his condition to deteriorate. As the Deveza Supp. Decl. makes clear, the Bureau of Prisons ("BOP")

---

[1] Defendants also attached an uninvited rebuttal compiled personally by defendant PATRICIA GREEN as to the government's characterization of her role. The document is both highly detailed and difficult to follow. The government will attempt to respond to questions the Court may have about the issues this document raises at the time of sentencing.

[2] Mr. Deveza's initial declaration was attached to the Government's Combined Sentencing Position and Response to Defendants' Joint Sentencing Memorandum ("Gov. Sent. Mem."), filed on January 14, 2010.

can address and treat defendant GERALD GREEN's specific medical needs. Indeed, Mr. Deveza, the Health Services Administrator of the Metropolitan Detention Center in Los Angeles, has undertaken a thorough review of the defendant's medical summary, the Dr. Reiss Letter, as well as defendants' filings to date, and has extensively addressed and laid to rest defendants' and Dr. Reiss' overstated concerns about prison conditions, including some old data on the incidence of tuberculosis in certain BOP facilities.

As a matter of law, this Court has sentencing discretion on account of defendant GERALD GREEN's ill health and age. However, despite thousands of serious federal criminal cases each year, defendants cannot point to cases with comparable procedural and factual circumstances granting the same extreme medical variances they seek. The sentences sought by the defendants and probation officers are unreasonable and contrary to the needs of justice.

Defendants again attempt in various ways to downplay the gravity with which violations of the Foreign Corrupt Practices Act ("FCPA") have been treated in other cases, and should be treated in this case. Defendants point to pre-trial settlements in FCPA cases against corporations as a reason for this Court not to impose jail time on them, but those cases are incomparable to this one. Defendants also obfuscate the clear mandate of the United States' treaty obligation to parity in sentencing between FCPA and domestic bribery cases. And, lastly, defendants attempt to cloak their appeal for lenience in academic and legal respectability with a superficial argument that the bribery in this case was economically benign, "efficient," and a "stimulus" to Thailand; however, even the economics-oriented authors whom

defendants cite do not offer support for the kind of bribery defendants committed here. In sum, defendants arguments would require this Court to ignore both traditional legal authority and the egregiousness of the bribery in this case.

Therefore, this Court should impose upon each defendant imprisonment for a significant number of years.

II.

DISCUSSION

A. DEFENDANT GERALD GREEN SHOULD NOT AVOID PRISON BECAUSE OF HIS MEDICAL CONDITION, WHICH IS STABLE AND CAN BE WELL CARED FOR BY THE BOP

Defendant GERALD GREEN's medical regimen can be maintained by the Bureau of Prisons ("BOP") and he will receive proper medical care if he is sentenced to a term of imprisonment. Defendant GERALD GREEN's claims that he cannot safely be housed in a federal prison without significant risk of further degeneration of his lung function are incorrect. His lung function is going to degenerate in the coming years whether or not he is incarcerated. Indeed, as Dr. Reiss states, "emphysema is a permanent and progressive disease" (Defs. Exh. O, attached to Defs. Supp. Sent. Mem., at 2). Notwithstanding the progressive nature of the disease, Dr. Reiss indicates that while defendant GERALD GREEN's prognosis is "quite poor", his medical condition has been "recently stabilized with a very strict regime of therapy including medication, daily exercise, steam inhalation and supplemental oxygen." (Id. at 1). Dr. Reiss further states that "any change in Mr. Green's treatment and personal regimen is likely to have a potentially severe negative impact on his health and well being." Dr. Reiss then cites five factors that are a

cause of concern. (Id. at 1-2). The question then becomes can BOP maintain defendant GERALD GREEN's regime of therapy, and can the factors cited by Dr. Reiss be addressed? As Mr. Deveza makes clear in his declarations filed with the Court, the answer to both questions is yes: BOP can maintain defendant GERALD GREEN's regime of therapy -- contrary to defendant GERALD GREEN's claims, and as Mr. Deveza sets forth in the supplemental declaration, the risk factors cited by Dr. Reiss are either not applicable (as discussed below) or no different than what defendant GERALD GREEN would encounter at home or in a private hospital. Defendants point to no cases granting such extreme variance from the guidelines under comparable procedural and factual circumstances.

1. Maintenance of Current Therapy Regime

Dr. Reiss indicates that defendant GERALD GREEN's strict medical regime includes "medication, daily exercise, steam inhalation and supplemental oxygen." (Defs. Exh. O, at 1). This regime can be adhered to if he is sentenced to prison.

a. Medications. Upon a review of defendant GERALD GREEN's medications, Mr. Deveza has concluded that "almost all of Mr. Green's current medications are on the BOP's formulary. The sole exception is Advair." (Deveza Supp. Decl. ¶ 4(b)). With respect to Advair, Mr. Deveza states:

> BOP policy provides that for purposes of continuity of care, inmates who are admitted to our institutions are continued on any medications prescribed for their chronic medical problems until a full assessment of their needs can be conducted. This is true regardless of whether the medications are formulary or non-formulary. Furthermore, if an inmate provides BOP with sufficient medical documentation regarding the failure of prior drug regimens, the BOP can expedite the approval process for non-formulary medications.

(Id.). Therefore, so long as defendant GERALD GREEN's doctor provides adequate documentation, defendant GERALD GREEN should be able to continue his use of Advair as well as his other specific medications.

b. Steam. Per Mr. Deveza, "steam or inhalation treatments are available at every Health Services Department throughout the BOP." (Id. ¶ 4(c)).

c. Supplemental Oxygen. Again, defendant GERALD GREEN will have access to supplemental oxygen, indeed, he can have access to his own oxygen concentrator. As Mr, Deveza states:

> Mr. Green is also using an oxygen concentrator. Use of this devise is also permitted at all BOP institutions. If Mr. Green has his own oxygen concentrator that he would like to continue using during his incarceration, he can bring that equipment with him to his designated institution and will have immediate access to the device.

(Deveza Decl. ¶ 15). Dr. Reiss did not opine on defendant GERALD GREEN's current exercise regime, however, there has been no claim that the defendant will not be able to exercise if incarcerated. Therefore, any concern about an alteration to the defendant's strict regime of therapy is unfounded.

2. Factors Of Concern Are Not Unique To Incarceration

In addition to outlining the above therapy regime, Dr. Reiss identified five other factors "of concern" in his letter. (Defs. Exh. O, at 2). It should be noted, that two of his cited factors, substitution of alternative medicines and termination or limitation of access to steam treatments, are, as discussed above, not factors implicated by incarceration. These cited concerns, as well as the other three factors cited (1) physical

or emotional stress; (2) exposure to respiratory infection from contact or forced close quarters; and (3) negative impact on ability to sleep, are all directly and thoroughly addressed in Mr. Deveza's supplemental declaration (Deveza Supp. Decl. ¶¶ 4(a)-(e)). Each of these factors are a cause of concern whether or not the defendant is incarcerated. Defendant GERALD GREEN has not identified one factor that is both unique to prison and will cause an adverse effect on his prognosis. Even Dr. Reiss states that the "exact effect of any of the above is unknowable." (Defs. Exh. O, at 2).

Without reiterating each of Mr. Deveza's responses, one factor in particular merits discussion. Dr. Reiss has cited exposure to respiratory infection from contact or forced close quarters with other patients as a cause for concern. (Id.). Defendant GERALD GREEN further states that a close quarter environment, especially one filled with "foreigners," is extremely dangerous for him. (Def. Supp. Sent. Mem., at 3). First, and as Mr. Deveza points out, defendant GERALD GREEN would face the same threat of exposure in the confined setting of a hospital as he would in a medical environment inside prison. (Deveza Supp. Decl. at ¶4(d)). Defendant GERALD GREEN's possibility of exposure to tuberculosis, which defendants portray as epidemic at BOP based on their hyperbolic reading of a study published several years ago, is also minimized as a result of the current strict BOP practices. (Id.) Second, defendant GERALD GREEN's statement of concern is ironic given his history of traveling to Thailand multiple times a year -- which required him to sit on an airplane with re-circulated air in close quarters

with many other persons.[3] BOP at least pre-screens all inmates for acute infectious diseases. (Id.) As for defendant GERALD GREEN's fear of contracting a disease from foreigners, that fear did not stop the defendant from interacting with many foreign persons while in Thailand (which is routinely hit by flu outbreaks) as well as the other foreign countries he traveled to during the course of his illegal conduct. Defendant GERALD GREEN's concern for unhealthful interactions has only been piqued by the prospect of his incarceration. Nonetheless, while he is at BOP, defendant GERALD GREEN's needs will be cared for. As Mr. Deveza states,

> [M]r. Green will have access to specialized medical care, including emergent care, as necessary, and will undergo regular, routine follow-up examinations and treatment. I reiterate that none of Mr. Green's medical conditions are unique and all can be adequately provided for by BOP Health Services staff.

(Id. ¶¶ 7).

In short, BOP has the demonstrated ability to adhere to defendant GERALD GREEN's medical regime, and there is a lack of compelling evidence that incarceration will adversely affect the defendant to any greater degree than the disease itself.

3. Sentencing Variances Based on Medical Condition

Notwithstanding the discretion this Court enjoys at sentencing, the cases do not support the notion that this Court should refrain from imposing imprisonment based on defendant

---

[3] According to defendant GERALD GREEN's Medical Summary, attached as part of Defs. Exh. O, he was hospitalized for 8 days in 2002 for pneumonitis and other afflictions, yet he traveled to Thailand twice that year. This pattern continues up until defendant GERALD GREEN's arrest, notwithstanding his diagnosis of severe emphysema and worsening condition over the years.

GERALD GREEN's health. If defendants' crimes are to be taken seriously, sentences to a term of imprisonment are appropriate, and if the Court sentences below the guideline range, it should only do so to a reasonable and limited extent so as to preserve the countervailing interests of justice.

As one court cited by defendants held, even where a departure or variance from the guidelines sentence is warranted because of extraordinarily ill-health and infirm age, "a prison term is necessary to vindicate the law and provide deterrence . . . the goal of general deterrence would be ill-served by a public perception that, even for extraordinary reasons, a person can . . . commit crimes without being imprisoned for a meaningful period." United States v. Jiminez, 212 F. Supp. 2d 214, 220 (S.D.N.Y. 2002) (defendant pleaded guilty to illegal re-entry after deportation and then had a brain aneurism, but was sentenced to imprisonment). See also United States v. Lacy, 99 F. Supp. 2d 108, 117-19 (D. Mass. 2000) (court departed to a level 21 and imposed a sentence of 41 months in a case where defendant, who had a bullet lodged in his head and raised numerous medical issues, pleaded guilty to selling crack cocaine); United States v. Moy, 2005 WL 311441 *26-29, *34 (N.D. Ill. 1995) (78 year old defendant with severe heart condition, who pleaded guilty to RICO violations, was sentenced to 30 months imprisonment). As the district court stated in Moy, despite the defendant's age and avalanche of health problems, "a downward departure to mere home confinement would deprecate the offenses for which defendant is being sentenced, especially the conspiracy to bribe a judge." 2005 WL 311441 at *29.

There is no case defendants cite, reported or unreported, justifying such an extreme departure or variance under a comparable combination of medical and procedural facts. In all but one of the medical variance cases defendants have cited, the defendants had pleaded guilty, or in a couple of cases had accepted responsibility and/or cooperated with the government after trial. Here in contrast, defendants chose to put the government to its burden and now cite defendant GERALD GREEN's medical condition as a basis to avoid a term of custody.

Defendant GERALD GREEN was able to commit his crimes with these medical conditions; he should not now be able to use these conditions as a backstop to avoid the type of sanctions other defendants would receive -- especially since the BOP is able to adequately care for his medical needs. The simple fact is that the infirm and elderly commit crimes notwithstanding their conditions. If a defendant can simply rely on ailing health to avoid incarceration, in the face of BOP's ability to care for such a defendant, there will be no incentive for defendants to cease their crimes, or to plead guilty and accept responsibility for their actions.

Based on the common and treatable nature of defendant GERALD GREEN's illness, he (and defendant PATRICIA GREEN) should still receive a significant number of years of imprisonment.

///

///

///

B. THE COURT SHOULD REJECT DEFENDANTS' ATTEMPTS TO DOWNPLAY BOTH THE GRAVITY OF FOREIGN BRIBERY GENERALLY, AND THE BRIBERY THEY COMMITTED IN THIS CASE

Defendants continue to suggest in their supplemental briefing that foreign bribery is not generally treated so severely, and was not so bad in this case. The Court should reject these unfounded arguments.

1. Incomparable Settlements With Corporations

Defendants first suggest that the government's sentencing position in this case is out of touch with its treatment of many FCPA violations as meriting "little or no prison time." (Defs. Supp. Sent. Mem., at 6.) Once again, defendants mix up apples and oranges.[4]

Defendants predominantly point to dispositions against corporations, which necessarily cannot involve jail time for inanimate legal persons. Rather, corporate dispositions must rely on fines and other sanctions that vary based on how pervasive and far-reaching the illegal conduct was, and what steps the corporation has taken to self-report violations, to cooperate with the government, and to clean up business operations going forward. See, generally, U.S.S.G. Chapter 8 (Sentencing of Organizations). Corporate admissions of guilt often reflect vicarious liability as a principal for the accumulated actions of corporate agents, as to any one of whom there may be an unsure or insufficient basis for investigating

---

[4] The government has already briefed the Court on cases that are closer matches to the instant case, in its supplemental sentencing memorandum filed on March 12, 2010 ("Gov. Supp. Sent. Mem."), at 20-31 & Appendices A & B. N.B.: The government has replaced Appendix B with an amended version filed yesterday, March 24, 2010, attached to a notice of errata.

and charging individually. The case at bar represents one of the increasing numbers of prosecutions of individuals that the Department of Justice has succeeded in bringing in an area where violations are rarely detected, evidence-gathering is greatly complicated by geography and diplomacy, proof of willfulness is required, and businesses often compartmentalize knowledge. Thus, it is incorrect for defendants, who derived virtually all their income over several years from illegal activity and who personally directed (and, in defendant GERALD GREEN's case, negotiated) the corrupt payments on behalf of the corporations they owned and controlled,[5] to compare their situation to a broad array of corporate defendants' dispositions.

Defendants refer specifically to a recent Deferred Prosecution Agreement ("DPA") reached by the government with arms manufacturer BAE Systems, PLC ("BAE"), providing for, inter alia, a fine of $400 million. (Defs. Supp. Sent. Mem., at 6-7 & n.2.) However, defendants fail to mention various salient characteristics of the BAE case, as set forth in the criminal information, that obviously distinguish its settlement from the outcome that should follow in this case: (a) BAE is a large British company whose U.S. subsidiary was not involved in the offense; (b) BAE made payments to overseas consultants knowing there was a "high probability" that those consultants would, in turn, make suspect payments to win foreign government contracts; and (c) BAE was not charged with FCPA violations, but rather with conspiracy to make false statements and to dishonor certain prior

---

[5] Here, defendants' corporations were their alter egos, and these corporations were not even charged.

undertakings with the United States government regarding its corporate compliance with the FCPA and other, export-control statutes.[6] (Exhibit N attached hereto.) Here, in contrast, defendants are U.S. citizens who were charged with personally committing direct and flagrant violations of the FCPA, as proven by overwhelming evidence after a vigorously-contested trial.

2. The OECD Convention's Implications On Sentencing

Defendants construct a straw man out of the government's arguments regarding the anti-bribery convention sponsored by the Organization for Economic Cooperation and Development ("OECD Convention"). Defendants also suggest that treaty deserves little if any weight and should not have resulted in the United States Sentencing Commission's 2002 decision to re-categorize violations of the FCPA under the public corruption sentencing guideline at U.S.S.G. §2C1.1. (Defs. Supp. Sent. Mem., at 7-11.) These arguments are legally unsound.

The government has never suggested that the OECD Convention requires any particular sentence of imprisonment, but rather that the treaty requires "comparable sentences in both domestic and foreign bribery cases." (Gov. Sent. Pos., filed on January 14, 2010, at 5-6, 29.) Because defendants and the probation officer have urged this Court to view the foreign bribery here as essentially an issue of Thai "culture," the government is simply underscoring that, pursuant to the OECD Convention, the Court must view the corruption of the public official's integrity here

---

[6] Contrary to defendants' suggestion, there is no assurance in this form of disposition that BAE will not still suffer debarment and other collateral consequences before other government agencies from its admitted conduct.

no less seriously than if it were occurring in Los Angeles, Sacramento, or Washington, D.C.

Defendants protest that the OECD Convention was just a "political treaty" that "originated" within the executive branch, creating unwarranted "pressure" upon this Court's sentencing discretion that should be resisted. (Defs. Supp. Sent. Mem., at 7-8, 12.) To the contrary, an executed treaty ratified by the legislative branch must be recognized and given its due as the law of the land. Defendants do not make a viable legal argument for why the severity of criminal sanctions is not a proper subject for an international treaty, or for why the judiciary should not honor this enactment of considered policy determinations by the other, co-equal branches of government.[7]

Indeed, defendants' characterization of the OECD Convention as a mere "political" venture suggests that it is a matter of power-brokering whether we hold the integrity of public officials in foreign countries as dearly as that of our own domestic public officials. To the contrary, the signatory countries and the Sentencing Commission have acted laudably and based on principle to counter hypocritical and condescending views regarding officials in developing countries, i.e., as incorrigibly corrupt but necessary instruments of the light-giving commercial interests of the developed world.

Moreover, the OECD Convention was intended to bring together member countries whose competition for business in developing

---

[7] Defendants' arguments have broad and unexamined implications on U.S. treaty obligations in the areas of torture, child sex-trafficking, terrorism, and money-laundering, to name but a few areas of criminal law.

countries needs to take place on a level playing field, so as to prevent developed countries whose laws or enforcement of laws against foreign bribery are weak or nonexistent from reaping unjust commercial windfalls. Thus, while Thailand is not an OECD Convention signatory, it is one of the intended beneficiaries of an international norm that developed countries have committed with each other to establishing and strengthening.

Defendants urge the Court to disregard the Sentencing Commission's application of §2C1.1 to FCPA cases because it did not do so on the basis of so-called "empirical and studied sentencing data." (Defs. Supp. Sent. Mem., at 11-13.) However, there is no broad permission to be found in the case law to disregard sentencing guidelines that do not mirror punishments historically imposed in a given area of criminal law. Rather, the Supreme Court cases cited by defendants arose out of the crack/powder cocaine disparity, and allowed district courts to disregard apparently arbitrary Sentencing Commission policy-making. See, e.g., Spears v. United States, 129 S.Ct. 840, 842-43 (2009). Defendants also cite district court opinions imposing sentences varying greatly from the Sentencing Guidelines in cases of downloading child pornography. These cases also had at issue a sub-type of criminal behavior for which there was no reason to believe Congress intended the guideline's severe effect. See United States v. Grober, 595 F. Supp. 2d 382, 394 (D.N.J. 2008) ("Surely [C]ongress did not intend to provide a sentencing range of 19 1/2 to 20 years for a typical downloader, especially one who pleads guilty.").

In the FCPA context, the Sentencing Commission did not make sentencing policy out of thin air, and did not accomplish a result Congress could not seriously have intended. Rather, the Sentencing Commission acted to effectuate a binding treaty obligation to sentence domestic and foreign bribery cases equivalently. There is no reason for this Court to disregard this equivalence and decide, contrary to the OECD Convention, to treat this case less seriously than it would treat a domestic bribery case presenting otherwise comparable facts.

3. Economically "Good" Bribery

Defendants caricature the government's position as a "one-size-fits-all" approach to bribery.[8] Encouraging the Court to adopt an "economic" approach instead, defendants argue that some bribery is legally wrong but economically good, and thus deserving of far more lenient punishment than that provided pursuant to the considerations of §2C1.1. However, aside from having no basis in legal precedent, defendants' superficial argument as applied to the facts of this case does not even find support even in the academic papers they cite.

First, defendants suggest that the payments at issue in this case were "economically efficient or value maximizing" (Defs. Supp. Sent. Mem., at 13), but do not give those concepts any

---

[8] Nowhere has the government denied that the Court has discretion to impose a sentence that varies from the Sentencing Guidelines under the statutory factors of 18 U.S.C. § 3553(a), or that there may be different types of harms caused by different bribery schemes, as defendants allege is the government's position. The government refers the Court to its supplemental sentencing brief for the discussion of how factors such as a defendant's performance or non-performance of the corrupt contracts factors into the sentencing analysis under the case law and the Sentencing Guidelines. (Gov. Supp. Sent. Mem., at 3-7.)

content or explain the mechanism by which the $1.8 million in payments for Governor Juthamas Siriwan demonstrated their operation. The terminology comes from a journal note by a law student, Marie M. Dutton, Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act, 2 N.Y.U.J.L. & Bus. 583 (2005-2006), which also does not explain how any court could determine what falls under this rubric. See id. at 584, 593, 614-15, 634, 636-39. The author does, however, catalogue many ways in which bribery of foreign officials "results in considerable economic harm for developing and developed countries alike." Id. at 583-89. To the extent the author believes the FCPA is over-inclusive to the detriment of economic efficiency, it is largely because of the law's failure to set forth a de minimus exception for petty bribery, versus large-scale bribery. Id. at 584, 598, 613, 631-39. Of course, the payments in this case were large-scale -- both as a percentage of each contract and in total dollars.

In addition, the author of the above law journal note argues that some unwritten, "legitimate traditions of gift-giving" related to cultural values of appreciation and hospitality are entitled to respect, not condemnation. Id. at 608-13. However, as the author disclaims: "It must be ensured that arguments extolling the virtues of cultural pluralism are not abused to justify predatory or economically detrimental practices." Id. at 612. The culturally-acceptable type of gift is of nominal or limited (and not excessive) value and is "'usually done in the open, and never in secret.'" Id. at 613 (quoting the Nigerian president). Again, in this case, defendants and Governor

Juthamas Siriwan engaged in a carefully camouflaged scheme involving huge sums, shell companies, pass-through prime contracts, overseas bank accounts in the names of nominees, and numerous other telltale signs of secrecy -- establishing the schemers' consciousness that the payments were not culturally acceptable, but shamefully wrong. The payments were also clearly prohibited under express provisions of Thai criminal law judicially noticed by this Court at trial.

Defendants ill-advise this Court by asserting that a few OECD Convention members may expressly permit foreign bribery under conditions that defendants argue pertain here, e.g., where the briber was the best-qualified bidder. (Defs. Sent. Mem, at 14-15.) The 2005 OECD Working Group report on Greece cited by defendants actually shows the contrary to be true, namely, that Greek officials maintained their law "covers bribery by someone who is the best-qualified bidder." Concerned OECD officials resolved to monitor developing case law to verify this official posture. (Exhibit O attached hereto, at 27-28.) Defendants' assertion that the Portugese statute requires an element of "actual detriment to international business" proves similarly inaccurate: Concerned OECD officials received official Portugese reassurances to the contrary, that "the absence of a victim would not constitute an obstacle to prosecution." (Exhibit P attached hereto, at 4.) Defendants' references to a "former" statute in Hungary make clear neither the scope of that law nor the current state of Hungary's law. Indeed, the true state of affairs is a broad consensus in the developed world about the scope of illegal foreign bribery.

Additional scholarship cited by defendants includes a paper by two assistant professors of economics arguing that bribery can sometimes be good -- a "stimulus" to underdeveloped economies. See Art Carden and Lisa Carden, "Corruption Creates Growth When People Aren't Free," August 20, 2009. (Exhibit Q attached hereto.) This paper, which does not even purport to be legal scholarship, argues that corruption may help remedy government over-regulation of the private sector economy in some countries. Its provocative thesis apparently has nothing to do with corruption in government procurement contracts, as in the case at bar. Moreover, the paper acknowledges as it must that corruption very often "undermines the stability of the institutional framework," produces "regime uncertainty, and ultimately reduces investment in productive activities." (Id. at 3.)

The sole legal opinion from a court of law that appears in defendants' brief in support of their "economic approach" to bribery is sorely off-point. In United States v. Schnieder, 930 F.2d 555 (2d Cir. 1991), the defendants were not convicted of a crime of public corruption at all, but rather the crime of procurement fraud. Since there was no allegation of undermining the integrity of a public official, the principal sentencing question in that case was the defendants' net profit. Id. at 557-58. There is nothing at all "analogous" about Schnieder.

Defendants simply offer tired excuses that Thai "culture" and "bureaucracy" had them "caught up" in an unavoidable, but harmless, situation. (Defs. Sent. Mem. at 16-17.) As the government has argued in its two previous sentencing briefs, there is no serious evidence for defendants' factual assertions

several years after the fact that they turned a huge profit for Thailand, that they were the best bidders, and that "they would have gotten the contracts anyway."[9] It is undisputed, as witness Patrick Debokay testified, that defendants had no prior experience in running film festivals. (Reporter's Transcript 8/26/2010, at 11.) Moreover, the Thai government could have identified many potential competitors for any of these contracts had not the corrupted official closed off the options for selecting vendors and prices. The schemers' siphoning of $1.8 million in funds from the Thai treasury to bribe Governor Siriwan was also not a harmless act.

The Court should treat the bribery in this case with the severity it deserves -- as egregious as any case of domestic bribery under similar facts, and in no way "good" for Thailand. Defendants have direct and total responsibility for these crimes, for which they are completely unrepentant. A sentence of a significant number of years in prison for each defendant is reasonable and, indeed, necessary.

---

[9] Defendants repeat in a shotgun approach the over-reaching and unsupported factual claims from their opening sentencing brief. (Defs. Sent. Mem. at 16-17.) As the government has addressed in its two previous briefs, an examination of the "evidence" defendants cited for each of their factual assertions shows that they have no serious or reliable basis. Defendants offer new evidence for one of their claims. By reference to meeting minutes and a consulting firm report, defendants attempt to buttress their prior claim to have "saved" Thailand $5 million on one contract by underbidding a competitor. (Defs. Supp. Sent. Mem., at 16 & n.9.) However, the government has shown that Governor Siriwan, who was taking bribes from defendants at the time, oversaw this selection and reported the "facts" on which defendants rely. (Gov. Supp. Sent. Mem., at 16; Gov. Exh. H attached thereto.) In any event, defendants and the ostensible competitor did not truly compete based on the same scope of services, so the claim of "savings" falls flat. (Id.)

III.

CONCLUSION

For the foregoing reasons, the Court should sentence each defendant to a significant number of years in prison.

The government respectfully requests leave to supplement its sentencing position as necessary, and at the time for hearing.

DATED: March 25, 2010

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

/s/
BRUCE H. SEARBY
Assistant United States Attorney
JONATHAN E. LOPEZ
Senior Trial Attorney
United States Department
of Justice, Fraud Section

Attorneys for Plaintiff
UNITED STATES OF AMERICA

SUPPLEMENTAL DECLARATION OF CARLOS DEVEZA

I, CARLOS DEVEZA, declare:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons ("BOP"), as the Health Services Administrator of the Metropolitan Detention Center in Los Angeles, California ("MDCLA"). I have been employed in this position since January 2002. I have been employed by the BOP for approximately 15 years. As the Health Services Administrator, I provide administrative supervision and direction to all Health Services staff, except the Clinical Director. I graduated with a degree of Doctor of Medicine from the University of the East Ramon Magsaysay Memorial Medical Center in Philippines in 1983. I have been employed by the BOP since 1992 as a Physician Assistant practicing under the license of the Clinical Director. If called upon, I could competently testify as set forth below.

2. I previously provided a declaration in response to a request by the Office of the United States Attorney ("USAO") regarding the medical condition and care for Gerald Green, a defendant in United States v. Gerald Green, 08-CR-00059-GW. In response to a subsequent request from the USAO, I have reviewed portions of the Defendants' Further Sentencing Memorandum as well as several of the exhibits attached thereto. More specifically, I reviewed in detail the defendants' arguments regarding Mr. Green's current medical condition and Exhibits S and O appended to Memorandum pertaining to that medical condition. As I explained in my initial declaration, I had not been provided with any of Mr. Green's current medical records before I prepared that declaration and thus my opinion was necessarily limited by that

lack of information. Although the defendant did not provide a complete set of his medical records in this supplemental filing either, Exhibit O provides me with significantly more information than I had originally. Exhibit O consists of a letter from Mr. Green's primary physician, Sheldon Reiss, M.D., and a summary of Mr. Green's medical records as prepared by Dr. Reiss. My caution is that my opinion is based on Dr. Reiss' letter and summary and thus dependant on the accuracy of those documents.

3. According to Dr. Reiss, Mr. Green suffers from an advanced case of chronic obstructive pulmonary disease ("COPD") and Emphysema. The results of the pulmonary function tests described in Dr. Reiss' summary of records show that Mr. Green's COPD is not going to improve. The medical records summary also shows that Mr. Green suffers from benign prostate hyperplasia, urinary bladder stones, and elevated cholesterol. Mr. Green's current prescription medications are: Albuterol (Proventil) Inhaler; Spiriva; Advair; Singulair; Flomax; Lipitor; Proscar; steroid pak and antibiotic pak. Furthermore, Mr. Green is currently on home oxygen and steam treatment.

4. In his letter to the Court, Dr. Reiss expressed a number of concerns about the potential effect of incarceration on Mr. Green's health. I address each of these expressed concerns below.

a. Physical or emotional stress created as a result of a changed environment and adjustment to confinement.

This is a factor that affects virtually all newly committed inmates, especially those who have not been incarcerated before. Virtually all inmates undergo a period of adjustment which can be

stressful. However, the BOP provides assistance to new inmates making this transition, including the provision of counseling services from psychologists to help individuals lessen the stress of adapting to their new environment.

b. The substitution of alternative medications to determine efficacy.

As an initial matter, I note that almost all of Mr. Green's current medications are on the BOP's formulary. The sole exception is Advair, which is a combination medication of Fluticanozole and Salmetrol. Fluticanozole is on the BOP's formulary; Salmetrol is non-formulary.

However, BOP policy provides that for purposes of continuity of care, inmates who are admitted to our institutions are continued on any medications prescribed for their chronic medical problems until a full assessment of their needs can be conducted. This is true regardless of whether the medications are formulary or non-formulary. Furthermore, if an inmate provides BOP with sufficient medical documentation regarding the failure of prior drug regimens, the BOP can expedite the approval process for non-formulary medications.

As such, if Mr. Green is sentenced to a term of incarceration, then I would strongly urge that he provide a copy of his medical records so that they can be forwarded to the BOP's Office of Medical Designation and Transportation. By doing so, he can ensure that his medical conditions can be fully considered as part of the BOP designation determination. In addition, upon surrender to his designated institution, Mr. Green should bring a copy of his medical records so that the screening medical staff

at the institution can incorporation them into his BOP medical file.

Furthermore, Mr. Green should bring with him a two week supply of all of his current prescribed medications, most especially the Advair. Although I would expect that all of his medications will be supplied by the institution's pharmacy and that the non-formulary medication authorization request will be handled expeditiously, a two-week supply of his medications will ensure that there is no interruption of his medication schedule as the result of his incarceration.

Moreover, given the revision of my opinion regarding Mr. Green's likely placement, as described below, I do not believe that there will be any significant delay in the provision of his necessary medications.

c. Limitation or Termination of access to steam treatments

Steam or inhalation treatments are available at every Health Services Department throughout the BOP. Further, if doing so is appropriate in the clinical judgment of the institution's Clinical Director, Mr. Green may be authorized to have a steam inhalation device in his possession for use outside of the Health Services Department.

d. Exposure to respiratory infection from contact with others in a confined environment.

As explained by Dr. Reiss, Mr. Green is susceptible to to infection due to his COPD/Emphysema and prolonged steroid use. Indeed, Mr. Green would face the same threat of exposure in the confined setting of a hospital as he would in a medical environment inside a prison. Mr. Green faces this risk of

exposure even in almost all confined areas, including restaurants, movie theaters and, potentially, courtrooms.

As for the issue of Tuberculosis ("TB") described in Exhibit "S", the BOP has implemented an extensive screening, surveillance and prevention plan to detect and treat any active cases of TB as well as other infectious diseases in the inmate population and among its workforce. See generally, Program Statement 6190.03, Infectious Disease Management, pages 7 - 11. See also 28 C.F.R. § 549.10, et seq. Upon admission, all inmates undergo the skin test for exposure to TB. Id. More intensive screening is conducted when an inmate has clinical indications of active TB or of recent exposure to TB. Such inmates undergo a chest x-ray to diagnose whether they have active TB. Finally, all inmates undergo yearly screening for TB exposure. Similarly, all BOP institutions screen inmates for any infectious diseases upon admittance to a BOP institution, with further testing conducted based upon clinical indications. The BOP conducts this screening because detection, control and elimination of infectious disease is paramount to ensure the ongoing health and safety of BOP staff as well as the inmates confined at BOP institutions.

Any inmate diagnosed with active TB os isolated from the general population, as needed admitted to an in-patient hospital until they are no longer infectious. As noted in the article, one of the reasons that the BOP has a higher number of identified cases is due to the active screening of inmates for both latent, i.e., inactive and non-infectious TB, and active TB. Inmates with latent TB do not pose a danger to Mr. Green as they are

non-infectious.

Finally, in the event that Mr. Green develops an infection, he will be readily evaluated by the clinical staff and prescribed antibiotics or steroids as clinically indicated.

e. Negative impact on Mr. Green's ability to sleep and the need to monitor his breathing during sleep.

Neither Dr. Reiss's letter nor the underlying documents refer to how Mr. Green's breathing is being monitored while he sleeps. I would again note, however, that the correctional setting is one that lends itself to quick response time during any medical emergencies. A BOP inmate is virtually never alone or unsupervised, as he might be were he living in the outside community. Correctional staff routinely refer any medical and psychological complaints to clinical staff enabling a clinical determination as to the urgency of the complaint. In short, the correctional setting facilitates, rather than interferes with, the immediacy of care an individual like defendant may require, because there is constant monitoring and more help available more quickly than in the outside community.

5. Lastly, after reviewing Dr. Reiss' letter and accompanying medical records, I concluded that Mr. Green would most like be designated to a Care Level III or IV institution rather than a Care Level II institution as I state in my prior declaration. Given this explanation of Mr. Green's multiple medical conditions, his current medications and other treatments, Mr. Green is clearly appropriate for one of these types of institutions. In addition, I consulted with James Pelton, M.D., the Medical Director for the BOP's Western Region. Dr. Pelton

opined that due to Mr. Green's continuous dependence on oxygen, he will almost certainly be designated to a Federal Medical Center ("FMC"), i.e., to a Care Level IV facility.

6. As I explained in my prior declaration, the BOP has six FMCs, all of which provide inpatient and outpatient medical, surgical, and psychiatric and organ transplant services to inmates commensurate with services provided in the community by hospitals and skilled nursing facilities. However, five of the FMCs house male inmates: Springfield, Missouri; Butner, North Carolina; Devens, Massachusetts; Lexington, Kentucky; and Rochester, Minnesota. The FMC in Carswell, Texas only houses female inmates. Furthermore, while most of the FMCs house inmates of every security level, the United States Medical Center for Federal Prisoners ("USMCFP") in Springfield, Missouri only houses high security inmates. Based on the little information I have about Mr. Green, it does not appear that there is anything in his background or his current crime that would justify classifying him as a high security inmate. Assuming this is correct, he will not be sent to either FMC Carswell (female inmates) or USMCFP Springfield (high security).

7. In sum, it is now my opinion that Mr. Green's conditions can be treated adequately at an FMC. It is also my opinion that Mr. Green will received appropriate medical care, monitoring and medications if he is incarcerated. Finally, I believe that Mr. Green will have access to specialized medical care, including emergent care, as necessary, and will undergo regular, routine follow-up examinations and treatment. I

reiterate that none of Mr. Green's medical conditions are unique and all can be adequately provided for by BOP Health Services staff.

I declare under the penalty of perjury, pursuant to Title 28, United States Code, Section 1746, that the foregoing is true and correct to the best of my information, knowledge and belief.

Executed this 24th day of January, 2010, at Los Angeles, California.

CARLOS DEVEZA
Health Services Administrator
Federal Bureau of Prisons
Metropolitan Detention Center,
Los Angeles

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Criminal No.
	:	
v.	:	**VIOLATION:**
	:	
BAE SYSTEMS plc,	:	**Title 18, United States Code,**
	:	**Section 371**
Defendant.	:	**(Conspiracy)**
	:	
	:	

INFORMATION

The United States Department of Justice charges that:

GENERAL ALLEGATIONS

1. At all relevant times, BAE Systems plc ("BAES"), formerly known as British Aerospace, was a multi-national defense contractor with its headquarters in the United Kingdom ("U.K."). In 2008, BAES was the largest defense contractor in Europe and the fifth largest in the United States ("U.S."), as measured by sales.

2. BAES's principal wholly-owned U.S. subsidiary is BAE Systems, Inc., headquartered in Rockville, Maryland. BAE Systems, Inc. is comprised of various defense and technology businesses and was created largely as a result of BAES's acquisitions of Marconi Electronic Systems in 1999, Lockheed Martin Aerospace Electronic Systems in 2000, and other U.S.-based defense contractors. This Information and the facts set out herein do not relate to or represent any conduct of BAE Systems, Inc. BAE Systems, Inc. was and is subject to a Special Security Agreement ("SSA") with the United States government which, for U.S. national security reasons, restricts the exercise by BAES of influence and control over the day to day activities and management of BAE Systems, Inc.

EXHIBIT N

3. From 2000, BAES agreed to and did knowingly and willfully make certain false, inaccurate and incomplete statements to the U.S. government and failed to honor certain undertakings given to the U.S. government. These statements and undertakings included that BAES would, within an agreed upon time frame, create and implement policies and procedures to ensure compliance with provisions of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, and the relevant provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). Certain of the statements were false because they were inaccurate or incomplete. BAES also failed to comply with certain of the undertakings in some material respects and failed to inform properly the U.S. government of those failures. BAES's failures to comply and inform the U.S. government constituted breaches of the representations and constituted a knowing and willful misleading of the U.S. government that impaired and impeded the activities and lawful functions of the U.S. government. BAES also made certain false, inaccurate and incomplete statements and failed to make required disclosures to the U.S. government in connection with the administration of certain regulatory functions, including in applications for arms export licenses, as required by the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751, *et seq.*, and the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120, *et seq.*

COUNT ONE

(Conspiracy)

4. Paragraphs 1 to 3 of this Information are re-alleged and incorporated by reference as if set out in full herein.

5. From at least in or about 2000, BAE Systems plc knowingly and willfully conspired, and agreed, with others known and unknown to the United States, to:

(a) knowingly and willfully impede and impair the lawful governmental functions of the United States government, including the Department of Defense and Department of State, by making certain false, inaccurate and incomplete statements to the U.S. government and failing to honor certain undertakings given to the U.S. government, thereby defrauding the United States in violation of Title 18, United States Code, Section 371; and

(b) commit offenses against the United States, to wit:

(i) knowingly and willfully make materially false, fictitious, or fraudulent statements or representations; in violation of Title 18, United States Code, Section 1001; and

(ii) knowingly and willfully cause to be filed export license applications with the Department of State, Directorate of Defense Trade Controls, that omitted a material fact required to be stated therein, that is, applications that failed properly to disclose fees or commissions made, offered and agreed to be made, directly and indirectly, in connection with sales of defense articles, in violation of Title 22, United States Code, Section 2778 and Title 22, Code of Federal Regulations, Sections 127 and 130.

PURPOSE OF THE CONSPIRACY

6. The purpose of the conspiracy was for BAES and its co-conspirators to impede and impair certain functions of parts of the U.S. government and make false statements to the U.S. government in connection with BAES's business operations, thereby defrauding the United States.

OVERT ACTS AND ADDITIONAL ALLEGATIONS

False Statements to the U.S. Department of Defense

7. The U.S. Department of Defense (the "Defense Department") is part of the Executive Branch of the U.S. government and is charged with coordinating and supervising agencies and functions of the government relating to national security and the military. The Defense Department is administered by the Secretary of Defense, who is appointed by the President of the United States, with the approval of the U.S. Senate.

8. Beginning in 2000 and continuing to at least 2002, BAES made certain false, inaccurate and incomplete statements to the Defense Department and failed to honor certain undertakings given to the Defense Department regarding certain payments and undisclosed commissions, discussed below, and its FCPA compliance policies and procedures.

November 18, 2000 Letter to Secretary of Defense

9. On November 18, 2000, BAES made false statements in correspondence to the then-Secretary of Defense, a copy of which is included as Exhibit A.

10. BAES's statements to the Secretary of Defense in the November 18, 2000 letter regarding BAES's anti-corruption compliance measures were also transmitted directly and indirectly to the U.S. Department of Justice.

11. In or about November 2000, BAES did not have and was not committed to the practices and standards represented to the U.S. government and referred to in paragraph 9 above and Exhibit A.

Additional False Statements to the Defense Department

12. On May 28, 2002, BAES made statements in correspondence to the then-U.S. Under Secretary of Defense that BAES had complied with the spirit and the letter of the statements made in BAES's November 18, 2000 letter.

13. Contrary to its previous assertions, in May 2002, BAES still had not created and was not intending to create sufficient mechanisms for its non-U.S. business to ensure compliance with the FCPA and laws implementing the OECD Convention.

14. Although BAES introduced enhanced compliance policies and procedures in 2001, such policies and procedures were not of themselves sufficient to satisfy all the statements made to the Defense Department. BAES therefore failed to honor certain of its undertakings made in the November 18, 2000 letter within the agreed periods and such undertakings remained unfulfilled at the time of the May 28, 2002 correspondence.

15. If, in May 2002, BAES had communicated its actual and intended FCPA compliance policies and procedures, the Defense Department and the Department of Justice could have commissioned further investigations and could have imposed appropriate remedies to satisfy their concerns.

16. BAES's false statements and failure to honor certain of its undertakings impaired and impeded the activities and lawful functions of the Defense Department.

False Statements to the U.S. Department of State

17. The U.S. Department of State (the "State Department") is part of the Executive Branch of the U.S. government and is the lead U.S. foreign affairs agency that advances U.S. objectives and interests in the world in developing and implementing the President's foreign policy.

Arms Export Control Act Statutory Background

18. The President has delegated authority to the State Department to review and grant export licenses for the transfer or retransfer of controlled U.S. technology identified on the United States Munitions List ("USML"). The export of USML defense materials is governed by the AECA and the ITAR. While 22 U.S.C. § 2778(g)(3) provides that the President has the power to approve an export license, the President, through Executive

Order 11958 and other regulations, including 22 C.F.R. § 120.1, has delegated the power to the State Department. Within the State Department, the Directorate of Defense Trade Controls ("DDTC") reviews the suitability of applications and can grant or reject the license application.

19. As part of the application process for an export license, pursuant to 22 C.F.R. § 130.9, each applicant is required to inform DDTC whether the applicant or its vendors have paid, or offered or agreed to pay fees or commissions in an aggregate amount of $100,000 or more for the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles. Additionally, all applicants and vendors have an ongoing obligation to correct any false statements or omissions on previous arms export license applications.

20. DDTC is also required to conduct a review pursuant to Section 38(g)(3) of the AECA (22 U.S.C. § 2778(g)(3)) to determine if the applicant is prohibited from receiving an export license. The reasons to prohibit an entity from receiving an export license for USML components include if there is reasonable cause to believe that the requesting entity has violated particular statutes, including the FCPA or the AECA.

False Statements by BAES in Arms Export License Applications

21. Beginning in 1993, BAES knowingly and willfully failed to identify commissions paid to third parties for assistance in the solicitation or promotion or otherwise to secure the conclusion of the sale of defense articles, in violation of its legal obligations under the AECA to disclose these commissions to the DDTC. BAES made (or caused to be made) these false, inaccurate or incomplete statements to the State Department both directly and indirectly through third parties. BAES failed to identify the commission payments in order to keep the fact and scope of its external advisors from public disclosure.

22. With respect to the lease of Gripen fighter jets to the Czech Republic and Hungary, discussed more fully below, and sales of other defense materials to other countries, BAES caused the filing, by the applicant, of false applications for export licenses of USML defense materials and the making of false statements to DDTC by failing to inform the applicant or DDTC of commissions paid as aforesaid.

23. If the State Department knew of the payments and undisclosed commissions, they could have considered that in deciding whether the export licenses should have been granted and the lease of the Gripen fighter jets to the Czech Republic and Hungary and sales of other defense articles might not have proceeded.

24. BAES's false, inaccurate and incomplete statements impaired and impeded the activities and lawful functions of the State Department.

BAES's Acts Demonstrating the Falsity, Inaccuracy and Incompleteness of BAES's Statements to the U.S. Government and BAES's Failure to Honor Undertakings to the U.S. Government

25. Both before and after BAES made the foregoing representations and undertakings, BAES agreed to make payments to third parties that were not subject to the degree of scrutiny and review required by the FCPA. Despite BAES's foregoing representations and undertakings, its systems of internal controls did not comply with the requirements of the FCPA.

BAES's Structure of Shell Companies and Intermediaries

26. After May and November 2001, BAES regularly retained what it referred to as "marketing advisors" to assist in securing sales of defense articles. In that connection, BAES made substantial payments which were not subjected to the type of internal scrutiny and review that BAES had represented they were or would be subjected to in the foregoing statements made to the U.S. government.

27. BAES took steps to conceal its relationships with certain such advisors and its undisclosed payments to them. For example, BAES contracted with and paid certain of its advisors through various offshore shell entities beneficially owned by BAES. BAES also encouraged certain of its advisors to establish their own offshore shell entities to receive payments while disguising the origins and recipients of such payments. In connection with certain sales of defense articles, BAES retained and paid the same marketing advisor both using the offshore structure and without using the offshore structure.

28. Although instructions were given within BAES during 2001 to discontinue the use of offshore structures in connection with marketing advisors, such instructions were not of themselves sufficient to satisfy the foregoing representations and undertakings made to the U.S. government.

29. After May and November 2001, BAES made payments to certain advisors through offshore shell companies even though in certain situations there was a high probability that part of the payments would be used in order to ensure that BAES was favored in the foreign government decisions regarding the sales of defense articles. BAES made these payments, ostensibly for advice, through several different routes and, consequently, they were not subjected to the type of internal scrutiny and review that BAES had represented that they would be subject to in the foregoing statements made to the U.S. government. BAES established one entity in the British Virgin Islands (the "Offshore Entity") to conceal BAES's marketing advisor relationships, including who the agent was and how much it was paid; to create obstacles for investigating authorities to penetrate the arrangements; to circumvent laws in countries that did not allow agency relationships; and to assist advisors in avoiding tax liability for payments from BAES.

30. After May and November 2001, BAES maintained inadequate information related to who its advisors were and what work the advisors were doing to advance the business

interests of BAES, and at times avoided communicating with its advisors in writing. BAES also at times obfuscated and failed to record the key reasons for the suitability of an advisor or to document any work performed by the advisor. Often, the contracts with advisors and other relevant materials were maintained by secretive legal trusts in offshore locations. BAES's conduct thus served to conceal the existence of certain of its payments to and through its advisors.

31. After May and November 2001 in most cases, BAES did not take adequate steps to ensure that its marketing advisors' and agents' conduct complied with the standards of the FCPA. FCPA due diligence and compliance were significantly neglected by BAES. In many instances, BAES possessed no adequate evidence that its advisors performed legitimate activities to justify the receipt of substantial payments. In other cases, the material that was purportedly produced by the advisors was not useful to BAES, but instead was designed to give the appearance that legitimate services were being provided for the significant sums paid.

32. After May and November 2001, BAES made payments of over £135,000,000 and over $14,000,000 to certain of its marketing advisors and agents through the Offshore Entity. BAES did not subject these payments to the type of internal scrutiny and review that BAES had represented they were or would be subjected to in the foregoing statements made to the U.S. government.

Undisclosed Payments Associated With the Lease of Gripen Fighters to the Czech Republic and Hungary

33. Beginning in the late 1990s, BAES provided marketing services in connection with the lease by the government of Sweden of fighter aircraft to the Czech Republic and Hungary.

34. BAES made payments of more than £19,000,000 to entities associated with an individual, "Person A," at least some of which were in connection with the solicitation,

promotion or otherwise to secure the conclusion of the leases of Gripen fighter jets as aforementioned. BAES made these payments even though there was a high probability that part of the payments would be used in the tender process to favor BAES. BAES made these payments, ostensibly for advice, through several different routes and, consequently, they were not subjected to the type of internal scrutiny and review that BAES had represented that they would be subject to in the foregoing statements made to the U.S. government.

Czech Republic - Gripen Fighter Jets

35. In May 1999, the government of the Czech Republic contacted the governments of the U.S., U.K., France and Sweden in relation to bids by major defense contractors to supply the Czech Republic with fighter aircraft. On May 25, 2001, U.S. and various European defense contractors withdrew from the tender process based on concerns about the integrity of the process. On May 31, 2001, the Czech Ministry of Defense accepted the tender offer from the government of Sweden for the sale of Gripen fighters manufactured by a Swedish company. However, continued concerns about the integrity of the process contributed to the failed passage through the Czech Republic legislature of the finance bill which was funding the purchase. After the collapse of the purchase deal, the Czech government invited tenders to lease fighter aircraft. Eventually, the Czech government decided to lease 14 Gripen fighter jets from the government of Sweden.

36. The relevant portions of the payments to entities associated with Person A were not publicly disclosed as related to the lease of the Gripen fighter jets to the Czech Republic. Further, BAES did not subject the payments to entities associated with Person A to the type of internal scrutiny and review that BAES had represented they were or would be subjected to in the foregoing statements made to the U.S. government.

37. The Gripen fighter jets that were leased to the Czech Republic contained U.S. controlled defense materials, for which the lessor (the government of Sweden) was required under U.S. law to apply for and obtain an arms export license from the U.S. Department of State. The payments to entities associated with Person A were not disclosed in the applications made for these licenses because BAES did not inform the applicant of the existence of the payments.

Hungary - Gripen Fighter Jets

38. In 1999, the Hungarian Cabinet published a tender to purchase used fighter aircraft. In June 2001, the Hungarian government announced that a U.S. defense contractor had won the tender. A few days later, the Hungarian government reversed the decision and chose instead to lease Gripen fighter jets from the Swedish government. On February 3, 2003, Hungary agreed to lease 14 Gripen fighter jets from the Swedish government.

39. The relevant portions of the payments to entities associated with Person A were not publicly disclosed as related to the lease of the Gripen fighter jets to Hungary. Further, BAES did not subject the payments to entities associated with Person A to the type of internal scrutiny and review that BAES had represented they were or would be subjected to in the foregoing statements made to the U.S. government.

40. The Gripen fighter jets leased to Hungary contained U.S. controlled defense materials, for which the lessor (the government of Sweden) was required under U.S. law to apply for and obtain an arms export license from the U.S. Department of State. The payments to entities associated with Person A were not disclosed in the applications made for these licenses because BAES did not inform the applicant of the existence of the payments.

Undisclosed Payments Associated with the Sale of Tornado Aircraft and Other Defense Materials to the Kingdom of Saudi Arabia

41. Beginning in the mid-1980s, BAES began serving as the prime contractor to the U.K. government following the conclusion of a Formal Understanding between the U.K. and the Kingdom of Saudi Arabia ("KSA"). Under the Formal Understanding and related documents, BAES sold to the U.K. government, which then sold to KSA, several Tornado and Hawk aircraft, along with other military hardware, training and services. Using the same contractual structure, further Tornado aircraft were sold to KSA in 1998, and additional equipment, parts and services have continued to be sold to KSA since then. Collectively, these arrangements will be referred to herein as the "KSA Fighter Deals."

42. Underlying the Formal Understanding and related framework, the U.K., KSA and BAES had certain operational written agreements for specific component provisions of the KSA Fighter Deals. The written agreements under the Formal Understanding and related framework, therefore, were divided into numerous Letters of Offer and Acceptance ("LOAs") that were added and revised over the years by the parties. The LOAs identified the principal types of expenditures, work to be undertaken, services to be provided, prices and terms and conditions.

43. At least one of the LOAs identified "support services" that BAES was obliged to provide. In the discharge of what it regarded as its obligations under the relevant LOA, BAE provided substantial benefits to one KSA public official, who was in a position of influence regarding the KSA Fighter Deals (the "KSA Official"), and to the KSA Official's associates. BAES provided these benefits through various payment mechanisms both in the territorial jurisdiction of the U.S. and elsewhere. BAES did not subject these payments and benefits to the type of internal scrutiny and review that BAES had represented it would subject them to in the foregoing statements to the U.S. government.

44. BAES provided support services to that KSA Official while in the territory of the U.S. BAES provided certain of those support services through travel agents retained by a BAES employee, who was also a trusted confidant of the KSA Official. These benefits, which were provided in the U.S. and elsewhere, included the purchase of travel and accommodations, security services, real estate, automobiles and personal items.

45. BAES undertook no or no adequate review or verification of benefits provided to the KSA Official, including the review or verification of over $5,000,000 of invoices submitted by the BAES employee from May 2001 to early 2002, to determine whether those invoiced expenses were costs which met the standards of review to which BAES was committed by virtue of the foregoing statements made to the U.S. government. BAES's provision of these benefits, and its lack of diligence and review in connection with such benefits, constituted a failure to comply with the foregoing representations made to the Department of Defense.

46. BAES also used intermediaries and shell entities to conceal payments to certain advisors who were assisting in the solicitation, promotion and otherwise endeavoring to secure the conclusion or maintenance of the KSA Fighter Deals.

47. After May and November 2001, and until early 2002, in connection with the KSA Fighter Deals, BAES agreed to transfer sums totaling more than £10,000,000 and more than $9,000,000 to a bank account in Switzerland controlled by an intermediary. BAES was aware that there was a high probability that the intermediary would transfer part of these payments to the KSA Official. BAES undertook no or no adequate review or verification of the purpose of these payments, and therefore BAES failed to comply with the foregoing representations made to the Department of Defense.

Gain to BAES from False Statements to the U.S. Government

48. The gain to BAES from the various false statements to the U.S. government exceeded $200,000,000.

All in violation of Title 18, United States Code, Section 371

PAUL E. PELLETIER
Acting Chief
MARK F. MENDELSOHN
Deputy Chief
Criminal Division, Fraud Section

By: _____
Nathaniel B. Edmonds
Senior Litigation Counsel
1400 New York Avenue, N.W.
Washington, DC 20005
(202) 307-0629
nathaniel.edmonds@usdoj.gov

JOHN J. DION
Chief, Counterespionage Section
National Security Division

By: _____
Patrick T. Murphy
Trial Attorney

EXHIBIT A

BAE SYSTEMS

Chief Executive

Our ref. JPW/DS/2126

16 November 2000

Honorable William S Cohen
Secretary of Defense
Department of Defense
1000 Defense Pentagon
Washington D.C
20301-1000
USA

Privileged and Confidential
May not be disclosed under FOIA

Dear Secretary Cohen,

I am pleased to reaffirm BAE SYSTEMS plc's commitment to adhering to the highest ethical standards in the conduct of its business throughout the world. We have recently undertaken significant new steps in this regard and I am delighted to share them with you.

Our affiliates in the United States -- BAE SYSTEMS Holdings, Inc., BAE SYSTEMS, North America, and entities wholly owned or controlled by them (collectively "BAE US Affiliates") -- are, and have long been, strongly committed to operating in full compliance with the Foreign Corrupt Practices Act ("FCPA"). As Chief Executive Officer of BAE SYSTEMS plc, I commit that the BAE US Affiliates will not knowingly offer, pay, promise to pay, or authorize the payment of anything of value, directly or indirectly, to a foreign public official for the purpose of influencing any official act or omission in order to obtain or retain business in violation of the FCPA. The BAE US Affiliates will not use BAE SYSTEMS plc, a non-US affiliate or any third party to undertake such activities on their behalf.

In addition, I am pleased to inform you that our Board of Directors recently voted to adopt a proposal for all of the Company's non-US businesses to comply with the anti-bribery provisions of the FCPA, as if those provisions applied to us. The Board resolved that because of "the size of the Company's presence in the US following the MES US merger, the importance of the US to the Company's long term strategic objectives and the prospective convergence of the English law of corruption with the FCPA, it was agreed that the Company should develop an FCPA compliance program for its non-US businesses to operate as if these businesses were, in fact, subject to the FCPA."

We are also aware of the recent signing and ratification of the Convention on Combating Bribery of Foreign Public Officials In International Business Transactions ("OECD Anti-Bribery Convention") by member states of the Organisation for Economic Co-operation and Development, including the United Kingdom and the United States, and of the importance of full compliance with these provisions.

BAE SYSTEMS plc, Stirling Square 6 Carlton Gardens London SW1Y 5AD United Kingdom
Telephone 01252 373232 Fax 01252 383981 Direct Line +44 (0) 1252 384820 Direct Fax +44 (0) 1252 384507
Registered in England & Wales No. 1470151 Warwick House PO Box 87 Farnborough Aerospace Centre Farnborough Hampshire GU14 6YU

Accordingly, I confirm that BAE SYSTEMS plc and other non-US entities wholly owned or controlled by it ("BAE Affiliates") are committed to conducting business in compliance with the anti-bribery standards in the OECD Anti-Bribery Convention. In order to raise the level of awareness of our BAE Affiliates with regard to these obligations, I commit that BAE Affiliates will use best efforts to adopt within six months, and in any event within twelve months, compliance programs to ensure that the BAE Affiliates meet these standards. These programs will include training for employees, internal procedures and controls concerning payments to government officials and the use of agents, consultants and other third parties, and a program of internal audits.

BAE SYSTEMS plc is committed to exemplary business practices and the highest ethical standards. We believe that these steps will enhance our ability to fulfil those goals.

Yours sincerely,

JOHN WESTON

Privileged and Confidential
May not be disclosed under FOIA

OECD OCDE

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

GREECE: PHASE 2

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 26 April 2005.

EXHIBIT 0

TABLE OF CONTENTS

A. INTRODUCTION

1. The On-Site Visit

1. From 4 to 8 October 2004, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Athens, Greece as part of the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and the 1997 Revised Recommendation (the Revised Recommendation). The purpose of the visit was to examine Greece's structures for enforcing the laws and rules implementing these OECD instruments, and to assess their application in practice.

2. The Greek authorities were co-operative during the entire Phase 2 examination process. Prior to the visit, Greece responded to the Phase 2 Questionnaire and a supplemental questionnaire. Greece also provided relevant legislation and case law. The examination team analysed these materials and conducted independent research to obtain additional points of view. During the visit, Greece provided the examination team with sufficient access to government representatives and the meetings were well-attended, particularly by the Greek private sector.[1] Following the visit, the Greek authorities continued to provide additional information.

3. The examination team expresses its appreciation of the hard work and professionalism of the Greek authorities throughout the examination process.

2. General Observations

(a) Economic System

4. As of 2001, Greece had a population of almost 11 million, with roughly 3.2 million in the Athens Metropolitan Area and 1.0 million in Thessaloniki.[2] The country borders Albania, Bulgaria, Turkey and the Former Yugoslav Republic of Macedonia.[3]

5. Greece's mixed capitalist economy is the 19th largest of the 30 OECD countries. Its per capita gross domestic product (GDP) ranks 23rd in the OECD and 36th in the world. Tourism accounts for 15% of GDP, while the contribution of agriculture, forestry and fisheries to GDP is the largest in the European Union (EU) in relative terms.[4] The Greek government reports that the informal economy is the largest in

---

1 See the List of Participants in the Annex 1.

2 National Statistical Service of Greece, 2001 Census; OECD (2004), *Territorial Review of Athens, Greece*, OECD, Paris, p. 55; OECD (2002), *Economic Surveys: Greece*, OECD, Paris, p. 7.

3 U.S. Central Intelligence Agency (11 May 2004), *The World Fact Book*, U.S. Central Intelligence Agency, Washington, D.C.

4 GDP measured on a purchasing power parity basis. OECD (2004), *OECD in Figures*, OECD, Paris, pp. 12-13; OECD (May 2004), *OECD Main Economic Indicators*, OECD, Paris; The World Bank (April 2004), *World Development Indicators Database*, The World Bank; The Economist Intelligence Unit (2004), *Country Profile – Greece*, The Economist Intelligence Unit, London, p. 34.

Europe and accounts for 20-40% of the economic output of Athens.[5] Another report places the national figure at 25-30%.[6]

6. In terms of trade, the Greek economy is focused mainly on the domestic market, thus leaving the country with a sizeable trade deficit. Trade amounts to roughly a quarter of GDP, which is similar to the EU average but lower than the average for smaller countries. From 1997 to 2002, exports fell by an annual average of 1.5% while imports increased by an annual average of 2.0%.[7] Recent data point to a marked decline in nominal exports to major OECD countries and the euro area. This was partly offset by a continuation of buoyant exports to the Balkans, central Europe, the former Soviet Union and other non-OECD countries.[8]

7. In 2002, Greece's major exports included manufactured goods (20.55%), miscellaneous manufactured articles (17.86%), food and live animals (16.88%), machinery and transport equipment (13.25%), and chemicals and related products (9.78%). Major imports were machinery and transport equipment (32.89%), manufactured goods (14.68%), mineral fuels, lubricants and related materials (13.88%), miscellaneous manufactured articles (12.14%), and chemicals and related products (10.99%).[9] In addition, Greece has the world's largest beneficially-owned shipping fleet (approximately one in six of all deadweight tonnes afloat).[10]

8. In terms of foreign direct investment (FDI), Greek companies have invested extensively in the Balkans, Central Eastern Europe and the former Soviet Union in areas including banking, telecommunications, construction, food and retail.[11] Greece is also actively integrating its energy infrastructure with that of the Balkan states and aims to become the major Balkan energy hub by 2010.[12]

---

5 OECD (2004), *Territorial Review of Athens, Greece*, OECD, Paris, pp. 56 and 83.

6 The Economist Intelligence Unit (2004), *Country Profile – Greece*, The Economist Intelligence Unit, London, pp. 37 and 42.

7 OECD (2004), *Territorial Review of Athens, Greece*, OECD, Paris, p. 78; OECD (2002), *Economic Survey of Greece*, OECD, Paris, p. 102; OECD (May 2004), *OECD Main Economic Indicators*, OECD, Paris.

8 In 2002 these countries accounted for 33.4% of the total value of exports (OECD (2002), *Economic Survey of Greece*, Paris, p. 28; The Economist Intelligence Unit (2004), *Country Profile – Greece*, The Economist Intelligence Unit, London, p. 55). In 2002, Greece's major export partners in commodities were (USD): (1) Germany (1.123 bn), (2) Italy (914 m), (3) United Kingdom (670 m), (4) Bulgaria (577 m), (5) United States (570 m), (6) Cyprus (511 m), (7) France (384 m), (8) Turkey (362 m), (9) Former Yugoslav Republic of Macedonia (341 m), (10) Albania (335 m). Its major import partners in commodities were (USD billion): (1) Germany (3.962), (2) Italy (3.739), (3) Russian Federation (2.386), (4) South Korea (1.938), (5) France (1.848), (6) Netherlands (1.813), (7) United States (1.529), (8) Belgium (1.416), (9) United Kingdom (1.323), (10) Spain (1.253) (OECD Database).

9 OECD Database.

10 The Economist Intelligence Unit (2004), *Country Profile – Greece*, The Economist Intelligence Unit, London, p. 25.

11 Kamaras, A. (2001), *A Capitalist Diaspora: The Greeks in the Balkans*, Hellenic Observatory (London), pp. 41-42; The Economist (10 October 2002), "Good Neighbours", The Economist, London.

12 Energy Information Administration (4 August 2003), *Country Analysis Briefs - Greece*, U.S. Department of Energy, www.eia.doe.gov. Top sources of inward FDI in 2001 were (USD million): (1) Portugal (951.5); (2) Netherlands (300.3); (3) United Kingdom (224.2); (4) Belgium-Luxembourg (112.7); (5) Denmark (84.5). Top destinations of outward FDI in 2001 were (USD million): (1) United States (195.4); (2) United Kingdom (136); (3) Germany (56.4); (4) Bulgaria (38.1); (5) Hong Kong, China (15.9) (OECD Database; last update 9 April 2002).

9. Small and medium-sized enterprises (SMEs) play a significant role in the Greek economy, constituting almost 99% of Greek businesses. Greek SMEs produce 19% of exports and contribute up to 12% of GDP. Based on a 1998 census, 96.3% out of 509 000 enterprises had fewer than nine employees. Greek SMEs comprise both traditional and modern enterprises and are characterised by very different structural and operational patterns.[13] In addition to approximately 20 large enterprises, there are 3 500 SMEs active in the Balkans. Seventy-five percent of these firms operate in northern Greece.[14]

(b) Political and Legal System

10. Greece is a parliamentary republic. The legislative branch consists of a 300-seat unicameral Parliament (*Vouli ton Ellinon*) whose members are elected by direct popular vote to four-year terms. The Parliament has exclusive jurisdiction to enact criminal laws. The chief of state is a President who is elected to a five-year term by Parliament. The executive branch of government is led by an elected Prime Minister. The Council of Ministers (cabinet) is appointed by the President on the recommendation of the Prime Minister.[15]

11. Greece's judiciary is divided into courts of first instance, courts of appeal or higher courts and the *Areios Paghos*, the supreme criminal court. The President appoints judges for life after consultation with a judicial council. Courts may refuse to apply statutes on grounds of unconstitutionality. Lower courts are not obliged to follow the *Areios Paghos*, though such decisions may be reversed on appeal. The *Areios Paghos* generally follows its own precedents. The works of legal scholars are not sources of law but can be very influential.[16]

12. Prosecutions are conducted by the Public Prosecutors Office, which is divided by geographic region and level of court. Prosecutors are bound by the principle of mandatory prosecution, *i.e.* they must commence proceedings upon receiving information of a crime; they have no discretion to not proceed.

(c) Implementation of the Convention and the Revised Recommendation

13. Greece implemented the Convention by enacting Law 2656/1998 (see Annex 2). After the Phase 1 review in July 1999, Greece amended several aspects of the Law on the recommendation of the Working Group. The revised Law refers to the definition of "foreign public officials" in the Convention and expressly permits confiscation of the proceeds of foreign bribery. It also expands administrative liability to all legal persons (not only enterprises) (Article 9, Law 3090/2002).

14. Both the previous and the present, recently-elected governments have undertaken several initiatives to combat corruption. In 1999, Greece began to require certain public officials and their families to declare their assets annually. In 2003, the programme was expanded to additional officials. According to the Greek authorities, corruption was a major issue in the March 2004 elections. Since being elected,

---

13 OECD (2004), *Territorial Review of Athens, Greece*, OECD, Paris, p. 92.

14 Gilson, G. (12 April 2002), "Cash to Enhance Peace", Athens News, Athens.

15 U.S. Central Intelligence Agency (11 May 2004), *The World Fact Book*, U.S. Central Intelligence Agency, Washington, D.C.

16 Spinellis, D. and Spinellis, C.D. (1999), *Criminal Justice Systems in Europe and North America – Greece*, Heuni, Helsinki, pp. 30-31; Christodoulou D. Ph., "Introduction to the Greek Legal System", *Guide to Doing Business in Greece*, American Hellenic Institute, Washington, D.C.; Dagtoglou, P.D. (1993), "Constitutional and Administrative Law", *Introduction to Greek Law*, Kluwer and Sakkoulas, Deventer, pp. 21-52; U.S. Central Intelligence Agency (11 May 2004), *The World Fact Book*, U.S. Central Intelligence Agency, Washington, D.C.

the present government has appointed a commission to review all non-criminal legislation that might facilitate corruption. The Ministry of Interior, Public Administration and Decentralisation has announced several initiatives to improve the government's transparency and accessibility. Parliament is considering a bill to ban persons with interests in media companies from competing for public contracts. It should be noted, however, that almost all of these efforts focus on domestic and not foreign corruption.

(d) Cases Involving the Bribery of Foreign Public Officials

15. Greece has had no prosecutions of foreign bribery.

3. Outline of the Report

16. The report is structured as follows. Part B examines Greece's efforts to prevent, detect and raise awareness of foreign bribery. Part C-E look at the investigation, prosecution and sanctioning of foreign bribery. Part F sets out the recommendations of the Working Group and issues that require follow-up.

B. PREVENTION, DETECTION AND AWARENESS-RAISING

17. In general, Greece has made commendable efforts to raise awareness and to train its officials to fight domestic corruption. Until very recently, however, little has been done concerning foreign bribery and the Convention. Officials at the on-site visit frankly admitted that there were few people who were aware of the Convention in the first few years after its ratification, though they are hopeful that the situation will improve.

18. This low level of awareness of foreign bribery may largely be due to the policy of the Greek government (as described by one official) to give domestic bribery greater priority over foreign bribery. Representatives of civil society also expressed concerns over the enforcement and investigation of foreign bribery. One NGO and a journalist described a lack of "political will" in investigating and prosecuting bribery. Several participants believed that enforcement is ineffective because of insufficient training for law enforcement agencies and the absence of a government policy against corruption.

1. Awareness-Raising Initiatives within the Public Sector (Excluding Law Enforcement and Tax Agencies)

19. At the time of the on-site visit, apart from law enforcement agencies and diplomatic officials, the Greek government appeared to have made few efforts to raise awareness of the Convention within the public sector. Several Greek government bodies (such as the Ministries of Finance and Economy (MOFE), Justice, and the Interior, Public Administration and Decentralisation, and the Hellenic Capital Markets Commission, Greece's securities market regulator) deal with foreign companies or Greek companies which operate internationally. Yet, the government had not trained or raised awareness of the Convention amongst the staff of these bodies. The MOFE stated that it had recently conducted meetings on the Convention because of the impending Phase 2 on-site visit. It discovered that many people in the MOFE (apart from members of the Body for the Prosecution of Economic Crime (SDOE), which is the body designated to investigate foreign bribery under Law 2656/1998) did not know about the Convention, and "some had reservations about the Convention" when they were told about it. It was also unclear whether agencies which provide officially supported export credit (the Export Credit Insurance Organisation) and official development assistance (Hellenic Aid) had undertaken awareness-raising activities for their staff (see Sections E.3(a) and (b)).

Commentary

The lead examiners recommend that Greece make more efforts to raise the awareness of the Convention and Law 2656/1998 in the public sector, particularly in the Ministries of Finance and Economy, Justice, and the Interior, Public Administration and Decentralisation, the Hellenic Capital Markets Commission, the Export Credit Insurance Organisation and Hellenic Aid.

2. Government Initiatives to Raise Awareness within the Private Sector

(a) Generally

20. As in the public sector, at the time of the on-site visit, little had been done to raise the awareness of the Convention and Law 2656/1998 amongst the Greek business community, academics and relevant professionals. The Ministry of Justice and the Ministry of Finance and Economy (MOFE) had not engaged in such activities. These Ministries had not issued brochures or circulars to publicise the Convention or Law 2656/1998, nor had they referred to these instruments on their web-sites. The MOFE promoted the OECD Guidelines for Multinational Enterprises only until 2002 when it ran into "administrative difficulties". The web-site of the Hellenic Centre for Exports, however, continues to refer to the Guidelines, the Convention and the Revised Recommendation.

21. Greece reported, however, that there have been various activities after the on-site visit to raise the awareness of foreign bribery and the Convention. The Ministry of Justice has created a new web-page dedicated to anti-corruption legislation, including the implementation of the Convention and other international instruments to which Greece is or will soon be a party.[17] The web-sites of several other ministries and authorities now refer to corruption issues and the Convention[18] or link to other web-sites that do so. These developments are encouraging.

(b) Officially Supported Export Credits

22. Export credit agencies deal with companies that participate in the international market and thus could play an important role in raising awareness of the Convention and in discovering foreign bribery cases. In Greece, officially supported export credits are administered by the Export Credit Insurance Organisation (ECIO), a "legal entity of private law" supervised by the Ministry of Economy and Finance. Most of the services of the ECIO are provided to small firms which form the majority of exporters in Greece.[19]

23. The ECIO has made some efforts to communicate the Convention to its clients. According to a recent OECD survey,[20] Greece informs all applicants requesting officially supported export credit about the

---

17 Greece has ratified the 1999 Council of Europe Civil Law Convention on Corruption. It is in the process of ratifying the 1999 Council of Europe Criminal Law Convention on Corruption and the 2003 UN Convention on Corruption.

18 These include the web-sites of the Ministry of Foreign Affairs, the Ministry of Finance and Economy, and the Body for the Prosecution of Economic Crime (SDOE).

19 OECD Working Party on Export Credits and Credit Guarantees (2004), *Officially-Supported Export Credits and Small Exporters*, OECD, Paris.

20 OECD Working Party on Export Credits and Credit Guarantees (2004), *Responses to the 2002 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – As of 12 October 2004*, OECD, Paris, TD/ECG(2004)15.

legal consequences of foreign bribery in the application form and the general conditions of cover.[21] Applicants are asked to undertake in the application that they have not and will not engage in bribery in the export transaction.[22] The ECIO may also deny support if an applicant engages in bribery (see Section E.3(a)). In 2001, the ECIO sent circulars to clients and potential clients advising them of these provisions. The ECIO does not mention these provisions or the Convention on its web-site, although it indicated that it intends to do so.

(c) Official Development Assistance

24. Agencies that dispense official development assistance (ODA) also deal with companies that participate in the international market. Greece is not a major provider of ODA by international standards, but its role is increasing, particularly in the Balkans.[23]

25. The International Development Co-operation Department within the Ministry of Foreign Affairs (commonly known as Hellenic Aid) is responsible for administering ODA in Greece. Apart from including an anti-bribery clause in its contracts, it is unclear what efforts, if any, Hellenic Aid has made to raise awareness of the Convention amongst the companies with which it deals. The web-site of Hellenic Aid describes the conditions for granting aid, but it does not refer to the Convention or the anti-bribery provisions in its contracts.

26. Following the on-site visit, Greece stated that Hellenic Aid was reviewing all of its procedures while participating actively in the general world-wide debate on the accountability of ODA.

(d) Hellenic Capital Markets Commission

27. The Hellenic Capital Markets Commission (HCMC) is the securities market regulator in Greece. It does not appear the HCMC has directly promoted the Convention to the Greek private sector. According to the Greek authorities, the HCMC had undertaken "an extensive consultation with the industry in view of the Convention. Early on it adopted rules on the prevention and legalisation of revenue from illicit

---

21 The application form and general cover state:

> ECIO's cover is invalidated. If due to bribery the export or credit contract is void under the applicable law, and the regulations of international trade, it is legitimate to withdraw cover for this transaction. If an indemnity is already paid, this sum must be paid back to ECIO according to the civil laws about undue enrichment. Further access to any of ECIO's coverage is denied.

22 The undertaking reads:

> We hereby declare that: "Neither we, nor anyone acting on our behalf, have been engaged or will engage in Bribery in the export transaction." Moreover, we are aware that in case where we, or anyone acting on our behalf, have been engaged or will engage in Bribery in the export transaction, ECIO's cover is invalidated, Claims are not indemnified and/or recourse is sought and Other (*e.g.* denial of access to official support). If an indemnification has been already paid this sum must be paid back to ECIO.

23 In 2002, Greece provided USD 276 million in ODA (0.21% of Gross National Income), ranking 20th out of 22 members of the OECD Development Assistance Committee (DAC). The bilateral share of ODA was USD 107.64 million (DAC, OECD (2003)). In 2002, Greece established the Plan for the Economic Reconstruction of the Balkans (GPERB), a five-year, EUR 550 million development aid programme directed at mainly Balkan countries (namely Bulgaria, Albania, Bosnia and Herzegovina, Macedonia, and Serbia and Montenegro) for infrastructure, social and business projects. Approximately 80% of the funds are given directly to recipient states, while the remaining are available to private investors. Proposals for private investment must be approved by the Ministry of Economy and Finance (web-site of the Ministry of Foreign Affairs, www.mfa.gr).

activities in decision 108 of 27 May 1997 and has regularly conducted seminars on the consequences for the regulated industry of these rules" (Response to Phase 2 Questionnaire, p. 8). This decision, however, dealt with money laundering, not foreign bribery and was made before Greece had ratified the Convention. At the on-site visit, the HCMC undertook to raise awareness of the Convention. Following the visit, the HCMC stated that it planned to refer to the Convention and the Revised Recommendation on its web-site.

28. The HCMC has developed a Code of Conduct for Companies Listed in the Athens Stock Exchange and Connected Persons, which applies to all listed companies. The Code deals primarily with corporate governance issues and does not touch upon foreign bribery.

Commentary

The lead examiners recommend that Greece take a proactive role in raising the awareness of the Convention and Law 2656/1998 within the private sector. In particular, they recommend that the Ministries of Justice, and Finance and Economy further increase the publicity of these instruments by circulating literature to relevant business organisations, enterprises and professionals. The lead examiners also recommend that the ECIO, Hellenic Aid and the HCMC make greater efforts to promote the Convention, Law 2656/1998 and the consequences of engaging in bribery to their clients and prospective clients.[24]

3. Awareness-Raising Initiatives by the Private Sector

29. Based on the level of participation in the on-site visit, the Greek business community appeared genuinely interested in the Convention and the issue of foreign bribery. The lead examiners met numerous representatives of Greek companies and business associations from sectors such as banking, energy, construction, telecommunication, food and shipping. Unfortunately, this interest has not necessarily been translated to awareness of the Convention, which is generally low in the Greek private sector.

(a) Business and Labour Organisations

30. Business organisations which specialise in trade and international investment can be instrumental in raising awareness of the Convention. Unfortunately, none of these organisations in Greece, such as the Hellenic Foreign Trade Board, received information on the Convention from the Greek government or provided training to their members. The Inter-Balkan and Black Sea Business Centre stated that it would provide such training if asked to do so. The Exporter Association of Northern Greece was aware of Law 2656/1998, but did not relay the information to its members. The Panhellenic Exporters Association did not believe that there were any reasons to disseminate information about the Convention to its members.

31. The situation is the same for other general business organisations and chambers of commerce. The Hellenic Banking Association has provided seminars on money laundering, but not foreign bribery. The Federation of the Greek Industries (SEV) may be the only exception, partly because it was involved in the preparation of the Convention through the Business and Industry Advisory Committee to the OECD (BIAC). It indicated that it has provided training to its members on both the Convention and the OECD Principles of Corporate Governance.

---

[24] This Commentary should not be interpreted as a suggestion that the policies of the ECIO and Hellenic Aid do not meet the standards set out in the following instruments: Working Party on Export Credits and Credit Guarantees (20 February 2003), *Action Statement on Bribery and Officially Supported Export Credits*, OECD, Paris, TD/ECG(2000)15; and Development Assistance Committee (7 May 1996), *Anti-Corruption Proposals For Bilateral Aid Procurement*, OECD, Paris, DCD/DAC(96)11/FINAL.

32. The lead examiners are of the impression that Greek business organisations have done little to promote the Convention because they do not see foreign bribery as a pressing concern, even though many Greek businesses are active in sensitive economies and sectors. The SEV and the Federation of Industries of Northern Greece stated that their members have not reported being solicited by foreign public officials, although they have not sought information from their members on the topic. Another participant at the meeting stated that the quality of the public administrations in the Balkans has improved since 1995. The average citizen in those countries may still experience corruption, but these are only "minor offences". The representative added that there have been reports in the media of "bigger cases" but there have been no specific complaints.

33. It is of interest to note that the view of Greek civil society on the likelihood of Greek companies to commit foreign bribery is in contradistinction to that of the private sector. One NGO stated that it is difficult for small companies to resist bribery in countries where the legal environment is weak and the public administration is prone to corruption and malpractice (such as in the Balkans).

34. The trade unions at the on-site visit stated that they have not undertaken any initiatives to raise awareness of the Convention amongst their members.

35. Following the on-site visit, Greece stated that the SEV, the Export Organisation of Northern Greece and the Athens Chamber of Commerce were organising further conferences, lectures and open debates on these subjects. These organisations also planned to disseminate Greek translations of the Convention and the Revised Recommendation electronically and through leaflets.

(b) Major Greek Enterprises

36. The situation with Greek enterprises is similar. None of the companies at the on-site visit received any information from the government regarding the Convention or Law 2656/1998. Some only became aware recently. Others became aware earlier because they are listed on stock exchanges in other jurisdictions which are parties to the Convention, and were required by these jurisdictions to implement anti-foreign bribery measures. Some companies became aware through their legal departments when the Convention was ratified, but it is not clear whether they disseminated the information from the legal departments to other employees. None of the companies set up training seminars or provided literature to explain the Convention and the implementing legislation.

37. All major Greek companies are required to have codes of conduct and policies on business integrity (Law 3016/2002). Companies which participated at the on-site visit stated that they periodically disseminate their codes and policies to staff through presentations and workshops. Unfortunately, the codes of only two companies discuss bribery (but not specifically foreign bribery). The code of a maritime company requires its employees to act "ethically and honestly", but does not refer to bribery.

38. Although the companies who attended the on-site visit are all active internationally, including in sensitive markets such as the Balkans, all of the companies categorically state that their employees have never been asked to pay a bribe by a foreign public official. One bank acknowledged that there is small-scale corruption in the Balkans (and gave the example of paying a bribe to avoid a speeding ticket), but believes that corruption does not exist in major transactions. Another bank stated that it had encountered fraud committed by its employees in which the bank suspected, but could not prove, that funds may have been diverted for a bribe. One shipping company denied having been solicited, but stated that other smaller companies in the industry often are.

(c) Small and Medium-Sized Enterprises

39. The level of awareness among small and medium-sized enterprises (SMEs) is particularly important because a significant number of Greek SMEs operate internationally. Because of their limited resources, it is often difficult for SMEs to obtain relevant information and legal advice. Greek SMEs and organisations which represent SMEs have not received information on the Convention from the government, nor have they received or provided relevant training. None of them were aware of companies being solicited by foreign public officials, even though many Greek SMEs operate in sensitive economies. The Association of Business Consultants for Small and Medium Enterprises in Greece was not aware of the Convention before the on-site visit.

(d) Accounting and Legal Professionals

40. Similarly, the Institute of Certified Public Auditors (SOEL) and the Accounting and Auditing Oversight Board (ELTE) have not engaged in activities to raise awareness amongst their members. The ELTE believed that this was the responsibility of the SOEL. Meanwhile, the SOEL did not believe that these activities were worthwhile since it doubted the effectiveness of accounting and auditing as a means of preventing and detecting foreign bribery. According to the representative of the SOEL, foreign bribery occurs at extremely high levels in a corporation, such as when a company receives state aid, and hence usually will not be detected by internal or even external auditing.

41. Following the on-site visit, Greece stated that the ELTE was planning to send two circulars to all Greek auditing firms. One circular will contain the complete text of Law 2656/1998 and describe how the relevant provisions have been implemented. The second circular will draw the attention of all Greek auditing firms to the relationship between the Convention and the recently introduced Greek Auditing Standards (Government Gazette B 1589, 22 October 2004).

42. The level of awareness within the legal profession also appears to be low. The Athens Bar Association stated that the Convention had been discussed. It held a meeting on the subject on 15 November 2004. According to the Association of Greek Criminal Lawyers, academic interest in foreign bribery has been quite low because of a lack of cases. It also indicated that it had planned a meeting in October 2004 to discuss foreign bribery, but it is not clear whether the meeting was eventually held. Beyond the criminal bar, there appeared to have been little, if any, awareness-raising activities.

(e) Conclusion

43. The interest of the private sector in the issue of foreign bribery is encouraging. There remain concerns, however, over the low level of awareness of the Convention and Law 2656/1998. Efforts to disseminate information on these instruments have not been adequate. The situation is particularly disconcerting since many Greek businesses operate in sensitive markets and sectors. The absence of reports by employees that they have been solicited by foreign public officials provides only false comfort, considering so few employees are aware of the Convention. In short, the private sector, with the assistance and encouragement of the Greek government, needs to be much more proactive in raising awareness of the Convention and Law 2656/1998. The efforts that have been undertaken since the on-site visit are encouraging but not sufficient.

Commentary

The lead examiners recommend that Greece be more proactive in raising awareness of the Convention and Law 2656/1998 in the private sector. Specifically, they recommend that Greece make further efforts to (1) directly publicise these instruments to the public, particularly the business and relevant professional communities, and (2) collaborate with and

assist business, labour and professional organisations to raise awareness, e.g. through publicity campaigns and seminars.

4. Reporting by the Public Administration Generally

44. Greek public officials are obliged to report crimes of which they become aware "in the exercise of their duties" (Article 37(2), Code of Penal Procedure). Breach of this provision is punishable by imprisonment of up to two years, unless such act is punishable by another penal provision (Article 259, Penal Code). Since 2003, Greek civil servants (excluding police personnel) have reported 34 cases of domestic bribery to law enforcement authorities. No cases of foreign bribery have been reported.

5. Foreign Representations

45. Greek diplomatic representations posted overseas may receive information on bribery of foreign public officials by Greek companies abroad. The Ministry of Foreign Affairs (MOFA) states that it has not received reports of foreign bribery committed by Greek companies. Nor has it received complaints of any economic crime, including foreign bribery, from Greek companies which operate internationally. These companies also have not sought assistance from Greek embassies and diplomatic posts on such matters.

46. The MOFA stated that it had organised seminars to raise awareness of the Convention amongst its overseas officials. At the on-site visit, the Ministry also stated that it had sent circulars on this subject to its officials abroad. After the visit, however, an official from the Ministry of Justice stated that no circulars had been sent. The MOFA added a reference to the Convention on its web-site following the on-site visit.

47. Greek overseas embassy officials have a duty to report crimes. According to the MOFA, on becoming aware of an offence committed by a Greek national or company, economic counsellors posted abroad will make a cursory determination of whether the case is frivolous. If it is not, the counsellor must report the case to the local government and monitor the progress of the case. As with all public officials, they are also required to report the case to Greek law enforcement authorities. The MOFA, however, has not created specific guidance for its officials to report complaints of foreign bribery.

Commentary

The lead examiners recommend that the Ministry of Foreign Affairs undertake further efforts to raise awareness of the Convention amongst its overseas diplomatic staff. They also recommend that the Ministry issue guidance to foreign representations, including embassy personnel, concerning the steps that should be taken where non-frivolous allegations arise that a Greek company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Greece.

6. Treatment of Bribe Payments by the Tax Authorities

48. The examination of tax information can also uncover foreign bribery. Furthermore, the Revised Recommendation urges member countries to disallow tax deductions of bribes to foreign public officials.[25]

---

[25] See also OECD (1996), *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, C(96)27/FINAL, OECD, Paris.

(a) Non-Deductibility of Bribes

49. The Greek authorities stated that bribe payments are not deductible in Greece, although there is no legislative provision which expressly prohibits such deductions. As noted in the Phase 1 review (at p. 16), Article 31 of Law 2238/1994 "states as a general principle that any expenditure not directly related to the business of the enterprise is non-deductible." As well, the Law lists in detail deductible items. Bribes are not deductible because they are not on the list.

50. After the on-site visit on 14 January 2005, the Ministry of Finance and Economy issued an 81-page exhaustive list of deductible items. The list was compiled based on judicial decisions and the practice of tax authorities. The tax authorities are required to allow deduction of all items on the list. The list, however, does not include bribes.

51. According to Greek officials, that bribe payments are not deductible in Greece is amply supported by case law, but the Greek authorities did not provide such case law to the lead examiners.[26] The Greek authorities also confirmed that a conviction for bribery is not a precondition to non-deductibility of a bribe.

52. Although bribe payments may not be deductible *per se*, there remain categories of deductible expenses which could conceivably be used to hide bribe payments. According to Greek officials, these include salaries, administrative expenses, travel expenses, royalties and know-how acquisition expenses. Within each category, any expense incurred "within the activities of an enterprise" is considered "productive" and hence deductible.

Commentary

The lead examiners recognise that Greek law does not allow tax deduction of bribes. Nevertheless, they believe that an express denial of deductibility in Greek tax law may strengthen the mechanisms available for detecting and deterring bribery. Therefore, they recommend that Greece consider introducing an express denial to its legislation.

(b) Awareness and Training of Tax Officials

53. Awareness of foreign bribery amongst tax officials is particularly important in Greece since the tax administration has hired over 1 200 new personnel over the last four years. Unfortunately, the present level of awareness amongst tax officials appears uneven. For instance, one official at the on-site visit mistakenly thought the Revised Recommendation concerned the declaration of bribes as income by Greek public officials.

54. The Greek tax authorities stated that seminars are offered to both new recruits and tax examiners on a wide variety of subjects, including corruption. At the time of the on-site visit, it was not clear whether these seminars had dealt specifically with foreign bribery. Only a summary of the OECD Bribery Awareness Handbook for Tax Examiners had been translated into Greek, and it was not known whether the summary had been disseminated to all tax examiners and new recruits. There appeared to have been no other training or guidelines on how to detect deduction of bribe payments.

---

[26] The Greek authorities provided a translation of Decision 1820/1994 of the Council of State. The case stands for the general proposition that a deduction will not be allowed if an expenditure "is feigned, that it was either not paid by the company, or that it was paid, though not for the productive purpose that is recorded but for another, not productive purpose." The case does not deal directly with deduction of bribe payments.

55. Since the on-site visit, Greece has added foreign bribery to the lectures and seminars which are provided to all fiscal officials, including the officers of the SDOE, and customs and excise officials. The Ministry of Finance and Economy intends to translate into Greek the full text of the OECD Handbook and specific instructions on how to detect bribe payments. The Ministry plans to disseminate this information to all tax examiners, accountants, certified public auditors and any other relevant authority or body. It also intends to include the Greek text of the Handbook on its central web-site with links to the SDOE web-site.

56. Tax audits also do not contain a component specifically on the deduction of bribes. Greek officials explained that deductions must be supported by written documentation (including receipts). Tax examiners choose a random sample of filed tax returns for examination, but statistics on the percentage of tax returns that were examined were not available. Based on the filed information, tax examiners cross-check claims for deductions with an enterprise's cash flow and other transaction documents. The primary purpose of the inspection is to determine whether the expense is fictitious. Greek officials will seek the assistance of foreign tax authorities to verify a deduction only when there is evidence that a foreign company colluded with the taxpayer. What amounts to such evidence is not clear.

57. The lead examiners are concerned that mere verification of whether an expense exists may not be sufficient to detect deductions of bribes, since such payments are not fictitious *per se*. Furthermore, the requirement of evidence of collusion before seeking the assistance of foreign authorities appears high. If an expense *prima facie* falls into a category of allowable deduction based on the supporting documentation, a tax examiner may have little incentive to make further inquiries. To remedy the situation, the Greek authorities could consider addressing foreign bribery (including methods of detecting bribes) in its training seminars for tax officials and developing guidelines for tax examiners on how to detect bribe payments. Greece could also consider translating the entire OECD Bribery Awareness Handbook for Tax Examiners into Greek and disseminating it to all tax examiners.

Commentary

The lead examiners recommend that Greece increase its efforts to further raise the awareness of foreign bribery amongst tax officials.

(c) Reporting and Information Sharing

58. Tax officials are generally required to maintain confidentiality of information gathered in the course of their duties. Hence, they cannot pass information or intelligence to other law enforcement agencies absent a judicial order. The only exception is Article 37 of the Code of Penal Procedure, which obliges all public officials (including tax officials) to report knowledge of a crime to the public prosecutor.

59. Tax examiners can also gather information to further their investigations. Greek tax officials stated that all natural and legal persons are obliged to forward any information or evidence upon request. The Financial Inspector and the head of the competent tax authority may apply to a competent judicial council to lift bank secrecy (Article 66(1)(b), Law 2238/1994).

60. Concerning the sharing of information with tax authorities in other jurisdictions, the Commentary on Article 26 of the OECD Model Tax Convention was recently amended. Paragraph 12.3 of the Commentary now permits contracting states "to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (*e.g.* to combat money laundering, corruption…)", provided that "such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use." Greece did not object to the amendments to Article 26. Greece intends to amend the tax treaties to which it

is a party to reflect the amendment, although it does not know when it will do so. Greece also intends to adopt the amendment in the tax treaties that it signs in the future.

7. Reporting by Accountants and Auditors

(a) Accounting and Auditing of Private Sector

61. Effective accounting and auditing procedures may also result in the detection of bribery of foreign public officials. As with all individuals in Greece, accountants and auditors are under a general obligation to report crimes of which they become aware.

(i) Internal Auditing

62. Additional laws govern reporting by internal auditors. A company that has been or will be listed must set up an internal audit department to implement and monitor the company's internal control and compliance procedures (Law 3016/2002). The internal audit department must report the results of audits, presumably including any irregularities, to the board of directors on a quarterly basis. It is also required to attend (but not report to) general meetings of shareholders.

63. Internal auditors are hired and fired by the board of directors; their independence is thus debatable. Furthermore, a board of directors is not required to report irregularities discovered by internal auditors to law enforcement authorities. Representatives of the Greek accounting profession at the on-site visit concurred with these observations and stated that effective detection of accounting irregularities depends primarily on external auditing. Furthermore, they believed that bribery will only occur at very high levels in a company, and hence the role of internal auditors in the detection of bribery is very limited.

(ii) External Auditing

64. The lead examiners were advised that all *sociétés anonymes* (corporations) in Greece (including state-owned and state-controlled companies) are subject to external audits. In addition, entities which have two of the following three features must be externally audited by Certified Public Auditors, who are more qualified than regular auditors: (1) annual turnover of more than EUR 3 million; (2) assets greater than EUR 1.5 million; (3) more than 50 employees (Article 42, Law 2190/1920). Representatives of the Greek accounting profession stated that approximately 4 000 enterprises are subject to external auditing. In their view, companies that are not externally audited by Certified Public Auditors tend to be small and do not conduct business internationally.

65. There are some rules to enhance the independence and transparency of external auditors. An auditor's remuneration must be disclosed in a company's financial statements. An auditing firm and its subsidiaries are only allowed to provide auditing services to a client; provision of other services such as consulting is prohibited. A company must change auditors at least once every four years. If a company terminates an auditor before his/her term is over, the new auditor must be allowed to verify with the previous auditor whether the latter had detected any accounting irregularities.

66. External auditors have reporting obligations in addition to those which apply to all individuals in Greece. Representatives of the Greek auditing profession stated that they are obliged to report instances of tax evasion to the tax authorities. They must report to shareholders any act (including bribery) which prevents them from reaching a proper conclusion on a company's accounts. These obligations to report supersede any duties of confidentiality. If an external auditor is in doubt over whether he/she has an obligation to report, he/she must seek the advice of the Accounting and Auditing Supervisory Board. Despite these reporting requirements, representatives at the on-site visit were not aware of any cases in which bribery or other crimes had been discovered through an external audit.

67. After the on-site visit, Greece added that auditors who discover any illegal acts identified in the course of an audit must also report the matter to the board of directors and the audit committee of the audited company (Paragraph 2250, Greek Auditing Standards). The auditors are further obliged to report the matter to the competent public authorities.

68. The lead examiners are mindful of the reporting obligations of Greek accountants and auditors as described above. Nevertheless, it may be advantageous to further require external auditors to report indications of bribery to corporate monitoring bodies (such as the Hellenic Capital Markets Commission) as appropriate (Revised Recommendation V.B.(iii)). Furthermore, specific directions to these professionals on their obligation to report foreign bribery and false accounting will enhance detection of these offences, and also raise much-needed awareness of the Convention amongst corporations and the accounting profession.

Commentary

The lead examiners recommend that Greece devise specific guidelines for accountants and auditors to report foreign bribery and false accounting. They also recommend that Greece require external auditors to report indications of bribery to corporate monitoring bodies (such as the Hellenic Capital Markets Commission) as appropriate.

(b) Accounting and Auditing of the Public Sector

(i) Court of Audit

69. The Court of Audit is principally responsible for auditing the Greek public sector. The Court audits "the expenditures of the State, local government agencies and other legal entities subject to this status by special provision of law" (Article 98, Constitution). It does not, however, audit state-owned or controlled entities which the legislature has designated as private bodies (*e.g.* banks and power companies); these entities are subject to the auditing rules which govern the private sector.

70. The Court conducts annual audits. It may also conduct additional special audits when the need arises. The Court audits not only accounts but also contracts (such as those involving procurement) which exceed a certain value and to which the public sector is a party.

71. According to Greek officials, the Court applies internationally accepted auditing standards as a matter of practice. As of 2002, the Court was taking steps to implement the 15 European Implementing Guidelines for INT.O.S.A.I. Auditing Standards. It is unclear whether those guidelines have now been fully implemented.

72. As with private sector auditors, the Court has a duty to report criminal offences. Upon discovery of offences in the course of its work, the Court will report the case to the relevant Minister, the Court's President and the public prosecutor's office. On average, it makes ten such reports annually.

(ii) Additional Investigative Bodies

73. There are additional bodies which monitor the public sector. Under Law 3074/2002, the Public Administration Inspection-Auditing Corps (SEEDD) and the Public Administration General Inspector (PAGI) may inspect and audit regional and local authorities, state-run enterprises, state-run public law legal entities, and public corporations which are managed directly or indirectly by the state as a shareholder or under administrative acts. The PAGI submits annual reports, and additional reports if necessary, to the Prime Minister and the President of Parliament. Both the SEEDD and the PAGI must report any penal offences which they discover to the public prosecutor.

74. At the on-site visit, the Court of Audit, the SEEDD and the PAGI demonstrated that their primary focus is, understandably, corruption within the Greek civil service. Nonetheless, these bodies audit and monitor entities (such as state-controlled enterprises) which may deal with foreign public officials. Thus, it is important that these bodies are fully aware of the Convention and Law 2656/1998, and of their obligations to detect and report foreign bribery.

Commentary

The lead examiners recommend that Greece raise the awareness of the Convention and Law 2656/1998 amongst the Court of Audit, the SEEDD and the PAGI, and reiterate to these bodies of their obligations to detect and report foreign bribery.

8. Money Laundering

(a) The Offence of Money Laundering

75. Effective sanctions against money laundering may reduce the incentive to bribe foreign public officials. In Greece, Article 2 of Law 2331/1995 implements the offence of money laundering. A person commits money laundering when he/she "purchases, conceals, accepts as real security, accepts under his/her possession, is made the beneficiary, modifies or transfers any property that results from criminal activity, with the intent to profiteer or to conceal the true provenance or to assist a person engaged in that activity". The Law lists all eligible predicate offences, which includes domestic and foreign bribery, regardless of whether the offence was committed in Greece or abroad.

76. Money laundering is punishable in Greece by imprisonment of up to ten years. If the offender launders money professionally or is a repeat offender, the minimum punishment is ten years imprisonment. At the on-site visit, Greece stated that fines are not available, but the instrument used in committing a predicate offence (*e.g.* a bribe), the proceeds of a predicate offence and property acquired from such proceeds are confiscated. If confiscation is not possible, the court may impose a fine in an equivalent amount. After the on-site visit, Greece changed its position and stated that fines are available for money laundering under Article 81 of the Penal Code.[27]

77. Legal persons may also be liable for money laundering. If a predicate offence listed in Law 2331/1995 results in "direct financial benefit" to a legal person whose administrators or managers are aware of the source of the benefit, then the legal person may be fined administratively between three to ten times the value of the benefit. The legal person may also be banned temporarily or permanently from operating, receiving public benefits or participating in public tenders. Penalties are reduced if administrators or managers of the legal person are negligent as to the source of the benefit (Article 8, Law 2928/2001).

(b) Money Laundering Reporting

78. An effective system for reporting suspected money laundering transactions may lead to detection of the underlying predicate offence. In Greece, Article 4 of Law 2331/1995 requires credit or financial institutions to examine every transaction that may be connected to money laundering, and to implement internal procedures for detecting and reporting of such transactions. These obligations extend to the institutions' overseas branches. All suspicious transactions must be reported to Greece's financial intelligence unit, the Committee under Article 7 of Law 2331/1995. Breach of these obligations may result

---

[27] Article 81 of the Penal Code permits a court to impose a fine "together with a custodial penalty" when a crime "emanates from causes of profit".

in administrative sanctions against a credit and financial institution for failure to establish the appropriate internal control and communication.

79. After the on-site visit, Greece stated that the government will soon present draft amendments to Law 2331/1995 to Parliament. Under the proposed amendment, a person who breaches his/her duty to report a suspicious transaction because of gross negligence may be imprisoned for up to two years. A person who provides false or misleading data is subject to similar punishment.

80. Responsibility for collecting and analysing all suspicious transaction reports (STRs) rests with the Committee. The Committee is chaired by a senior judge or public prosecutor. Its remaining 13 members are drawn from various government ministries, the SDOE, representatives of the banking and securities sectors, and the regulatory bodies of these sectors. The members work for the Committee only part-time and generally meet once per week. The Committee also has four permanent officers. When the Committee wishes to conduct investigations, it seeks the assistance of the SDOE and, if necessary, other police forces.

81. The Bank of Greece is responsible for enforcing the reporting obligations in the banking sector. The Bank issues circulars and orders to all financial institutions detailing how the reporting obligations should be implemented. All institutions must have internal audit and control procedures that have been approved by the Bank. The Bank conducts annual on-site examinations to enforce these requirements. The Bank also assists financial institutions by providing guidelines on how to set up internal reporting and control procedures. It disseminates new rules, regulations and typologies through circulars and the internet, though it does not appear that these materials deal specifically with foreign bribery. The Bank also regularly meets Greek financial institutions to discuss the latest typologies.

82. The private sector provides additional training and awareness-raising activities. The Hellenic Banking Association holds seminars for bank employees and has supplied literature on topics such as customer due diligence to its members. It holds regular meetings between the Committee and compliance officers of its member banks to discuss typologies and compliance procedures. Through circulars, it advises its members of legislative changes.

83. Representatives of financial institutions corroborated much of the above. All of the represented institutions had compliance policies which applied to Greek and overseas branches. All had trained its employees on money laundering through seminars, presentations, information packages and internet resources. In some cases, training was also provided to overseas employees.

84. The lead examiners were encouraged to hear that some of these initiatives dealt specifically with laundering of proceeds of bribery. One major bank had a policy (available in print form and on the internet) which discusses the treatment of politically exposed persons.[28] The policy manual of another major bank contained one paragraph on bribery. According to the Bank of Greece, the procedures and typologies of several other banks in Greece which were not present at the on-site visit also refer to bribery.

---

[28] Politically exposed persons (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, *e.g.* heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials. For more information, see Glossary and Recommendation 6 of *The Forty Recommendations (2003)*, Financial Action Task Force, Paris.

(c) Statistics

85. The lead examiners are pleased that Greece's suspicious transaction reporting system has led to investigations into bribery. From 2001 to 2003, the Committee received three STRs concerning suspected bribery of foreign public officials, although additional investigation eliminated the suspicions. In addition, the Committee has received 15 STRs regarding domestic bribery since 2001. Six of those cases were forwarded to the public prosecutor's office and resulted in criminal proceedings. The remaining cases were closed because of insufficient evidence.[29]

(d) Tax Amnesty Programme

86. Following the examples of several other countries, Greece enacted a programme to repatriate assets between 4 August 2004 and 4 February 2005 (Article 38, Law 3259/2004). Participants in the programme may transfer assets from abroad to Greece subject to a 3% tax on the value of the asset. The transferor is then absolved of all past tax liabilities with respect to the transferred assets. The Greek government has extended the programme by three months because the amount of funds that had been repatriated was much less than expected.[30]

87. Any individual or entity subject to Greek taxation may take advantage of the programme. Repatriation must be effected through credit or other financial institutions that operate in Greece. The transferor must submit a written declaration or authorisation to the financial institution. After the on-site visit, the Greek authorities added that the transferor is required to specify the name of the transferor and the source of the funds in the declaration.

88. The lead examiners are concerned that the programme may be used to dissimulate bribe payments and proceeds of bribery. According to Greek authorities, the programme exempts the transferor from fiscal offences only; laws such as Law 2331/1995 on money laundering continue to apply, as do anti-money laundering measures (such as suspicious transaction reporting). It is, however, unclear whether and how the money laundering reporting obligations are applied to repatriated assets. In particular, the lead examiners are concerned that the declaration filed by the transferor may contain little information on the source and nature of the asset in question. If that is the case, it may be extremely difficult to determine whether the assets are bribe payments or proceeds of bribery. Greece was unable to advise whether assets repatriated under the programme have generated any STRs.

Commentary

The lead examiners recommend that Greece pay particular attention to information arising as a result of its present and future tax amnesty programmes in order to prevent the misuse of these programmes for the dissimulation of bribes.

---

29 In total, the Committee received 753 STRs in 2003, 20 of which were forwarded to the public prosecutor's office for prosecution, leading to EUR 30 million of assets being frozen. There are 131 STRs still under investigation, while the remaining cases have been closed because of insufficient evidence. In 2002, the Committee received 840 STRs, 30 of which were sent to the public prosecutor's office for prosecution, resulting in EUR 25 million of assets being frozen. There are 137 cases still under investigation.

30 Katherimerini English Edition (4 February 2005), "Amnesty Fails to Lure Back Funds", Kathimerini English Edition, Athens.

9. Whistleblowing and Witness Protection

(a) Whistleblowing and Whistleblower Protection

89. According to Greek officials at the on-site visit, whistleblowing frequently occurs in Greece because of a long-standing statutory provision which obliges all persons to report any crime of which they become aware to the public prosecutor or any law enforcement authority (Article 40, Code of Penal Procedure). The Greek authorities believe that there have been many convictions under this provision for failure to report a crime but they could not provide supporting statistics. They also added after the on-site visit that, according to a recent report, the Hellenic Police has been receiving fewer reports from whistleblowers, but that a higher percentage of reports are from identified sources.

90. Representatives from the private sector and civil society had a different view. One representative stated that Greeks are generally reticent to whistle-blow because of recent historical events. This is consistent with a recent statement by the Greek government.[31]

91. The reluctance to whistle-blow could be partly due to a lack of government initiatives in this area. The SDOE may be one of the few government bodies which have made any efforts in this regard. It stated that it had sent letters and circulars asking citizens and companies to report any wrongdoing of which they become aware. It visited companies and business associations for the same purpose. It created a committee and a hotline to receive complaints. Nevertheless, it is unclear how much emphasis was placed on foreign bribery in these initiatives. According to Greece's response to the Phase 2 Questionnaire at p. 7, the hotline appears to be used primarily for reporting tax offences.

92. Another reason for the lack of reporting may be inadequate protection for whistleblowers from reprisals by their employers. There are no laws which specifically deal with this issue. At the on-site visit, one academic and one judge believed that a whistleblower could use Article 281 of the Civil Code (which deals with an abuse of rights) to sue an employer for unjust dismissal. Other participants stated that the provision either did not apply or could only be used as a last resort.

93. In the absence of specific legislation, protection of whistleblowers needs to come from collective agreements and corporate codes of conduct. The availability of these sources in Greece appears uncertain. The Code of Civil Servants (Law 2683/1999), which applies to most civil servants, and the Code of Conduct for Companies Listed on the Athens Stock Exchange and Connected Persons (CMC Rule 5/204/14/14.11.2000) do not refer to reporting of crimes. A representative of a labour union believed that there would be sufficient protection only if an allegation is true. Most major companies have codes of conduct, but copies of the codes provided to the examination team contain little to encourage or protect whistleblowers. One company stated that its code of conduct offered protection of a whistleblower's identity.

94. Greek officials stated that their government is considering expanding the scope of whistleblower protection. The degree of expansion, if any, is expected to be small because of cost.

Commentary

The lead examiners recommend that Greece undertake initiatives to encourage whistleblowing by employees (in both the public and private sectors) and to remind employees of their legal obligation to report crimes. The lead examiners further recommend that Greece consider

31 GRECO (17 May 2002), *Evaluation Report on Greece, First Evaluation Round*, Council of Europe, GRECO, Strasbourg, para. 10.

introducing measures to protect whistleblowers (in both the public and private sectors) from dismissal or other forms of retaliation.

(b) Witness Protection

95. In Greece, witness protection is only available to "essential" witnesses who provide information on the activities of a criminal or terrorist organisation (Article 9, Law 2928/2001). As with whistleblower protection, the government is considering extending witness protection to other crimes. Again, the degree of expansion, if any, is expected to be small for reasons of cost.

Commentary

The lead examiners recommend that Greece consider making witness protection programmes available in foreign bribery cases.

C. INVESTIGATION OF FOREIGN BRIBERY

1. Law Enforcement Authorities in Greece

(a) Responsibility for Investigating Foreign Bribery

(i) Division of Competence between the Body for the Prosecution of Economic Crime and the Internal Affairs Division of the Hellenic Police

96. On a facial reading of the relevant legislation, investigations of domestic and foreign bribery fall within the competence of different agencies. Responsibility for investigating domestic bribery falls to the Internal Affairs Division of the Hellenic Police (IAD) under the Ministry of Public Order (Article 1(2), Law 2713/1999, as amended by Article 2(1), Law 3103/2003). Responsibility for investigating foreign bribery belongs to the Body for the Prosecution of Economic Crime (SDOE) under the Ministry of Economy and Finance (Article 4, Law 2656/1998). The SDOE is also responsible for investigating financial crimes which damage the state's financial interests, trafficking of narcotics and firearms, and tax offences.

97. This division of responsibility was not so clear at the on-site visit. The Ministry of Justice, the SDOE and the IAD indicated that the SDOE has exclusive competence over foreign bribery. Judges, prosecutors and later the Ministry of Justice maintained that all police agencies and the SDOE are competent, even though this appears to directly contradict Article 4 of Law 2656/1998.

98. After the on-site visit, the Greek authorities indicated that Article 4 of Law 2656/1998 accords the SDOE primary responsibility for the implementation of the Convention and the investigation of foreign bribery cases. Nevertheless, if a case of foreign bribery is reported to the police or the public prosecutor, these bodies will immediately investigate the case after notifying the SDOE.

(ii) The Special Investigations Service

99. After the on-site visit, Greece substantially overhauled the SDOE by replacing it with the Special Investigations Service (YPEE) (Law 3296/2004). The internal structure of the YPEE significantly differs from that of the SDOE. Under the new legislation, responsibility for investigating foreign bribery falls to the Department of Mutual Administrative Assistance and Controls of the Directorate of Administrative Support of the YPEE. The Department is also responsible for investigating domestic corruption and for reviewing financial audit controls when there are reasonable grounds to suspect fraud. The YPEE plans to

make an official announcement on its competence, with particular emphasis on its responsibility for investigating foreign bribery.

(iii) Conclusion

100. The assignment of responsibility for investigating foreign bribery is less clear in practice than as described in Law 2656/1998 (as amended by Law 3296/2004). What is clear is that both the IAD and the YPEE (previously the SDOE) have competence to investigate foreign bribery. This raises several potential concerns, *e.g.* the possibility of concurrent investigations, co-ordination of investigations by different agencies, information sharing and conflicts of competence. The recent restructuring of the SDOE does not appear to clarify these issues.

Commentary

The lead examiners recommend that Greece establish procedures for co-ordination, sharing information and resolving conflicts of competence between the IAD and the YPEE. They also recommend that the Working Group monitor this issue as cases develop.

(b) Training and Resources

(i) The Body for the Prosecution of Economic Crime (SDOE)

101. The SDOE has 1 000 officers and 300 administrative personnel. A share of the budget of the Ministry of Finance and Economy (MOFE) is allocated to the SDOE, although officials at the on-site visit could not indicate the amount or portion that was allocated. Representatives of the SDOE at the on-site visit indicated that its human and financial resources were "satisfactory".

102. Members of the SDOE are trained by the MOFE. These members are highly experienced in the investigation of tax and customs offences because they are mainly seconded from the MOFE. Experience and training in corruption offences may be more limited. Members are required to attend courses on bribery generally and to participate in training activities organised by the School of Public Administration. They are asked to confirm in writing that they have read Law 2656/1998 and that they are aware of the Law's contents. The SDOE has organised various seminars on the Convention and the implementing legislation at the central level in Athens but not at the regional level.

103. SDOE officers outside of Athens offered a slightly different view. They stated that there had been no seminars on (domestic or foreign) bribery or the Convention. In their view, the Convention is new and it will take time before foreign bribery cases are detected.

104. The lead examiners are concerned that members of the SDOE may not be sufficiently trained in the area of foreign bribery. SDOE members are drawn from the Ministry of Finance and Economy, not law enforcement agencies. While SDOE members are trained on theoretical issues such as the content of Law 2656/1998, they do not appear to have been trained on the practical aspects of bribery investigations, such as the *modus operandi* of these crimes or the means to gather evidence. Unlike the IAD (which deals with domestic bribery offences), the SDOE has no experience in investigating bribery offences. It may be advantageous to assign competence to investigate domestic and foreign bribery to a single agency, so that experience in domestic bribery investigations can be used in foreign bribery investigations.

105. After the on-site visit, Greece stated that the creation of the YPEE will necessitate "a complete reshuffle" of its training schedule and that particular emphasis will be placed on all forms of international economic crime. However, no other details were provided.

Commentary

The lead examiners recommend that Greece provide training on the practical aspects of foreign bribery investigations to members of the YPEE. They also recommend that Greece consider assigning the competence for investigating domestic and foreign bribery to a single law enforcement agency.

(ii) Internal Affairs Division of the Hellenic Police (IAD)

106. Two institutions provide training to the officers of the IAD. The Greek Police Academy, which has recently acquired the status of a university, offers a four-year programme to new recruits who have passed an entrance examination. The Academy also provides lectures and graduate programmes to all serving officers in Greece. In addition, the National Security School offers training to serving officers at regular intervals.

107. In terms of curriculum, the Academy's programmes include components on money laundering and domestic bribery. Foreign bribery was added only in 2004. In 2005, both the Academy and the National Security School plan to offer a series of lectures by SDOE and IAD officers on the practical aspects of domestic and foreign bribery investigations.

108. The Hellenic Police offers additional seminars on matters such as money laundering, but there have been no seminars on corruption, whether domestic or foreign.

Commentary

The lead examiners recommend that the Greek Police Academy and the National Security School implement their initiatives to provide training programmes on the practical aspects of foreign bribery investigations to police officers and recruits.

2. Prosecutors and the Judiciary

109. The National School of Judicature in Thessaloniki provides an 18-month training programme to new judges and prosecutors. The programme includes training on theoretical and practical issues. In November 2004, the School offered courses on corruption and foreign bribery for the first time.

110. The School also provides continuing education through seminars and courses, although it has only offered seminars on corruption generally and not on foreign bribery. It had planned to hold a criminal law conference in early November 2004 which would include issues such as corruption, foreign bribery and the Convention, but it is not clear whether this initiative has been implemented. According to the Greek authorities, judges and prosecutors outside of Athens receive similar training on topical issues and developments in the law, although training procedures emanate from Athens.

111. The Association of Juridical Studies is a separate body that provides additional training to appellate judges on developments in the law. It is not clear whether the Association has provided any training on foreign bribery.

Commentary

The lead examiners recommend that the National School of Judicature continue its training programmes on foreign bribery for prosecutors and judges, including new recruits.

3. Lifting Bank Secrecy

112. The SDOE may obtain bank information. SDOE officers may, in the course of the exercise of their duties, access bank data subject to bank confidentiality under the direction of a prosecutor attached to the SDOE (Articles 2(6) and 4(12), Law 2343/1995). The YPEE has retained the same powers.

113. The IAD may lift banking confidentiality when investigating bribery. The investigative powers of the IAD are governed by its enabling statute (Law 2713/1999). Article 6(2) of that Law states that a prosecutor may request the lifting of bank secrecy during the preliminary investigation of any offence within the remit of the IAD.

4. Mutual Legal Assistance and Extradition

(a) Mutual Legal Assistance

114. The significance of mutual legal assistance under the Convention is two-fold. First, parties to the Convention are obliged to provide prompt and effective legal assistance to other parties to the fullest extent possible under their laws, treaties and arrangements (Article 9). Second, in order to effectively prosecute foreign bribery, parties themselves must be able to seek and use evidence from abroad efficiently.

115. According to the Greek authorities, Greece has signed bilateral and multilateral treaties on mutual legal assistance with almost all of its major trade and investment partners.[32] The execution of requests is governed primarily by Articles 457-461 of the Code of Penal Procedure. The same procedure applies regardless of whether the target of an investigation is a legal or natural person. Dual criminality is not a prerequisite to rendering assistance. Since 2000, the Ministry of Justice has handled more than 15 000 requests, but none involving foreign bribery. During that time, the Ministry rejected only one request for assistance. It usually takes between one month and one year for Greece to comply with a request.

(b) Extradition

116. Greece has extradition relations with most of its trade and investment partners.[33] In addition, the Convention may serve as a treaty for extradition to and from another party state. Greece has also implemented the European Arrest Warrant (Law 3251/2004). Reciprocity and dual criminality are prerequisites to granting extradition. Greek nationals cannot be extradited but will be prosecuted in Greece. Since 2000, the Ministry of Justice has handled more than 380 extradition requests (both incoming and outgoing), none of which involved foreign bribery. According to the Greek authorities, an incoming extradition request is usually executed within three months.

D. PROSECUTION OF FOREIGN BRIBERY AND RELATED OFFENCES

1. The Offence of Foreign Bribery

(a) Elements of the Offence

(i) Definition of "Foreign Public Officials"

117. At the time of the Phase 1 review, Law 2656/1998 did not define "foreign public officials". The Greek authorities stated that Greek courts would therefore refer to the definition of "public officials" in the

---

32 See Annex 3 for a complete list.

33 See Annex 3 for a complete list.

domestic bribery provisions of the Penal Code for guidance. Nevertheless, the Working Group was concerned that the definition in the Penal Code was narrower than the one in the Convention.

118. Greece has amended Law 2656/1998 since the Phase 1 review. Article 2(1) of Law 2656/1998 now prohibits bribery of "a foreign public official, in the meaning of the OECD Convention ratified in article 1 of the present Law." This reference to the Convention should fully import the definition of "foreign public officials" from the Convention into Law 2656/1998, thus eliminating the earlier concerns.

(ii) Use of an Official's Position in Excess of His/Her Powers and Direct Application of the Convention

119. In the Phase 1 review (at pp. 4-5), Greece stated that, "According to legal doctrine and case law, an offence is committed solely when the official acts or refrains from acting in the performance of duties assigned to him by a law, decree, regulation, circular or instruction; it is not committed when an official makes use of his position in excess of his powers." However, pursuant to Article 28(1) of the Constitution, Greek courts would directly apply the Convention to extend Law 2656/1998 to cover these situations:

> 28.(1) The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

120. Officials at the on-site visit elaborated that, because of this provision in the Constitution, ratified international conventions form part of domestic Greek law and have greater force than a domestic statute (but less than the Constitution). Courts generally interpret statutes in a manner consistent with international conventions and will declare statutes that conflict with such conventions to be of no force and effect.

121. Notwithstanding the assurances of the Greek authorities, the Working Group in Phase 1 doubted that the direct application of the Convention could remedy shortcomings in Law 2656/1998.

122. During the on-site visit, Greece maintained this position. After the on-site visit, however, Greece contended that the wording of Article 2(1) of Law 2656/1998 covers bribery of an official who uses his/her position in excess of his/her powers. There is no need to resort to direct application of the Convention.[34] Greece did not provide case law supporting its latest position.

(iii) Bribery by a Best-Qualified Bidder

123. Law 2656/1998 prohibits bribes in order to obtain or retain "an unfair business or other advantage of pecuniary or any other nature that is not due".[35] In the Phase 1 review (at p. 5), some doubts were expressed over whether the law covers a briber who is the best-qualified bidder as required by Commentary **4** of the Convention. Again, Greece responded that the direct application of the Convention would cure any deficiencies.

124. Greece has not amended Law 2656/1998 in this regard since the Phase 1 review. During the on-site visit, Greece maintained this position. After the on-site visit, however, the Greek authorities stated that

---

34 The direct applicability of the Convention will be discussed in Section D.1.(c)(iii).

35 In Phase 1, this portion of Law 2656/1998 was translated as bribery "in order to obtain or retain improper advantage or any other improper benefit".

the wording of Article 2(1) of Law 2656/1998 covers bribery by someone who is the best-qualified bidder. There is no need to resort to direct application of the Convention. Greece did not provide case law in support of its position.

(iv) Conclusion

125. The lead examiners appreciate Greece's amendment to Law 2656/1998 to expressly refer to the Convention's definition of a "foreign public official". Yet they remain concerned that Law 2656/1998 does not cover bribery of a foreign public official who uses his/her position in excess of his/her powers, or a briber who is the best-qualified bidder.

Commentary

The lead examiners recommend that the Working Group monitor whether Law 2656/1998 covers the following situations as case law develops (1) bribery of a foreign public official who uses his/her position in excess of his/her powers, and (2) a briber who is the best-qualified bidder.

(b) Jurisdiction

(i) Territorial Jurisdiction

126. Article 4(1) of the Convention requires a party to "establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory." Under Greek law, territorial jurisdiction applies "to all acts committed on the Greek territory, even if committed by foreign nationals." An act is considered committed at a place "where the culpable person committed the punishable act or omission in whole or in part, as well as the place where the punishable result occurred [...]" (Articles 5 and 16, Penal Code).

127. The Greek authorities assert that the breadth of these provisions is clear. For instance, territorial jurisdiction applies when a person in Greece arranges a meeting with (but does not offer or promise a bribe to) a foreign public official by telephone. The individual then flies to the foreign country, and offers and gives a bribe to the foreign public official. It is also not clear whether territorial jurisdiction applies when a person in Greece instructs an agent who is overseas to offer a bribe to a foreign public official. Greece, however, did not provide case law in support of this position.

(ii) Nationality Jurisdiction

128. Parties to the Convention which have jurisdiction to prosecute their nationals for offences committed abroad must establish the same jurisdiction for foreign bribery, according to the same principles (Article 4(2), Convention). In Greece, because foreign bribery is a misdemeanour, nationality jurisdiction can be asserted only upon the complaint of the government of the country in which the crime was committed.[36] An official at the on-site visit explained that the reason for this requirement was respect for a foreign state's sovereignty.

---

[36] Article 6 of the Penal Code reads:

> 6.(1) Greek penal laws also apply on any act that they regard as a felony or misdemeanour, which has been committed abroad by a Greek, if such act is regarded as a punishable act by the laws of the country where it has been committed, or if it has been committed in a country under constitutional turmoil.

129. In the Phase 1 review (at p. 18), the Working Group questioned the effectiveness of this basis for asserting nationality jurisdiction. Greece has made no legislative amendments in this regard. It also has not provided any case law or explanation to alleviate these concerns.

130. The lead examiners also have some doubts over the reason for the requirement of a complaint by a foreign government, namely respect for the foreign state's sovereignty. A complaint is not necessary to assert nationality jurisdiction to prosecute felony crimes. It is also not necessary to prosecute bribery of EU officials (Article 6, Law 2802/2000). Abolition of this requirement from foreign bribery under the Convention not only eliminates the concerns of the lead examiners, but it will also harmonise the legislative schemes for bribery of EU and non-EU officials.

131. After the on-site visit, the Greek authorities added that problems with nationality jurisdiction should rarely arise in foreign bribery cases. In their view, most foreign bribery cases also involve money laundering. In these cases, nationality jurisdiction need not be invoked because Greece's money laundering offence covers predicate offences that are committed outside of Greece. As well, Greece may invoke nationality jurisdiction to prosecute bribery of foreign judges without consent of a foreign state after that offence has been re-classified as a felony.

Commentary

Greece continues to require a complaint from the government of the country in which the crime was committed before asserting nationality jurisdiction to prosecute foreign bribery. The lead examiners recommend that Greece eliminate this requirement. They also recommend that the Working Group monitor Greece's exercise of territorial and nationality jurisdiction over foreign bribery offences as cases emerge.

(c) Defences and Exemptions from Prosecution

(i) Defences of Necessity and Extortion

132. Greek officials stated that the defence of necessity will not arise in a case of foreign bribery. The defence requires proof of imminent danger that is not due to the fault of the accused and which cannot be prevented by other means. The impact of the illegal act must also be substantially smaller "in form and significance" than the danger avoided (Article 25, Penal Code). An example is where a person breaks a window and enters a house in order to save an occupant from being murdered.

133. The Greek authorities stated that extortion in Greece is defined as a request for undue payment. Extortion is not a defence to bribery; on the contrary, if an official extorts from an individual and the individual pays the official, the individual will generally be guilty of bribery. The Greek authorities did not provide case law in support of this proposition since they do not believe that the defence has ever been raised in a domestic bribery case.

[...]

(3) In so far as misdemeanours are concerned, the victim's complaint requesting prosecution or a request for prosecution by the government of the country where the misdemeanour was committed is necessary in order for the provisions of paragraphs 1 and 2 to be applied.

According to the Greek authorities, there are no "victims" in an offence of bribery: "The good adversely affected by the offence of (active) bribery of a public official is the State" (Greece's response to the Phase 2 Questionnaire, p. 19).

(ii) Defence of Effective Regret

134. Article 236 of the Penal Code provides for a defence of "effective regret". A briber is not punishable if he/she confesses to the crime before a preliminary examination by law enforcement authorities commences. A bribe that had been given is not confiscated but returned to the briber. Although Article 236 deals with domestic active bribery, Greek officials confirmed that the defence also applies to foreign bribery.

135. Greece elaborated on the defence after the on-site visit. When a briber reports the matter to the law enforcement authorities, a prosecution will be taken because the principle of mandatory prosecution continues to apply. Only a court may ultimately decide to terminate the prosecution against the briber. The trend of the Greek courts, however, is not to completely exonerate the briber, but to impose a light penalty, taking into consideration factors such as the degree of co-operation by the briber. Furthermore, the bribe is returned to the briber but any proceeds of bribery are confiscated under Article 76(1) of the Penal Code. Greece did not provide case law in support of its position.

136. This defence could contravene the Convention in some cases. A person who has given, offered or promised a bribe to a foreign public official (and hence has completed the offence within the meaning of Article 1 of the Convention) could in some cases remain unpunished if he/she makes a sufficiently early confession. The Convention does not contemplate liability to be imposed on such qualified terms.

Commentary

The lead examiners recommend that the Working Group monitor the application of the defence of "effective regret" in Article 236 of the Penal Code in foreign bribery cases.

(iii) Political Offences and Offences Affecting International Relations

137. In Greece, "political offences" and "offences through which the international relations of the state may be disturbed" could be exempt from prosecution. The Minister of Justice, following a concurring opinion of the Council of Ministers, may postpone or suspend a prosecution of such offences (Article 30(2), Code of Penal Procedure).

138. The Greek authorities elaborated that there are no clear definitions of "political offences" and "crimes through which the international relations of the state may be disturbed". There are also no rules or guidelines governing the use of this provision. A decision of the Minister of Justice to invoke this provision is purely political in nature. A judge at the on-site visit opined that the provision is essential to Greece's national security. Since its enactment in 1951, the provision has been used no more than twice.

139. If invoked in a foreign bribery case, this exemption from prosecution contradicts Article 5 of the Convention, which requires that investigations and prosecutions of foreign bribery shall not be influenced by "the potential effect upon relations with another State". The exemption may also contradict Commentary 27, which states that prosecutorial decisions should not be "subject to improper influence by concerns of a political nature".

140. Nevertheless, the Greek authorities maintain that this exemption does not apply to foreign bribery. In their view, Article 5 of the Convention supersedes Article 30(2) because of the direct application of the Convention: "The courts are well tuned to this arrangement [of directly applying international conventions] and they readily identify domestic provisions *rendered inapplicable* because of their incompatibility with an international convention" (Response to Phase 2 Questionnaire, p. 3; italics

added).[37] One academic in criminal law added that the Convention takes precedence because the Convention was ratified after Article 30(2) was enacted (*lex posterior derogat legi anteriori*).

141. Greece referred to two cases in support of its position. In the first case, the Greek government neglected to designate certain wetlands for environmental protection as required by an international convention. A Greek court took notice of the convention and made the designation. In the second case, a Greek court held that a prohibition on purchasing property in a border area contravened an EU convention. Accordingly, the court struck down the prohibition and applied the EU convention.

142. Notwithstanding Greece's assertions to the contrary, the lead examiners remain doubtful that the Convention can directly cure any defects in Law 2656/1998. First, in the only cases that the Greek authorities have referred to, the courts either struck down a domestic statute or implemented an international convention to the benefit of a private individual. This is fundamentally different from using an international convention to enlarge the scope of a domestic criminal offence. Such a measure will generally be to the detriment of an accused. Indeed, Greek officials at the on-site visit agreed that the principle of legality (*nullum crimen sine lege*) in Greek jurisprudence would prohibit extending criminal statutes in this manner. They also stated that there are no cases in which a Greek court has done so.

143. Second, Greece may have weakened its position by amending Law 2656/1998 to expressly refer to the Convention's definition of "foreign public officials". Greek courts may take the amendment as an admission by the legislature that, absent an express reference to the Convention in Law 2656/1998, the Convention does not directly apply.

144. Third, Greece admits that the Convention is not self-executing. Article 1 of the Convention does not stipulate that foreign bribery is an offence, but merely that parties to the Convention shall take necessary measures to criminalise foreign bribery. As such, domestic legislation is necessary to implement the Convention in Greece.

145. Finally, Article 28(1) of the Constitution is not always operable. The article only applies to aliens (presumably non-Greek nationals) "under the condition of reciprocity." Thus, even if Article 28(1) can be used to directly apply the Convention, Greek courts will do so only against persons whose home countries have criminalised foreign bribery (*e.g.* other parties to the Convention).

146. In sum, the lead examiners doubt that Convention can be directly applied to Law 2656/1998 to exclude the exemption in Article 30(2) of the Code of Penal Procedure in foreign bribery cases. If the exemption is available in foreign bribery cases, then there are insufficient guarantees to ensure that political considerations do not influence a decision to not prosecute. There are no guidelines on how the Minister of Justice exercises his/her discretion. There are also no mechanisms to independently review the Minister's decision. Since the decision results in no legal proceedings being taken, the case would not reach the courts. One legal academic suggested that the only possibility of judicial review is when a prosecutor blatantly disobeys the Minister and forges ahead with prosecution. The likelihood of this occurring is more than questionable.

Commentary

The lead examiners recommend that Greece amend its legislation to expressly exclude the operation of Article 30(2) of the Code of Penal Procedure from the offence of foreign bribery.

---

37 See section D.1(a)(ii) Direct Application of the Convention.

(iv) Immunity from Prosecution for Present and Former Ministers and Deputy Ministers

147. Article 86(1) of the Constitution provides immunity from prosecution for certain members of the Greek government. "Only the Parliament is competent to press charges against those who are or were members of the Government or Deputy Ministers for criminal offences committed by them during the discharge of their duties, as stipulated by the law." This raises two issues: when does Article 86(1) apply and how immunity can be lifted.

To Whom Is Immunity Available

148. Article 86(1) applies to "those who are or were members of the Government or Deputy Ministers". Greek officials explained that these include Ministers and Deputy Ministers, who may be non-elected officials.

149. The lead examiners are concerned that immunity under Article 86(1) may be applied in a case of foreign bribery. Immunity arises when a crime is committed "during the discharge of duties, as stipulated by law". This conceivably covers a Minister who is responsible for promoting Greek business interests overseas, and who bribes a foreign public official so that a contract is awarded to a Greek company. Greece responded that immunity would not be granted in such a case even though the crime was committed in the interest of the state. There appears to be no cases in support of this position.[38]

Lifting of Immunity

150. If Article 86(1) may apply to a foreign bribery case, the next question is how immunity may be lifted. When a law enforcement official suspects that a present or former Minister or Deputy Minister has committed a crime, the case is referred to Parliament immediately. Upon the written request of 30 Members of Parliament, a special Parliamentary committee is convened to investigate the case. The committee has the same powers as a public prosecutor of the court of first instance. When the investigation is completed, formal criminal charges are laid only if a majority of the Parliament in plenary session agrees. If charges are pressed, the case is tried by a Special Court consisting of members of the *Areios Pagos* and Council of State (Article 86, Constitution and Law 3126/2003).

151. The lead examiners are concerned that political factors may affect a decision to not prosecute a foreign bribery case under this procedure. When immunity arises, Parliament (not a public prosecutor) must decide whether to prosecute; the usual principle of mandatory prosecution does not apply. There appears to be no criteria or guidelines governing the making of this decision. Nor is the decision reviewable. Since Parliament is an inherently political organ, political factors could conceivably influence the decision, contrary to Commentary 27 of the Convention. The procedure may also contravene Article 5 of the Convention, which stipulates that investigation and prosecution of foreign bribery "shall not be influenced by national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

---

38 At the on-site visit, Greek officials referred to one case in support of their position that the Minister in the example would not be immune from prosecution. Greece provided a copy of this case to the lead examiners after the visit. In a decision of the Special Court dated 11 August 1990, the Court convicted a former Deputy Minister for instigating others to make false declarations. The Deputy Minister, acting in the national interest, had arranged for forgery of documents which falsely stated the origin of a quantity of corn so that a company could avoid paying duties. Thus, the case stands for the proposition that instigating forgery in the "national interest" is not a defence to the crime; it does not stand for the proposition that Article 86(1) could never apply to a Deputy Minister who so acts in the national interest. To the contrary, because the case was tried by a Special Court, it appears that Article 86(1) and the procedure for lifting immunity prescribed therein (see next section) did in fact apply to the case.

Commentary

The lead examiners are concerned that process of granting immunity from prosecution under Article 86(1) of the Constitution may be influenced by the factors listed in Article 5 and Commentary 27 of the Convention. Therefore, they recommend that the Working Group monitor this issue as cases develop.

(d) Limitation Periods and Delays in Proceedings

152. To effectively combat foreign bribery, any statute of limitation applicable to the offence must allow adequate time for investigation and prosecution (Article 6, Convention). In Greece, since foreign bribery is a misdemeanour, the limitation period for completing a prosecution (including any appeals) is five years. Time begins to run when the offence has been committed. Once proceedings are commenced, the limitation period is suspended for up to three years until a conviction becomes irrevocable (*i.e.* all appeals have been exhausted). Taken together, these provisions require proceedings (including appeals) to conclude within eight years of the commission of the crime (Articles 111-113, Penal Code).[39]

153. Compared to other jurisdictions, the length of the limitation period for foreign bribery in Greece is *prima facie* unremarkable. Even so, the lead examiners are concerned that lengthy delays in the Greek criminal justice process may cause limitation periods to expire in foreign bribery cases.

154. There are reports of significant delays in the Greek criminal justice system. Greece stated that "[e]xact numbers are not available but among recently reported cases there is only one instance of a case that succumbed to the statute of limitations: *Athens Court of Appeal* 478/2000" (response to the Phase 2 Questionnaire, p. 21). On the other hand, the Minister of Justice recently admitted that "[i]t takes two to three years for a definitive ruling, five to six for a final one and seven to eight for an irrevocable one. [In March 2004], appeals against rulings by the Three-Member Criminal Appeals Court are not scheduled until 2007."[40] Another source states that "courts have a heavy backlog of cases and rigid procedures lead to long delays; cases are frequently abandoned because of the statute of limitation."[41]

155. Representatives of the Greek judiciary at the on-site visit agreed that delay may indeed be a problem. The lack of material resources and a shortage of courtrooms are contributing factors. Consequently, judges carry extremely heavy caseloads. One legal academic described the court process as cumbersome and that litigants can easily seek adjournments (though less so in criminal cases). A recent strike by barristers has worsened the problem by creating backlogs. One judge believed that a longer period should apply to bribery cases involving large sums of money.

156. Problems with delay are exacerbated in foreign bribery cases, since such cases are often complex and involve gathering evidence from overseas, thus adding to the length of proceedings. Parenthetically, if foreign bribery is re-classified as a felony, the limitation period for the offence would be increased to 25 years (Article 111(2)(b), Penal Code), which would eliminate any concerns.

---

39 The limitation period may also be suspended if "prosecution may not commence or continue according to a provision of law" (Penal Code, Article 113(1)).

40 Katherimerini English Edition (15 March 2004) "Everyone is Equal Before the Law and No One Should Enjoy Impunity", Katherimerini English Edition, Athens; Kalliri, F. (15 March 2004) "Slow Mills of Legal System to Grind Faster", Katherimerini English Edition, Athens.

41 The Economist Intelligence Unit (2004), *Country Profile – Greece*, The Economist Intelligence Unit, London, p. 7.

157. After the on-site visit, Greece added that Law 2656/1998 will be amended to re-classify bribery of a foreign judge as a felony. The limitation period for such an offence would accordingly be increased.

Commentary

The lead examiners recommend that Greece ensure delays in proceedings do not result in the expiry of limitation periods in foreign bribery cases.

2. Liability of Legal Persons

158. Article 2 of the Convention obliges parties to establish the liability of legal persons for foreign bribery. Since criminal liability cannot be attributed to legal persons under the Greek Constitution, Article 5 of Law 2656/1998 imposes administrative liability against legal persons for foreign bribery. Because Greece has had no prosecutions for foreign bribery, the operation of this provision remains untested.

(a) Scope of Application

159. In the Phase 1 review (at p. 17), the Working Group noted that Law 2656/1998 only imposes administrative liability against "enterprises and not all legal persons – such as foundations, associations or other civil bodies – which can be used in the commission of bribery". Since then, Greece has amended Article 5 of Law 2656/1998 to cover "any legal entity or undertaking", which, according to the Greek authorities, includes all legal persons and enterprises (Article 9, Law 3090/2002).

(b) Fault of Managers

160. Law 2656/1998 imposes administrative sanctions against a legal person for foreign bribery upon the "fault of its managers".[42] This raises two questions: the scope of "managers" and the meaning of "fault".

161. Law 2656/1998 does not define the scope "managers". In its response to the Phase 2 Questionnaire at pp. 13-14, Greece stated that:

> Generally speaking, however, the term "management" covers the statutory organs of the legal entity, as stipulated in the law and its own constitution.
>
> According to Article 71 of the Civil Code, a legal person is held liable for the acts or omissions of the organs which represent it. Non-senior management or other employees do not usually bind the legal person and thus any personal fault of the employee does not necessarily entail the responsibility of the legal person.

162. Likewise, Law 2656/1998 does not define the meaning of "fault". Greece explained that "if the employee in question acted on behalf of the entity upon a direct order or the implied consent of the constitutional organs of the legal person, then, under Articles 334 and 922 of the Civil Code, the legal person is also held liable for the fault of the natural person as well" (response to the Phase 2 Questionnaire, p. 14). During the on-site visit, law enforcement representatives and one prosecutor added that "fault" likely encompasses both intentional acts and omissions. One academic stated that a legal person likely will not be liable for an offence committed by a natural person (the principal offender) because of "loose management structures" within the legal person.

---

[42] In Phase 1, this was translated as "the fault of senior management" (underlining added).

163. The lead examiners are concerned that the element of "fault of managers" imposes an overly onerous threshold for liability. The concept requires proof that the principal offender acted "upon a direct order or the implied consent of the constitutional organs of the legal person". At a minimum, this may require proof that the constitutional organ of a legal person knew of or was wilfully blind to the acts of the principal offender. Inadequate supervision by the organ may not suffice. In a multinational corporation, it is unlikely that a board of directors would be aware of the detailed activities of an overseas sales office that may deal with foreign public officials on a day-to-day basis.

164. The lead examiners are further concerned that sanctions are triggered only by the acts of an unduly small set of persons associated with a legal person. Liability only arises upon the fault of the constitutional organs of a legal person, such as a board of directors. Thus, blameworthy acts of officers, managers and employees will not attract liability for the legal person. In reality, these are often persons who commit or authorise bribery.

Commentary

The lead examiners recommend that Greece ensure that liability of legal persons for foreign bribery is effective, particularly regarding (i) the threshold for imposing liability, and (ii) the categories of persons whose acts may trigger the liability of a legal person.

(c) Jurisdiction

165. Law 2656/1998 does not specify the circumstances under which there will be jurisdiction to proceed against a legal person for foreign bribery. Greece stated that such jurisdiction is determined according to the "effective seat" theory. Greek laws apply to all legal persons which have a registered office or an "effective seat" in Greece. An effective seat is the place where a legal person carries out its management, unless otherwise provided in the deed of constitution or the articles of incorporation (Article 64, Civil Code and response to the Phase 2 Questionnaire, p. 14). Furthermore, the Greek authorities believe that there is a trend in which Greek courts tend to accept rather than reject jurisdiction.

166. The lead examiners have some concerns that a legal person operating in Greece could avoid the application of Greek law merely by designating its seat to be outside of Greece through its constitution or articles.[43] The jurisprudence on this point is apparently inconsistent.[44]

167. The lead examiners are further concerned that Law 2656/1998 may be unduly restrictive, in that it applies only to companies that carry out their management in Greece. Under this approach, the Law may

---

43 In Symeonides, S.C. (1993) "The General Principles of the Civil Law", *Introduction to Greek Law*, Kluwer and Sakkoulas, Deventer, p. 58, the author states that:

> The seat of the legal person is the place designated by the charter, or, in the absence of such designation, at the place where its central administration is located. While it is disputed whether a legal person may have multiple general seats, a "special seat" in addition to the general seat is clearly permissible [...]"

44 In Kozyris, P.J. (1993) "Conflict of Laws, Nationality, International Jurisdiction and Recognition and Enforcement of Judgments and Awards", *Introduction to Greek Law*, Kluwer and Sakkoulas, Deventer, p. 307, the author states that:

> Seat is only one and is located at the *situs* of management and, according to the majority view, it must be real and it will not suffice for it to be merely stated in the charter (see AP 1082/1990, Hell Dni 32 (1991) 794; 178/1991, Hell Dni 32 (1991) 1240; 711/1991, Hell Dni 33 (1992) 122; Piraeus Three-member District Court 1858/1990, E. Nautil. D. 1991. 20).

not apply to a legal person who has numerous sales or operation offices in Greece but whose management office is abroad.

168. According to the Greek authorities, Greek laws also apply to a foreign subsidiary whose parent company is located in Greece if there is "sufficient connection" between the subsidiary and its parent. What amounts to sufficient connection is not clear.

Commentary

The lead examiners are concerned that the effective seat theory may not provide a sufficiently broad jurisdictional base for imposing liability against legal persons for foreign bribery. They recommend that the Working Group monitor this issue as cases develop.

(d) Proceedings in Relation to Principal Offender

169. Article 5 of Law 2656/1998 contemplates proceedings against a legal person that are separate from those against the principal offender. Proceedings against legal persons are governed by the Administrative Code, not the Code of Penal Procedure. A public prosecutor is not involved in the process. Administrative sanctions against legal persons are not imposed by a court but by the SDOE after it conducts an investigation, although the decision of the SDOE can be appealed to the Council of State. According to the Greek authorities, "the outcomes of the two proceedings have no bearing on each other: the legal person may still be subject to an administrative fine, although the natural persons, who comprise the Board of Directors, may be found not guilty of the particular offence."

170. There are obvious advantages to this approach. Obstacles in proceedings against a principal (*e.g.* where the principal has absconded or died) will not impede proceedings against a legal person. Administrative procedures may be simpler and more expedient than criminal ones.

171. But there may also be drawbacks. This approach results in duplicate proceedings in two different forums, which requires additional resources. The prosecutor in the criminal proceedings against the principal may use a law enforcement agency other than the SDOE to investigate, which raises issues of co-ordination and information sharing between the SDOE and the other agency. Inconsistent verdicts against the principal and the legal person may raise questions about fairness. An academic at the on-site visit shared some of these concerns and called for joint proceedings for a principal offender and a legal person.

172. A further question is what will actually happen in practice. At the on-site visit, the SDOE stated that although Law 2656/1998 gives it competence to investigate foreign bribery, the government has not enacted by-laws or decrees to create an institutional framework to implement the Law. Consequently, in practice the SDOE would proceed against a legal person only upon the conviction of the principal. Whether SDOE will refuse to proceed even when such a conviction is impossible (*e.g.* the principal has died) remains to be seen.

Commentary

The lead examiners recommend that the Working Group monitor the effectiveness of the system of concurrent proceedings against the principal offender and a legal person in Greece. They also recommend that the Working Group monitor whether in practice proceedings against legal persons will be taken independently of proceedings against a principal offender, including whether conviction of the principal is a prerequisite.

(e) Investigative Issues

173. The Greek authorities confirmed that the same investigative tools may be used in investigations against legal and natural persons. The investigative powers of the SDOE derive from its enabling statute (Law 2343/1995). This statute makes no distinction between investigations of natural or legal persons.

3. False Accounting and Auditing

(a) Scope of the Offence

174. Article 8(1) of the Convention obliges Parties to prohibit the making of off-the-books accounts or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents for the purpose of bribing foreign public officials or of hiding such bribery.

175. Greece has implemented this provision through Article 3 of Law 2656/1998. Greek tax legislation (particularly Decree 186/1992) may also prohibit the same activities. Greece also asserts that Article 3 of Law 2656/1998 applies both to natural and legal persons.

Commentary

The lead examiners recommend that the Working Group monitor the application of the false accounting offence in Article 3 of Law 2656/1998 to legal persons, in order to determine whether Greece can effectively address accounting offences connected with the concealment of foreign bribery.

(b) Types of Sanctions

176. Article 3 of Law 2656/1998 provides for a maximum of three years imprisonment for false accounting for the purpose of hiding foreign bribery. There have been no prosecutions under this provision.

177. Tax statutes provide additional sanctions in certain circumstances. As noted in the Phase 1 review (at p. 13), activities described in Article 8(1) of the Convention and which result in loss of tax revenue for the Greek state are punishable by imprisonment of one to ten years. Filing false tax documents is also punishable by imprisonment of one to three months. Greece has provided statistics on such cases for 2001-2003, which show that extremely large amounts have been levied against enterprises.[45] Nevertheless, Greece did not provide the circumstances of these cases (*e.g.* whether these cases involve the activities described in Article 8(1) and, if so, the amounts involved). Furthermore, the Greek authorities stated that the amount of these levies could be altered upon appeal to the administrative courts.

178. Additional administrative sanctions are available. Representatives of Hellenic Capital Markets Commission (HCMC) stated that it may impose fines against natural and legal persons for false accounting which involve listed companies. In serious cases, the HCMC can suspend trading or revoke licences. In 2003, the HCMC imposed fines against 16 listed companies for failure to submit financial statements to the Commission and to disclose major events or daily transactions that affect share prices. Four listed

[45] From 2001-2003, SDOE investigated 1 450 cases involving use of fictitious and forged documents. It imposed sanctions in 965 cases. The maximum amount imposed was EUR 525 356 000.50. Levies of over EUR 1 million were imposed in 89 cases.

companies were fined for providing misleading information and delays in the publication of financial statements.[46] It is not clear whether these cases involved fraudulent accounting.

(c) Suspension of Sentences and Conversion of Sentences to Fines

179. The Greek Penal Code provides a system of converting sentences to fines which may drastically reduce the severity of a sentence. Conversion is mandatory for jail sentences of less than one year. It is discretionary for sentences between one and three years, taking into account whether the offender is a recidivist and whether incarceration is necessary to deter the offender. At a rate of EUR 4.40 to 59.00 per day, a three-year sentence may be converted to a fine of up to EUR 64 605.00 The fine may be reduced by one-third if the offender is unable to pay and the crime is not related to "avid profiteering". At the offender's request, the fine may be further converted to the performance of community service at a rate of two to six hours of service per day of imprisonment (Article 82, Penal Code).

180. In addition, jail sentences may be suspended. Suspension is mandatory for jail sentences of less than two years and discretionary for sentences between two and five years, having regard to factors such as the characteristics of the offender, the gravity of the crime and whether incarceration is needed to deter the offender. When suspending jail sentences of three to five years, a court will impose conditions on the offender, such as restrictions on the offender's movement and periodic reporting to the police (Articles 99-100A, Penal Code).

181. The Greek authorities did not provide statistics on the frequency of conversion and suspension of jail sentences. A study published in 1999 stated that only 3% of the custodial sentences are served in prisons.[47]

(d) Sufficiency of Sanctions

182. The lead examiners are concerned that sanctions for false accounting provided in Law 2656/1998 may not be effective, proportionate and dissuasive in view of the conversion and suspension of sentences. The limited statistical information available suggests that the majority of sentences for false accounting will be suspended or converted to a fine of no more than EUR 64 605. Fines at this level amount to no more than the cost of doing business. Conversion to community service and suspension of sentences worsen these concerns.

183. The sanctions under tax statutes and those imposed by regulatory bodies (such as the HCMC) do not eliminate these concerns. These sanctions do not necessarily apply to all of the activities described in Article 8(1) of the Convention, but only when those activities amount to additional offences (*e.g.* tax evasion). Furthermore, in the absence of more detailed statistics, the lead examiners are unable to conclude that these sanctions are effective, proportionate and dissuasive.

Commentary

The lead examiners recommend that Greece ensure that the penalties for false accounting in practice are effective, proportionate and dissuasive. They also recommend that Greece compile statistics on the criminal, civil and administrative sanctions that are imposed for false accounting.

---

46 See also HCMC (2003), *2003 Annual Report*, HCMC, Athens, p. 119.

47 Spinellis, D. and Spinellis, C.D. (1999), *Criminal Justice Systems in Europe and North America – Greece*, Heuni, Helsinki, pp. 37, 53 and 55.

E. SANCTIONS FOR BRIBERY OF A FOREIGN PUBLIC OFFICIAL

1. Sanctions against Natural Persons

(a) Generally

184. Bribery of domestic and foreign public officials is punishable in Greece by imprisonment of one to five years.[48] Fines are available.[49] The sanctions available for domestic active bribery are identical. Judges have discretion in determining the length of a sentence within this range, taking into account factors such as the gravity of the offence and the personal characteristics of the offender (Article 79, Penal Code).

185. These sanctions may be *prima facie* adequate but for the system of suspending sentences and converting sentences to fines, which results in a large number of jail sentences to be served out of custody (see Section D.3(c)). At the on-site visit, a judge stated that sentences for domestic bribery generally start at three years imprisonment and thus may not be eligible for conversion to fines or community service. A prosecutor opined that the range is usually two to five years. Greece did not provide statistics on the actual sanctions that have been imposed for domestic bribery.

186. The lead examiners are concerned that sanctions for foreign bribery in Greece may not be effective, proportionate and dissuasive. A sentence for foreign bribery may fall below three years and hence be eligible for conversion to a fine or community service. All sentences for foreign bribery are also eligible for suspension.

Commentary

The lead examiners recommend that Greece ensure that sanctions against natural persons for foreign bribery are effective, proportionate and dissuasive, in view of Greece's system for converting jail sentences. They also recommend that Greece compile statistics on the sanctions (including confiscation) for domestic and foreign bribery, including suspensions and conversions of sentences. Finally, they recommend that the Working Group monitor the level of sanctions imposed based on statistics provided by Greece.

(b) Confiscation

187. During the Phase 1 review, the Working Group noted that Article 2(2) of Law 2656/1998 provides for confiscation of "gifts offered or their value" but not "other undue advantages" or the proceeds of bribery. As noted earlier, Greece has since amended Article 2(2) to expressly provide for confiscation of the proceeds of bribery.

188. The concern over confiscation of "other undue advantages" remains. During Phase 1, Greece stated that this deficiency is remedied by Article 76(1) of the Penal Code, which expressly permits confiscation of "undue advantages". Greece believed that Article 76(1) applies to Law 2656/1998 by reason of Article 12 of the Penal Code, which applies the general provisions of the Code to a special law (such as Law 2656/1998) unless a conflict results. Nonetheless, the Working Group doubted this conclusion since there may indeed be such a conflict in this case. By expressly covering confiscation of

---

48 Law 2656/1998 does not specify a maximum term of imprisonment. However, since foreign bribery is a misdemeanour, Article 53 of the Penal Code states that the maximum term is five years.

49 During the Phase 1 review (p. 7), Greece stated that fines were not available for domestic and foreign bribery. During the Phase 2 examination, Greece stated that its earlier position was incorrect. Fines are available under Article 81 of the Penal Code.

only gifts and proceeds, it is arguable that the legislature had intended to exclude other types of property (*e.g.* undue advantages) from Article 2(2).

189. The lead examiners further note that Greece may have weakened its position by amending Law 2656/1998 to include confiscation of proceeds of bribery. Article 76(1) also covers confiscation of proceeds. Greek courts may therefore take the legislature's decision to add confiscation of proceeds to Law 2656/1998 as an admission that Article 76(1) does not apply to the foreign bribery offence.

Commentary

The lead examiners recommend that Greece amend Law 2656/1998 to expressly allow for the confiscation of "other undue advantages".

2. Sanctions against Legal Persons

190. Law 2656/1998 imposes an administrative fine of up to three times the value of the "benefit" against legal persons who are responsible for foreign bribery. The Law does not define how "benefit" is determined, nor have the Greek authorities issued guidelines for this purpose. During the on-site visit, the Greek authorities stated that a court will likely equate "benefit" with the value of the contract obtained by the briber. The SDOE added that a similar provision exists for fraud. In a recent case in which a legal person fraudulently obtained state aid for investment, the Greek authorities imposed an administrative fine based on the size of the subsidy and tax benefits that accrued to the legal person.

191. Law 2656/1998 also provides for temporary or permanent bans on engaging in business activities and entitlement to public benefits or aid (Article 5). The Law does not provide for confiscation of property against a legal person, although Greece takes the view that such confiscation is available under Article 76 of the Penal Code (Response to Phase 2 Questionnaire, p. 18).

192. The lead examiners were initially concerned that this system of sanctions may not be effective, proportionate and dissuasive. There may be cases in which a fine cannot be imposed because no contract is involved. For instance, a legal person may bribe not to obtain a contract but to obtain tax relief, subsidies or a permit to conduct business. A bribe may also be offered but not accepted, thus resulting in no contract. Even if a contract is involved, the value of the contract may not be an equitable basis for determining the fine, *e.g.* where a foreign public official sells an asset to a briber at a discount in return for a bribe. At the on-site visit, the Greek authorities candidly admitted that there may be shortcomings in the current system.

193. The situation is worsened because the lead examiners doubt whether confiscation under Article 76 of the Penal Code is available in foreign bribery cases against legal persons (see the preceding section). Bans on engaging in commercial activities and receiving public subsidies may ameliorate these concerns to an extent. But in the absence of case law, it is not known whether Greek courts will readily impose such bans in practice.

194. After the on-site visit, the Greek authorities provided a different interpretation of the law. According to this view, the value of a contract will be one (but not the sole) determinant of "benefit". This interpretation, if adopted by the courts, would greatly alleviate the concerns of the lead examiners.

Commentary

The lead examiners recommend that Greece compile statistics on the sanctions imposed against legal persons. They also recommend that the Working Group monitor whether sanctions imposed against legal persons for foreign bribery are effective, proportionate and

dissuasive, in view of Article 5 of Law 2656/1998 which imposes an administrative fine of up to three times the value of the benefit.

3. Administrative Sanctions

195. In addition to criminal sanctions, the Convention contemplates civil and administrative sanctions for foreign bribery. These may include temporary or permanent exclusion from entitlement to public benefits (such as export credit support or official development assistance) and disqualification from participation in public procurement (Article 3(4) and Commentary 24, Convention) and privatisation.

(a) Officially Supported Export Credits

196. The Export Credit Insurance Organisation (ECIO) has yet to impose sanctions for bribery, though in theory it may do so. According to a recent OECD survey, the ECIO may deny support if it has "suspicions" or "sufficient evidence" that bribery is involved in a transaction, or if it is aware of a legal judgment for bribery against an applicant.[50] When asked what amounts to "suspicions" and "sufficient evidence" of bribery, ECIO officials stated that these concepts are "very fluid" and likely require the commencement of a preliminary investigation by law enforcement authorities.

197. The ECIO has the authority to audit companies to determine whether funds obtained from the agency has been used for a bribe. Yet, it is unclear whether and when the ECIO would exercise the power to audit. Indeed the agency has never done so.

198. The ECIO states that its clients have not reported being solicited for bribes by foreign public officials. Nevertheless, the ECIO has not inquired with its clients whether they have been solicited (*e.g.* through an anonymous questionnaire), although it believes that it would be a good idea to do so.

199. Although the ECIO may impose administrative sanctions against companies which engage in foreign bribery in theory, the lead examiners are concerned this may not occur in practice. The ECIO has provided no guidelines to its staff on what amounts to "suspicions" or "sufficient evidence" of bribery which would trigger sanctions. It also has provided no training to its staff on how to detect such "suspicions" or to gather "sufficient evidence". It is not clear whether the ECIO has instructed its staff to check for outstanding investigations or convictions against a client before and after approving support.

---

50 The ECIO has adopted the following practice. Prior to the approval of support, if ECIO suspects bribery is involved in the transaction, it will withhold support for the transaction and seek further clarification from the exporter. If ECIO has sufficient evidence of bribery, it is required to inform law enforcement authorities, and it will withhold support and deny access to official support for all business. Finally, if ECIO is aware of a legal judgment of bribery against the applicant, it will withhold support and deny access to official support for all business.

After the approval of support, if ECIO suspects bribery is involved in the transaction, no action is taken. If ECIO has sufficient evidence of bribery, ECIO is required to inform law enforcement authorities. Cover is invalidated and it will deny any claims for indemnification. If ECIO is aware of a legal judgment of bribery against the applicant, cover is invalidated and it will deny any claims for indemnification (OECD Working Party on Export Credits and Credit Guarantees (2004), *Responses to the 2002 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – As of 14 May 2004*, OECD, Paris, TD/ECG(2004)9).

The lead examiners believe that it may be useful for the ECIO to provide its staff with a copy of the OECD Best Practices to Deter and Combat Bribery in Officially Supported Export Credits.[51]

200. The lead examiners are encouraged by the ECIO's policy to impose administrative sanctions against clients who engage in bribery. This policy could be made more effective if the ECIO considers providing guidelines to their staff on what evidence is necessary to trigger administrative sanctions. It could also be useful to train ECIO staff on how to gather such evidence. The ECIO may also consider instructing their staff to verify whether an applicant is being investigated for or has been convicted of bribery before and after benefits are provided.

(b) Official Development Assistance

201. As noted earlier, the International Development Co-operation Department within the Ministry of Foreign Affairs (commonly known as Hellenic Aid) is responsible for administering official development assistance. Greece has provided no information on what actions are taken, if any, when a party to a transaction funded by Hellenic Aid engages or has engaged in foreign bribery.

202. Hellenic Aid stated that "consular authorities and the technical services of the Ministry of Foreign Affairs [closely supervise the contracts that it funds]. An external audit is required in all cases and carefully implemented." Hellenic Aid has not provided information on whether it trains its officials in identifying transactions that may involve foreign bribery.

(c) Public Procurement

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

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

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

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

207. The lead examiners are concerned that some legal persons who have been convicted of foreign bribery may nevertheless be able to avoid these sanctions. A legal person who participates in public procurement is only required to demonstrate that it has not been banned previously. Thus, a legal person

---

51 Working Party on Export Credits and Credit Guarantees (14 October 2004), *Bribery and Official Supported Export Credits: Best Practices to Deter and Combat Bribery in Officially Supported Export Credits*, OECD (Paris), TD/ECG(2004)14.

who has been fined administratively under Law 2656/1998 for foreign bribery but not banned from the procurement process may escape detection. As well, in the absence of statistics on the sanctions that have been imposed, the lead examiners are unable to evaluate the effectiveness of the system.

(d) Privatisation

208. In Greece, an Inter-Ministerial Privatisation Committee (IPC) makes decisions on privatisation of government entities and assets. The IPC will ban a natural or legal person who has a prior conviction for bribery from participating in the privatisation process. The ban applies to an entire legal person (including subsidiaries) and privatisation of all entities. The onus is on a participant to demonstrate that he/she does not have such a prior conviction. Greece did not provide statistics on whether such sanctions have been previously imposed.

F. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

209. Based its findings on Greece's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Greece and (2) will follow up certain issues as cases emerge.

1. Recommendations

Recommendations concerning Detection and Prevention of Foreign Bribery

210. With respect to raising awareness of the Convention, the Revised Recommendation and Law 2656/1998, the Working Group recommends that:

(a) Greece take measures to further raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it, and undertake effective public awareness activities for the purpose of educating and advising the private sector on the offence (Revised Recommendation I);

(b) Greece further raise awareness of these instruments within the public sector, particularly in the Ministries of Finance and Economy, Justice, and the Interior, Public Administration and Decentralisation, the Hellenic Capital Markets Commission, the Export Credit Insurance Organisation, Hellenic Aid and among tax officials (Revised Recommendation I);

(c) Greece work proactively with the accounting, auditing and legal professions to establish training and awareness-raising activities about the foreign bribery offence in order to maximise the opportunities for prevention and deterrence within the business community (Revised Recommendation I);

(d) the Export Credit Insurance Organisation, Hellenic Aid and the Hellenic Capital Markets Commission make greater efforts to promote these instruments and the consequences of engaging in bribery to their clients and prospective clients (Revised Recommendation I);

(e) Greece issue guidance to foreign representations and embassy personnel concerning the steps that should be taken where non-frivolous allegations arise that a Greek company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Greece (Revised Recommendation I).

211. With respect to measures to disallow the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that Greece consider introducing an express denial of deductibility in order to strengthen the mechanisms available for detecting and deterring the offence (Revised Recommendations IV).

212. With respect to prevention and detection of foreign bribery through accounting and auditing, the Working Group recommends that Greece devise guidelines on reporting foreign bribery and false accounting for accountants and auditors, and require external auditors to report indications of bribery to corporate monitoring bodies (such as the Hellenic Capital Markets Commission) as appropriate (Revised Recommendations V.B.iii and V.B.iv).

213. Concerning other measures to prevent and detect foreign bribery, the Working Group recommends that Greece undertake initiatives to (i) remind employees of their legal obligation to report crimes, and (ii) consider introducing specific measures to further protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution (Convention, Article 5; Revised Recommendation I).

Recommendations Pertaining Investigation of Foreign Bribery

214. With respect to investigation of foreign bribery, the Working Group recommends that Greece:

(a) establish procedures for co-ordination, sharing information and resolving conflicts of competence between the Internal Affairs Division of the Hellenic Police and the Special Investigations Service, and consider assigning the competence for investigating domestic and foreign bribery to a single law enforcement agency, and provide further training on the practical aspects of foreign bribery investigations to members of the relevant law enforcement agencies (Revised Recommendation I);

(b) ensure that the National School of Judicature continue its training programmes on foreign bribery for prosecutors and judges, including new recruits (Revised Recommendation I).

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery

215. With respect to the prosecution of foreign bribery, the Working Group recommends that Greece:

(a) eliminate the requirement of a complaint from the government of the country in which the crime was committed before asserting nationality jurisdiction to prosecute foreign bribery (Convention Article 4(2));

(b) amend its legislation to exclude the application of Article 30(2) of the Code of Penal Procedure (which exempts "political offences" and "offences through which the international relations of the state may be disturbed" from prosecution) from foreign bribery cases (Convention Article 5 and Commentary 27);

(c) ensure delays in proceedings do not result in the expiry of limitation periods in foreign bribery cases (Convention Article 6);

(d) ensure that liability of legal persons for foreign bribery is effective, particularly regarding (i) the threshold for imposing liability, and (ii) the categories of persons whose acts may trigger the liability of a legal person (Convention Article 2).

216. With respect to sanctions for foreign bribery, the Working Group recommends that Greece ensure that the amount of an administrative fine against a legal person does not depend solely on the value of a contract obtained by the briber (Convention Article 3(2)).

2. Follow-up by the Working Group

217. The Working Group will follow up the issues below as cases and practice develop in Greece:

(a) whether Law 2656/1998 covers the following situations (i) bribery of a foreign public official who uses his/her position in excess of his/her powers, and (ii) a briber who is the best-qualified bidder (Convention Article 1);

(b) the application of the defence of "effective regret" in Article 236 of the Penal Code in foreign bribery cases (Convention Article 1);

(c) whether the effective seat theory provides a sufficiently broad jurisdictional base for imposing liability against legal persons for foreign bribery (Convention Articles 2 and 4);

(d) effectiveness of the system of concurrent proceedings against the principal offender and a legal person in Greece, and whether in practice proceedings against legal persons will be taken independently of proceedings against a principal offender, including whether conviction of the principal is a prerequisite (Convention Article 2);

(e) sanctions imposed against natural persons (including confiscation) for foreign bribery based on statistics provided by Greece (Convention Article 3);

(f) whether sanctions imposed against legal persons for foreign bribery are effective, proportionate and dissuasive, in view of Article 5 of Law 2656/1998 which imposes an administrative fine of up to three times the value of the benefit (Convention 3(2)).

ANNEX 1
List of Participants in the On-Site Visit

Lead Examiners from the Republic of Ireland

- Mr. Eugene Gallagher, Detective Superintendent, Garda Bureau of Fraud Investigation
- Mr. Henry Matthews, Professional Officer, Office of the Director of Public Prosecutions

Lead Examiners from Portugal

- Ms Susana Cortes, Legal Adviser, Bank of Portugal
- Mrs. Maria José Fernandes, Deputy Attorney, Ministry of Justice

The OECD Secretariat

- Mr. Patrick Moulette, Head, Anti-Corruption Division
- Mr. Silvio Bonfigli, Principal Administrator, Anti-Corruption Division
- Mrs. Catherine Yannaca-Small, Advisor on International Investment Law, Committee on International Investment and Multinational Enterprises
- Mr. William Loo, Administrator, Anti-Corruption Division

Ministries and Bodies of the Greek Government

- Ministry of Justice, including:
  - Department of Special Criminal Cases and International Judicial Co-operation in Criminal Cases
  - General Division of Legislative Co-ordination and of Special International Legal Relations
- Ministry of Economy & Finance, including:
  - Body for the Prosecution of Economic Crime (SDOE) in Athens and Central Macedonia
  - Accounting and Auditing Oversight Board (ELTE)
  - Department of International Organisations and Policies
  - Division of Data
  - General Division of Customs and Excise
  - General Division of Economic Inspection
  - General Division of Planning and Management
  - Special Secretariat of Privatisation
  - Tax Official, Division of International Economic Relations
  - Tax Department, Division of Inspection
- Ministry of Foreign Affairs, including the Department of International Development Co-operation
- Bank of Greece
- Committee of Article 7 of Law 2331/1995
- Court of Audit
- Export Credit Insurance Organisation (ECIO)
- General Inspector for Public Administration
- The Greek judiciary
- Hellenic Capital Market Commission (HCMC)
- Hellenic Parliament
- Ministry of Development, including:
  - Cadre of Civil Service, Management of Policy of Supplies
  - General Secretariat of Commerce
- Ministry of Environment, Planning and Public Projects
- Ministry of Public Order, including:
  - Hellenic Police Headquarters, Division of Public Security
  - Hellenic Police Headquarters, Division of Internal Affairs
  - Sub-Division of Internal Affairs in Thessaloniki

- Ministry of Interior, Public Administration and Decentralisation, including the Inspectors-Controllers Body for Public Administration
- National School of Judges
- The Ombudsman
- Police Academy
- Public Prosecutor's Office:
  - *Areios Pagos* in Athens - Inspection Department
  - Court of First Instance in Athens
  - Court of First Instance in Thessaloniki

Civil Society

- Athens Journalists Association
- Movement for the Citizens
- Network for Corporate Social Government
- Transparency International-Greece

Private Sector

- Academics and practitioners in criminal, constitutional, corporate and international law
- Associated Certified Public Accountants SOL S.A.
- Association of Business Consultants for Small and Medium Enterprises in Greece
- Association of Greek Criminal Lawyers
- Federation of Hellenic Industries (SEV)
- Athens Bar Association
- Athens Stock Exchange S.A.
- Bar Association of Thessaloniki
- Exporter Association of Northern Greece (SEVE)
- Federation of Industries of Northern Greece
- Greek General Confederation of Labour (GESEE)
- Greek Institute of Certified Public Accountants (SOEL)
- Hellenic Banking Association
- Hellenic Chamber of Commerce & Industry
- Hellenic Chamber of Shipping
- Hellenic Foreign Trade Board (HEPO)
- Hellenic Organisation of Small and Medium Enterprises and Handicraft (EOMMEX)
- Interbalkan and Black Sea Business Centre (DIPEK)
- Ombudsman for the Capital Market
- Panhellenic Exporters Association
- Union of Civil Servants (ADEDY)
- Alpha Bank
- Bank of Piraeus
- Ceres Hellenic Shipping
- Coca Cola Hellenic Bottling Co. S.A.
- DEH
- Delta Holding S.A.
- EFG Eurobank Ergasias SA
- Egnatia Bank
- Emporiki Bank
- Hellenic Petroleum S.A.
- Intracom S.A.
- Latsis Group
- Michaniki S.A.
- National Bank of Greece
- OTE
- Sarantopoulos S.A.
- Stelmar Tankers (Management) Ltd.
- Titan Group
- Tsakos Energy Navigation Ltd.
- Vodafone Panafone

ANNEX 2
Excerpts from Relevant Legislation
(Unofficial Translations Provided by the Greek Authorities)

Law 2656/1998

Article 1
The OECD Convention on combating bribery of foreign public officials in international business transactions, signed in Paris on 17 December 1997, is hereby ratified and enacted in accordance with the provisions of article 28, paragraph 1 of the Constitution. The authentic text of the Convention in English and its translation in Greek are as follows:

[...]

Article 2 - The Offence of Bribery of Foreign Public Officials
1. Any person who, in the exercise of international business activities and with the intent of obtaining or retaining an unfair business or other advantage of pecuniary or any other nature that is not due, offers, promises or gives directly or through third parties, a bribe or other advantages that are not due, to a foreign public official, within the meaning of the OECD convention that is ratified with the first article of the present law, for the official or a third party, in order that the official perform an act or omission related to his service or contrary to his duties, is punishable with imprisonment of at least one year.

2. The bribes that were given or their value, as well as the proceeds of the crime, which are stipulated in the previous paragraph, or their value, are appropriated.

Article 3 - Abetting or Concealment of Commission of Bribing of Foreign Public Officials
Any person who abets or, in order to conceal the commission of the act provided in article two:
1. Maintains off-the-books accounts.
2. Carries out off-the-books transactions or transactions inadequately identified in the books of his business.
3. Records nonexistent expenditures or incorrectly determines their subject-matter, or
4. Uses documents of false content,

is punishable with imprisonment of up to three years, provided that such act is not subject to heavier punishment in accordance with another provision of law.

Article 4 - Jurisdiction of SDOE
The carrying out of searches and preparatory investigations related to the punishable acts of the present law are submitted to the jurisdiction of the Body for the Prosecution of Economic Crime (SDOE).

Article 5 - Administrative Sanctions
If any legal entity or undertaking has benefited in any way from punishable acts of the present law by fault of its managers, one of the following administrative sanctions will be imposed thereon by decision of the director of the competent regional directorate of SDOE (article 5 of presidential decree 218/1996, Government Gazette issue A 168):
1. Administrative fine up to three times the value of the benefit, or
2. Temporary or definitive prohibition of exercise of its business activity, or
3. Temporary or definitive exclusion from public benefits or aid.

Article 6 - Laundering of Proceeds

1. Points xvii), xviii) and xix), added by virtue of paragraph 1 of article 6 of law 2515/1997 (Government Gazette issue A 154) in article 1 point (a) of law 2331/1995 (Government Gazette issue 173 A) are hereby enlisted as follows: xviii), xix), xx).

2. Following the abovementioned section xx) of law 2331/1995, section xxi) is added as follows: "xxi) The crime provided and punishable by the provisions of article 3 of the present law on combating bribery of foreign public officials in international business transactions."

Article 7 - Competent Authority

For the purposes of articles 4 paragraph 3, 9 and 10 of the Convention, the Minister of Justice acts as the Competent Authority.

Article 8

The present law enters into force as of its publication in the Government Gazette; the Convention hereby ratified enters into force in accordance with the provisions of the conditions of article 15 thereof.

Constitution of Greece

Article 28(1)

The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

Article 86

1. Only the Parliament is competent to press charges against those who are or were members of the Government or Deputy Ministers for criminal offences committed by them during discharging their duties, as stipulated by the law. The establishment of special ministerial offences is forbidden.

2. Pressing of charges, examination, preliminary examination, preliminary investigation against the persons and for the offences as mentioned in paragraph 1, shall not be carried out without the previous resolution by the Parliament in accordance with paragraph 3.

   If, within the framework of another examination, preliminary examination, preliminary investigation or administrative investigation, evidence arises, which relates to persons or offences as stipulated by the previous paragraph, the same shall be promptly forwarded to the Parliament by the person who conducts the examination, preliminary examination or investigation.

3. A motion for the pressing of charges shall be filed by at least thirty members of the Parliament. The Parliament, by its resolution passed by the absolute majority of all its members, shall form a special parliamentary committee to conduct a preliminary investigation, otherwise the motion shall be rejected as obviously unfounded. The findings report of the committee mentioned in the previous subparagraph shall be brought before the Plenary Session of the Parliament, which shall decide whether to press charges or not. The relevant resolution shall be passed by the absolute majority of all the members of the Parliament.

ANNEX 3
Conventions and Treaties on Mutual Legal Assistance and Extradition to Which Greece Is a Party

1. Mutual Legal Assistance

(a) Bilateral Treaties

Party	Law	Official Gazette	Party	Law	Official Gazette
Albania	L.2311/1995	119 A΄	Lebanon	L.1099/1980	87A΄
Australia	Not Ratified		Morocco	Not Ratified	
Bulgaria	L.841/78	228 A΄	Romania	L.D.429/1974	178 A΄
Canada	L.2746/1999	225 A΄	Syria	L.1450/1984	87A΄
China	L.2358/1995	239A΄	Tunisia	L.2312/1994	120A΄
Cyprus	L.1548/1985	95A΄	U.S.A.	L.2804/2000	49 A΄
Egypt	L.1769/1988	53A΄	USSR	L.D.1242/1982	44A΄
Georgia	L.2813/2000	68 A΄	Yugoslavia	L.D. 4009/1959	238 A΄

(b) European Convention on Judicial Assistance (L.D. 4218/1961)

State	Execution	Ratification	In Effect	State	Execution	Ratification	In Effect
Albania	19/5/1998	4/4/2000	3/2/2000	Latvia	30/10/1996	2/6/1997	31/8/1997
Andorra				Liechtenstein		28/10/1969	26/1/1970
Armenia	11/5/2001	25/1/2002	25/4/2002	Lithuania	9/11/1994	17/4/1997	16/7/1997
Austria	20/4/1959	2/10/1968	31/12/1968	Luxembourg	20/4/1959	18/11/1976	16/2/1977
Azerbaijan	7/11/2001			Malta	6/9/1993	3/3/1994	1/6/1994
Belgium	20/4/1959	13/8/1975	11/11/1975	Moldova	2/5/1996	4/2/1998	5/5/1998
Bulgaria	30/9/1993	17/6/1994	15/9/1994	Netherlands	21/1/1965	14/2/1969	15/5/1969
Croatia	7/5/1999	7/5/1999	5/8/1999	Norway	21/4/1961	14/3/1962	12/6/1962
Cyprus	27/3/1996	24/2/2000	24/5/2000	Poland	9/5/1994	19/3/1996	17/6/1996
Czech Republic	13/2/1992	15/4/1992	1/1/1993	Portugal	10/5/1979	27/9/1994	26/12/1994
Denmark	20/4/1959	13/9/1962	12/12/1962	Romania	30/6/1995	17/3/1999	15/6/1999
Estonia	4/11/1993	28/4/1997	27/7/1997	Russia	7/11/1996	10/12/1999	9/3/2000
Finland		29/1/1981	19/4/1981	San Marino	29/9/2000		
France	28/4/1961	23/5/1967	21/8/1967	Slovakia	13/2/1992	15/4/1992	1/1/1993
FYROM	28/7/1999	28/7/1999	26/10/1999	Slovenia	26/2/1999	19/7/2001	17/10/2001
Georgia	27/4/1999	13/10/1999	11/1/2000	Spain	24/7/1979	18/8/1982	16/11/1982
Germany	20/4/1959	2/10/1976	1/1/1977	Sweden	20/4/1959	1/2/1968	1/5/1968

State	Execution	Ratification	In Effect	State	Execution	Ratification	In Effect
Greece	20/4/1959	23/2/1962	12/6/1962	Switzerland	29/11/1965	20/12/1966	20/3/1967
Hungary	19/11/1991	13/7/1993	11/10/1993	Turkey	23/10/1959	24/6/1969	22/9/1969
Iceland	27/9/1982	20/6/1984	18/9/1984	Ukraine	29/5/1997	11/3/1998	9/6/1998
Ireland	15/10/1996	28/11/1996	26/2/1997	United Kingdom	21/6/1991	29/8/1991	27/11/1991
Israel		27/9/1967	26/12/1967	Yugoslavia		30/9/1992	29/12/2002
Italy	20/4/1959	23/8/1961	12/6/1962				

2. Extradition

(a) Bilateral Treaties

State	Law	State	Law
Australia	L.1928/91	Syria	L.1450/84
Canada	3008/2002	Tunisia	L.2312/1994
Egypt	L.1689/87	USA	L.5554/1932
Former UK Colonies (L.& L.D Africa, N.Zealand, Samoa Islands, India, Kenya, Fiji, Malawi)	L.D. 4031	USSR	L.1242/82
Georgia	2813/2000	Yugoslavia	L.D.4009/1959
Lebanon	L.1099/1980		

(b) European Convention on Extradition (L. 4165/1961)

State	Execution	Ratification	In Effect	State	Execution	Ratification	In Effect
Albania	19/5/1998	19/5/1998	17/8/1998	Latvia	30/10/1996	2/5/1997	31/7/1997
Andorra	11/5/2000	13/10/2000	11/1/2002	Liechtenstein		28/10/1969	26/1/1970
Armenia	11/5/2001	25/1/2002	25/4/2002	Lithuania	9/11/1994	20/6/1995	18/9/1995
Austria	13/12/1957	21/5/1969	19/8/1969	Luxembourg	13/12/1957	18/11/1976	16/2/1977
Azerbaijan	7/11/2001	28/6/2002	26/9/2002	Malta	19/3/1996	19/3/1996	17/6/1996
Belgium	13/12/1957	29/8/1997	27/11/1997	Moldova	2/5/1996	2/10/1997	31/12/1997
Bulgaria	30/9/1993	17/6/1994	14/9/1994	Netherlands	21/1/1965	14/2/1969	15/5/1969
Croatia		25/1/1995	25/4/1995	Norway	13/12/1957	19/1/1960	18/4/1960
Cyprus	18/9/1970	22/1/1971	22/4/1971	Poland	19/2/1993	15/6/1993	13/9/1993
Czech Rep.	13/12/1992	15/4/1992	1/1/1993	Portugal	27/4/1977	25/1/1990	25/4/1990
Denmark	13/12/1957	13/9/1962	12/12/1962	Romania	30/6/1995	10/9/1997	9/12/1997
Estonia	4/11/1993	28/4/1997	27/7/1997	Russia	7/11/1996	10/12/1999	9/3/2000
Finland		12/5/1971	10/8/1971	San Marino	29/9/2000		
France	13/12/1957	10/2/1986	11/5/1986	Slovakia	13/2/1992	15/4/1992	1/1/1993
FYROM	28/7/1999	28/7/1999	26/10/1999	Slovenia	31/3/1994	16/2/1995	17/5/1995
Georgia	22/3/2000			South Africa			

State	Execution	Ratification	In Effect	State	Execution	Ratification	In Effect
Germany	13/12/1957	2/10/1976	1/1/1977	Spain	24/7/1979	7/5/1982	5/8/1982
Greece	13/12/1957	29/5/1961	27/8/1961	Sweden	13/12/1957	22/1/1959	18/4/1960
Hungary	19/11/1991	13/7/1993	11/10/1993	Switzerland	29/1/1965	20/12/1966	20/3/1967
Iceland	27/9/1982	20/6/1984	19/9/1984	Turkey	13/12/1957	7/1/1960	18/4/1960
Ireland	2/5/1966	2/5/1966	31/7/1966	Ukraine	29/5/1997	11/3/1998	9/6/1998
Israel		27/9/1967	26/12/1967	United Kingdom	21/12/1990	13/2/1991	14/5/1991
Italy	13/12/1957	6/8/1963	4/11/1963	Yugoslavia		30/9/2002	29/12/2002

OECD OCDE

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

PORTUGAL

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

MAY 2002

PORTUGAL

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Portugal signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD Secretary-General on 23 November 2000 . On June 4, 2001, it enacted implementing legislation in the form of the *Law no. 13/2001 of 4 June*, which entered into force on June 9, 2001.

Convention as a Whole

The Portuguese Criminal Code as well as the Law no. 34/87 of 16 July penalises offences of passive and active bribery of domestic public officials. However, since these offences are defined as offences against the state, and hence relate only to Portuguese public officials, it was necessary to create a new offence of bribery of a foreign public official. In order to meet the requirements of the Convention, Portugal enacted the *Law no. 13/2001 of 4 June*, which establishes the offence of "*active corruption against international business*" by adding article 41-A to the Decree Law no. 28/84 of 20 January. The implementing legislation also addresses necessary amendments as regards money laundering and jurisdiction. The Portuguese authorities state that the existing provisions in the Criminal Code and elsewhere in the law apply to other obligations under the Convention[1].

In addition, Portugal made an amendment to the Criminal Code and the Law no. 34/87 in the form of Law no. 108/2001[2], in order to extend the scope of domestic public officials to include certain foreign public officials, for the purpose of the existing domestic bribery offences thereunder. The impact of this law is discussed under 3.1/3.2 "Criminal Penalties for Bribery of a Domestic and Foreign Official the sanctions".

The preamble of the Decree Law no. 28/84 states that the offences therein constitute "secondary criminal legislation". However, the Portuguese authorities confirm that the Decree Law has the same legal effect as ordinary national law and is a sufficient legal source for the imposition of criminal sanctions.

Article 8.2 of the Constitution of the Portuguese Republic states that, "rules provided for in international conventions that have been duly ratified or approved, shall apply in national law, following their official publication, so long as they remain internationally binding with respect to the Portuguese State". Thus, the Convention became part of Portugal's national legal system by its ratification, upon publication as of 31 March 2000. Moreover, the Portuguese authorities state that the Convention takes precedence over national laws. However, according to the explanation given by the Portuguese authorities, the Convention is not directly applicable where the domestic legislation conflicts or is deficient with respect to a standard of the Convention, but could be an interpretative tool for the court. Additionally, the Portuguese

---

1. In addition, the Portuguese authorities state that legislative amendment procedures in respect of money laundering, bank secrecy and confiscation are now underway. According to them, the amendment would include reversing the burden of proof as to the legal origin of assets in respect of confiscation of goods for bribery, money laundering offences, etc.

2. Law no. 108/2001 entered into force on 1 January 2002.

authorities state that the Commentaries on the Convention as well as the preparatory documents to the implementing legislation can be used for interpretative purposes by the courts.

In Portugal, the principle of *stare decisis* does not apply.

In addition, as mentioned above under "Formal Issues", the implementing legislation entered into force after the ratification of the Convention. The Portuguese authorities state that the Convention cannot be a legal basis for the investigation and prosecution of a foreign bribery offence or the application of the money laundering legislation in respect of an act of foreign bribery committed before the implementing legislation's entry into force, regardless if the Convention was published and in force in Portugal. The Portuguese authorities do not believe that this time lag would cause any problem in practice.

Portugal has two "autonomous regions": the Azores and Madeira. Portugal states that the Convention applies to both the Azores and Madeira, thus these regions are subject to the requirements of the Convention. Portugal further explains that all laws including decree laws that implement the requirements of the Convention (e.g. implementing legislation, Criminal Code, Decree Law no. 28/84, Code of Criminal Procedure, money laundering legislation, law lifting bank secrecy, laws relating to accounting and auditing standards, law on mutual legal assistance and extradition) apply to these regions.

Pursuant to the preamble of the Decree Law no. 28/84, its overall purpose appears to be to prevent and penalise offences against the national economy and public health. The Portuguese authorities state that the preamble carries interpretative weight in respect of the Decree Law. This raises the issue of whether bribery offences that do not also affect the domestic market would be prosecuted. Although the preamble of the Decree Law has not been amended, the Portuguese authorities state that this overall purpose of the Decree Law would "no longer" be a problem for prosecuting foreign bribery cases, since article 41-A clearly states that the offence applies to bribery in the conduct of "international business".

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

General Description of the Offence

Article 41-A of the Decree Law no. 28/84, which was added by the implementing legislation, sets out as follows:

Article 41-A "Active corruption against international business"

1. *Whoever either directly or through an intermediary with the consent or ratification of the former, gives or promises to give to a national or foreign public or political official or with their knowledge to a third party any undue pecuniary or intangible advantage, in order to obtain or retain business, a contract or other improper advantage in the conduct of international business, shall be punished with a prison sentence of one up to eight years.*
2. *For the purposes of the provisions laid down in the preceding paragraph, foreign public official means any person exercising a public function for a foreign country, whether that person holds a public office, in particular, an administrative or judicial office, whether appointed or elected, **or exercises** a function for an enterprise, a public organisation or a public services agency, from the national to local level, as well as any official or agent of a public international or supranational organisation.*
3. *For the purposes of the provisions laid down in paragraph 1, foreign political officials are those qualified as such by the law of the State for which they exercise such functions.*

Article 41-A establishes offences for active bribery of both domestic and foreign public officials related to international transactions. However, the review and analysis of the elements of the offence is restricted in

content to those covered by the Convention, and thus, the elements of domestic bribery under article 41-A are not discussed in this review.

The title "*Active corruption against international business*" appears above the offence in article 41-A. Since this title appears to indicate that the offence must be to the detriment of international business, there arises a question of whether the case would be prosecuted where there are no victims (i.e. competitor). However, the Portuguese authorities state that this title does not add any requirements to the offence and the absence of a victim would not constitute an obstacle to prosecution.

Article 1 of the Decree Law no. 28/84 states that, offences under the decree law, including the offence of bribery of a foreign public official shall be subject to the Criminal Code, the Code of Criminal Procedure and complementary legislation. Thus, general provisions in the Criminal Code and the Code of Criminal Procedure would apply in respect of the foreign bribery offence.

The Portuguese authorities state that only the general defences in the Criminal Code apply to the foreign bribery offence. As general defences, "mistake of fact", "mistake of law" or "necessity" may appear to be relevant to the foreign bribery offence. The Portuguese authorities confirm that these general defences could not be successfully invoked even where the defendant argues that his/her private lawyer wrongly advised him/her that the act (foreign bribery) would not constitute an offence, or that bribe was the only way possible to keep him/her in business.

1.1 The Elements of the Offence

1.1.1 any person

Article 41-A of the Decree Law no. 28/84 applies to "whoever" gives or promises a bribe to a foreign public official. The Portuguese authorities confirm that no category of natural person is excluded from this scope.

1.1.2 intentionally

Article 41-A does not expressly provide for the *mens rea* elements of the offence. The Portuguese authorities state that the foreign bribery offence under article 41-A is an "intentional offence" and thus requires the intent for a "direct", "necessary" or an "accidental" result of the offence, and does not cover the notion of negligence. They would appear to state that the result of the foreign bribery offence would be the offer, promise or gift.

1.1.3 to offer, promise, or give

Article 41-A only refers to a person who "gives" or "promises to give" a bribe and does not expressly cover a person who "offers" a bribe. The Portuguese authorities state that the Portuguese legal term "*der*", which is translated as "gives", includes the notion of "offering". They add that this is supported by jurisprudence in respect of the domestic bribery offence under the Criminal Code.

The Portuguese authorities confirm that article 41-A applies where the briber promises or gives a bribe in response to the solicitation by the foreign public official. However, such a situation could be a mitigating circumstance in determining the penalty.

1.1.4 any undue pecuniary or other advantage

Article 41-A applies to giving etc. of any "pecuniary or intangible advantage". The Portuguese authorities confirm that it covers all types of advantages, pecuniary and non-pecuniary, tangible and intangible, real and personal.

In addition, the Portuguese authorities state that the advantage must be "undue". The Portuguese authorities explain that "undue" advantage covers all advantages that cannot be justified by other purposes. They state that an anniversary gift would constitute a bribe as long as it is proved "undue".

The Portuguese authorities confirm that it is not possible to take into account any considerations such as 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, in accordance with Commentary 7. However, they state that regarding the "value" of the advantage, it would not constitute a bribe where the value of the bribe is so minor that it would not affect the public official's act/omission in any way.

Furthermore, the Portuguese authorities state that where the advantage is undue, a bribe would be committed even where the advantage is permitted or required by the written law of the public official's country.

1.1.5 whether directly or through intermediaries

Article 41-A applies where a person gives, etc. a bribe to a foreign public official, "directly or through an intermediary with the consent or ratification of the former". The term "consent" and "ratification" may appear to imply that the intermediary is aware of the bribery act. However, the Portuguese authorities state that bribing acts through intermediaries are covered by the offence irrespective of whether the intermediary is aware of the briber's intent.

Also, according to the Portuguese authorities, the condition of the briber's consent or ratification only requires that the briber be aware that the intermediary is bribing a foreign public official on the briber's behalf.

1.1.6 to a foreign public official

Article 41-A applies to bribes given, etc. to a (1) "foreign public official" and (2) "foreign political official", as well as to a domestic public official and domestic "political" official.

"Foreign Public Official"

Pursuant to paragraph 2 of article 41-A, the term "foreign public official" is defined as follows:

- any person holding a public office, in particular, those holding an administrative or judicial office for a foreign country, whether appointed or elected, from the national to local level;
- any person exercising a public function for an enterprise, a public organisation or a public services agency, for a foreign country, from the national to local level;
- any official or agent of a public international or supranational organisation.

The term "foreign public official" does not expressly cover a person holding a legislative office for a foreign country. However, the Portuguese authorities state that a foreign legislator would fall within the

scope of a "person holding a public office for a foreign country", and thus be considered as a "foreign public official" as long as he/she holds an office for which he/she has been appointed or elected. They further explain that the express reference to a person holding an "administrative or judicial office" in paragraph 2 is intended to indicate examples of persons holding a "public mandate" and does not exclude other categories of persons holding a public office for a foreign country including foreign legislators.

Furthermore, the term "public office", as well as other terms such as "foreign country", "public function", "public organisation", "public services agency" and "public international or supranational organisation" are not defined in the Portuguese implementing legislation. However, the Portuguese authorities are of the opinion that these term are clear enough in their meaning and do not need further definition. They also state that all categories of foreign public official enumerated in Article 1.4a of the Convention and Commentaries 12-18 would be covered under the term "foreign public official" as the Portuguese courts would refer to Article 1.4.a of the Convention and Commentaries 12-18 as the most important legal authorities for interpreting these terms .

Furthermore, Portugal states that the term "enterprise" does not include private enterprises but covers public enterprises directly and indirectly controlled by a foreign government(s), in conformity with Commentary 14.

"Foreign Political Official"

Under Portuguese law, Portuguese legislators are considered "political officials". However, the Portuguese authorities state that Portugal intends to cover a broader scope of foreign public officials by the term "foreign political official" (article 41-A, paragraph 3). They state that, for instance, a person holding a high position in a foreign political party could be covered thereby according to the law of the country. However, they further state that the court could interpret the term "foreign political official" to include a foreign legislator if a legislator is considered a political official in that country.

Paragraph 3 states that "foreign political officials are those qualified as such by the law of the State for which they exercise such functions". Thus, the definition of "foreign political official" is non-autonomous, in that it expressly refers to the definition in the law of the country of the foreign public official. However, the Portuguese authorities are of the opinion that the non-autonomous nature of the definition in paragraph 3 would not cause a problem since all the categories of foreign public officials enumerated in the Convention and Commentaries should be covered by paragraph 2 (i.e. "foreign public official"). Nevertheless, there remains concern that the provisions might be interpreted by the Portuguese courts as covering a foreign legislator only if defined as a "political official" by the law of the foreign public official. The Portuguese authorities do not share this concern.

1.1.7 for that official or for a third party

Article 41-A applies to giving, etc. of a bribe to a foreign public official "or with their knowledge to a third party". The Portuguese authorities state that the condition "with their knowledge" requires that where a third party beneficiary is involved, the foreign public official have "knowledge" that the benefit goes to the third party. However, they further state that this requirement is only necessary for punishing the public official concerned, and therefore, in order for the briber to be punished, it is not required that a foreign public official is aware of the fact that another person is the beneficiary of the bribe.

The Portuguese authorities confirm that article 41-A covers the case where the advantage goes directly to a third party. They also confirm that a "third party" includes natural and legal persons irrespective of the personal relationship between the party and the foreign public official.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Article 41-A does not expressly require the presence of an intention to obtain an act or omission of the official in return for the promise, etc.

Portugal states that the offence covers the case where it is either the foreign public official's act or omission that the briber intends to obtain.

Moreover, the Portuguese authorities state that the foreign public official's act/omission which the briber intends to induce could be an act/omission irrespective of whether it is within his/her authorised competence. Thus, it would appear to cover the case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office –though acting outside his/her competence-- to make another official award a contract to that company, in conformity with Commentary 19.

1.1.9 in order to obtain or retain business or other improper advantage

Article 41-A requires that the bribe be given, etc. to a foreign public official "in order to obtain or retain business, a contract or other improper advantage". Portugal confirms that article 41-A applies regardless if the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business, in accordance with Commentary 4.

The Portuguese authorities confirm that there are no exceptions for facilitation payments.

1.1.10 in the conduct of international business

Article 41-A applies to bribes given, etc. in order to obtain or retain an improper advantage, etc. "in the conduct of international business". The Portuguese authorities state that this includes the bribe given, etc. to obtain/retain a license/permit that would enable the briber to engage in international business, and an unfair tax break or a favourable foreign exchange rate.

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

Complicity in the bribery of a foreign public official is established as a criminal offence under the general provisions of the Criminal Code.

Article 26 states that "whoever executes a criminal act, directly or through an intermediary, or takes part directly in its execution, by agreement or in conjunction with one or more other persons, and anyone who intentionally induces another person to commit a crime, provided that the crime has been executed or begun, shall be deemed a principal to the crime." Article 27.1 states that "any person who, with criminal intent, in any manner aids or abets another person in the commission of a crime is punishable as an accomplice". The Portuguese authorities state that the notions of "incitement" and "authorisation" are covered by article 26 (i.e. "induces another person to commit a crime").

Pursuant to article 27.2, an accomplice is punishable by the same penalty as in respect of the full offence, however, "duly attenuated".

1.3 Attempt and Conspiracy

Article 1.2 of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic officials.

Attempt

The Portuguese authorities state that an attempt to bribe a domestic or foreign public official is punishable under article 22 of the Criminal Code[3]. Pursuant to paragraph 1 of article 22, an attempt is deemed to occur where a person takes "actions to execute a crime", but where the crime is not completed. Paragraph 2 states that:

Actions to execute a crime include:

a) Those that fulfil the conditions of a constituent element of a category of crime;
b) Those intended to produce the typical result; or
c) Those that, from common experience and in the absence of unforeseen circumstances, are such as to suggest that they will be followed by acts of the kind mentioned in the previous subparagraphs.

The Portuguese authorities state that "typical result" (paragraph 2.b) covers the act of offering, promising or giving the bribe in respect of the bribery offences. They state that acts which fulfil the condition under paragraph 2.c are all "executing" acts that can be committed in advance of constituent elements (paragraph 2.a) or "typical result" (paragraph 2.b), or that have direct links therewith.

The Portuguese authorities state that cases where (i) the foreign public official refuses an offer or gift, or (ii) where he/she does not become aware of the gift/offer, are covered as full offences.

An attempt is punishable by the same penalty as the full offence. However, where there are special mitigating circumstances (e.g. committed under threat), the maximum and minimum terms of imprisonment are reduced, by one third, and to 1 month, respectively.

Conspiracy

Conspiracy is not punishable under Portuguese law.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official".

---

3. In addition, article 4 of the Decree Law no. 28/84 states that an attempt to commit an offence under the decree law is always punishable.

2.1 Criminal responsibility

Article 3 of the Decree Law no. 28/84, which establishes criminal responsibility of legal persons for offences under the decree law including the bribery of a foreign public official, states as follows:

> *Article 3 Criminal liability of legal persons and similar*
>
> 1. *Legal persons, companies and de facto associations are liable for the offences laid down in this Decree-Law when they are committed by their governing bodies or representatives on their behalf and in the collective interest.*
>
> 2. *They are not liable if the offender has acted against express orders or instructions from authorised persons.*
>
> 3. *The liability of the entities mentioned in no.1 does not exclude the individual liability of the offenders and no.3 of article 2 is applicable, with the necessary adaptations.*

2.1.1 Legal Entities

Pursuant to article 3.1, entities subject to criminal liability are "legal persons, companies and de facto associations". The Portuguese authorities state that this covers all legal persons including corporations and unincorporated associations, and regardless if the entity has a legal personality. They also confirm that all state-owned and state-controlled legal persons are covered, as the law does not expressly exclude them. However, the Portuguese authorities state that there are no cases in respect of the offences under the same decree law that apply to state-owned or state-controlled legal persons[4].

2.1.2 Standard of Liability

Pursuant to article 3.1, in order for a legal person to be liable, the offence must be committed (i) by its "governing body" or its representative, and (ii) on its behalf and in the "collective interest". The Portuguese authorities state that, pursuant to the interpretation in the jurisprudence, article 3.1 covers a broader scope of persons than defined under commercial law, and includes any employee regardless of his/her position in the entity.

Identification of the natural person who committed the offence (i.e. "governing body" or "representative") is required in order to trigger the liability of legal persons. However, the Portuguese authorities confirm that a conviction of the natural person is not a prerequisite for the liability of the legal person.

The Portuguese authorities state that the condition of "on their behalf and in the collective interest" would be fulfilled even if the offence were committed only in part for the benefit of the legal person, or only for the benefit of the legal person's foreign subsidiary or foreign division.

However, if the offender acted "against expressed orders or instructions from authorised persons", the legal person is exempted from liability (article 3.2). The Portuguese authorities state that "authorised persons" are persons from the administrative body of the entity or persons having decision-making or control powers therein.

---

4. Portugal states that there are some cases applying criminal liability of legal persons for offences under the same decree law, which resulted in fines.

They state that this defence would not be successfully invoked where: (i) the statute or regulation of the company expressly prohibits an act of bribery or illegal acts; (ii) an "authorised person" expressly prohibited the act of bribery but failed to supervise the offender for preventing such an act; or (iii) the authorised person forbids bribery in general terms, but allowed the specific bribery transaction to occur.

Pursuant to article 3.3, liability of legal persons does not exclude the liability of natural persons who committed the offence.

In addition, the Portuguese authorities confirm that the principle of mandatory prosecution applies to legal persons.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute "effective, proportionate and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. Where a Party's domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are "subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions". The Convention also mandates that for a natural person, criminal penalties include the "deprivation of liberty" sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of "comparable effect" are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

Portuguese law already contained several offences of bribing domestic public officials under the Criminal Code and the Law no. 34/87 of 16 July before article 41-A was added to the Decree Law no. 28/84 for the purpose of implementing the Convention. As indicated earlier, this provision establishes new offences of bribing domestic and foreign public officials in the conduct of international transactions. Portugal confirms that, with respect of domestic bribery, all three laws (i.e. article 374 of the Criminal Code, article 18 of the Law no. 34/87 and article 41-A of the amended Decree Law no. 28/84) are applicable in the case of overlapping offences.

Penalties for Domestic Bribery under the Criminal Code and the Law no. 34/87 of 16 July

Pursuant to article 374 of the Criminal Code and article 18 of the Law no. 34/87 of 16 July amended by the Law no. 108/2001, a natural person is liable for active domestic bribery as follows[5]:

1. 6 months-5 years of imprisonment for bribing a public official (including a "political official") for obtaining an act/ omission which is contrary to his/her duties;

2. up to 6 months of imprisonment or a fine up to 60 days for bribing a public official (including a "political official") for obtaining an act/omission which is not contrary to his/her duties.

---

5. Penalties are as follows in consequence of the reverse application of the passive bribery offences (articles 372 and 373 of the Criminal Code and articles 16 and 17 of the Law no.34/87) to active bribery.

The minimum of imprisonment term/number of day-fines is provided in the general provisions of the Criminal Code as 1 month (article 41) and 10 days (article 47), respectively.

3. 2-8 years of imprisonment for bribing a "political official" for obtaining an act/omission which is contrary to his/her duties and where the briber is a "political official";

Fines in addition to imprisonment sentence are not available.

Fines under the Criminal Code and the Law no. 34/87 are calculated on the basis of a day-fine system. Under the general provision of the Criminal Code, which applies to the domestic bribery offences under the Criminal Code and the Law no. 34/87, the range of the daily amount of fine is PTE 200-100,000[6]. Consequently, the ranges of day-fines are, PTE 2,000-6,000,000 (approximately, 10-29,940 Euro) for the offence under article 374 of the Criminal Code and article 18 of the Law no. 34/87, where the act/omission of the public official is not contrary to his/her duties. The number of day-fines is determined on grounds such as the degree of culpability of the offender, circumstances of the offence, etc., and the daily amount of the fine is determined according to the financial situation of the offender (articles 47 and 71 of the Criminal Code).

Legal persons are not criminally liable for the domestic bribery offences under the Criminal Code and the Law no. 34/87. Also, there are no criminal accessory penalties applicable thereto.

Penalties for Domestic and Foreign Bribery under Article 41-A of the Decree Law no. 28/84

The penalties are identical for domestic and foreign bribery under article 41-A. Pursuant thereto, a natural person is liable for 1-8 years of imprisonment[7]. In addition, article 5 states that sentences of imprisonment may not be replaced by fines where the offence is committed under certain circumstances provided for in article 6. Thus, it appears that, for natural persons, in general, imprisonment sentences are imposed for the domestic and foreign bribery offences under article 41-A, but the courts have the discretion to impose a fine in lieu unless any of the circumstances enumerated in article 6 applies. Subject to the general provisions in the Criminal Code, the ranges of the daily amount and number of days of such fines (day-fines) are PTE 200-100,000 and 10-360 days, respectively. Thus, the range of the fine is PTE 2,000-36,000,000 (approximately, 10-161,640 Euro). Fines in addition to imprisonment sentence are not available.

Article 6 of the decree law provides for sentencing guidelines specific to offences under the decree law, including domestic and foreign bribery under article 41-A. Pursuant thereto, circumstances including the following shall be taken into "special consideration" in determining the penalty:

- the offence enabled the offender to obtain "excessive profits" or was committed with an intent to obtain them (paragraph g) ;
- the good or service involved in the offence represented the dominant part of the company's gross turnover in the previous year (paragraph h);

---

6. As of September 2001, 1,000 Portuguese Escudos (PTE) were valued at 4.42 U.S. dollars/4.49 Euro.

7. The imprisonment sanctions for financial offences such as robbery, embezzlement and extortion are comparable to the sanctions for the foreign bribery offence. In addition, Portugal states that sanctions under article 41-A of the Decree Law are higher than those of domestic bribery offences since the offence under the Decree Law harms not only the impartiality of the decision of the State, but also various interests such as economy .

– the offender favoured foreign interests to the detriment of the national economy (paragraph i).

The court's discretion to impose a fine in lieu in respect of the domestic and foreign bribery offences under article 41-A would appear to be broader than that in respect of the domestic bribery offence under the Criminal Code (i.e. a fine in lieu is available only where the purpose of the bribe is to obtain the public official's act/omission that does not constitute a breach of his/her duties).

In addition, since "special consideration" is given where the national economy is affected, this raises the question of whether the penalties for foreign bribery cases that only affect foreign markets or that are committed by Portuguese companies harming foreign competitors might not result in sufficiently effective, proportionate and dissuasive penalties. The Portuguese authorities state that the circumstance under paragraph i does not apply to article 41-A, although the law does not expressly exclude its application to the foreign bribery offence. They further state that since non-existence of circumstances under article 6 does not reduce the range of penalties (other than the exclusion of possibility of a fine in lieu), the penalties for foreign bribery cases will be sufficiently effective, proportionate and dissuasive.

Pursuant to article 7.1 of the decree law, penalties (i.e. principal penalty) for legal persons for the domestic and foreign bribery offences under article 41-A are: (1) "reprimand", (2) fine, and (3) dissolution.

Fines for legal persons are calculated on the basis of a day-fine system. Pursuant to article 7.4, the court shall fix the daily amount of fine between PTE 1,000-1,000,000 . According to the Portuguese authorities, the range of the number of day fines is identical to that of the applicable imprisonment term for the offence, namely, 1-8 years (i.e. 365-2,920 days) for the domestic and foreign bribery offences under article 41-A. Consequently, the range of the fine is PTE 365,000-2,920,000,000 (approximately, 1639-13,110,800 Euro).

The daily amount of day fines is determined on the basis of the economic and financial situation of the legal person and the number of day fines is determined by factors such as the degree of culpability of the offender and circumstances of the offence. Additionally, the Portuguese authorities state that the court would sanction a legal person with a "reprimand" in accordance with the guidelines under general provisions in the Criminal Code, if such a penalty is sufficient for the purpose of preventing the perpetrator's further commission of the offence.

Pursuant to article 7.6, dissolution shall be imposed on legal persons only if: (i) the founders of the entity had an "exclusive or predominant intention" to use the entity to commit the offence; or (ii) the repeated commission of the offence shows that the member or the management uses the entity for the purpose of committing the offence.

Furthermore, with respect to natural and legal persons, several criminal accessory penalties under article 8 may be imposed, including confiscation, temporary prohibition from exercising certain activities/ professions[8], temporary disqualification from bidding in public tenders, disqualification for subsidies from public bodies, temporary/permanent closure of the establishment and publication of the conviction[9].

---

8. The preamble of the decree law states that accessory penalties including the prohibition from exercising certain professions, etc. are "never laid down as a necessary effect of the main penalty", and thus, reconcile with article 30.4 of the Constitution which requires that no sentence may involve the loss of any civil, occupational or political rights.

9. Where the sanction of publication of the conviction is imposed, the convicted natural/legal person must pay the cost of the publication.

Additionally, pursuant to articles 2.3 and 3.3 of the decree law, legal persons are jointly and severally liable, under civil law, for the payments of fines, indemnities and other penalties imposed on natural persons (i.e. perpetrators) for offences committed on their behalf, and vice versa. Portugal confirms that this rule applies to all kinds of payments including criminal fines, confiscation and civil compensation. Moreover, the Portuguese authorities confirm that, under corporate tax law, fines paid by legal persons for offences committed by natural persons cannot be tax deductible.

Aggravating/mitigating circumstances which result in increases/reduction of penalties are provided in the general provisions of the Criminal Code. Pursuant thereto, the minimum term of imprisonment increases by one third in the case of recidivism, and the maximum and minimum terms of imprisonment are reduced, by one third, and to 1 month, respectively, if there are special mitigating circumstances (e.g. offence was committed under the influence of serious threat).

Discrepancy of Penalties between the Amendments under the Law no. 108/2001 and the Decree Law no. 28/84

Law no. 108/2001 extends the scope of domestic "public official" and "political official" (i.e. a person holding a legislative function) to include certain foreign public officials for the purpose of domestic bribery offences under the Criminal Code (article 374) and Law no. 34/87 (article 18). Pursuant thereto, acts of bribing the following foreign public officials constitute offences:

1) EU public officials (persons exercising legislative, administrative or judicial functions including magistrates), EU agents and the assimilate;
2) Domestic public officials (persons exercising legislative, administrative or judicial functions) of other EU states if the offence was committed in whole or in part in Portugal;
3) Persons exercising administrative or judicial functions in any international organisation of which Portugal is a member, if the offence was committed in whole or in part in Portugal.

Also, it appears that where the case satisfies the conditions for the foreign bribery offence and where the foreign public official concerned is one enumerated above, the elements of the domestic offences under the Criminal Code or the Law no. 34/87 are fulfilled.

Thus, it appears that a person who bribes one of these foreign public officials could be punished either by the domestic bribery offence under the Criminal Code/Law no. 34/87 (as amended by the Law no. 108/2001) or the foreign bribery offence under the Decree Law no. 28/84. As mentioned above, since penalties for the foreign bribery offence are more onerous than the domestic offences, there arises a question, in the case of overlapping offences, whether the court might apply the domestic offence in favour of the defendant, thus resulting in discriminatory punishments. However, the Portuguese authorities confirm that, in the case of overlapping offences, article 41-A of the Decree Law no. 28/84 would override the others as long as the case is proved to be committed "in the conduct of international business" in accordance with the general interpretation rule that the special provision derogates from the general provisions. The Portuguese authorities explain that article 41-A is considered a special provision of the aforementioned bribery offences under the Criminal Code/Law no. 34/87, in that article 41-A protects not only the impartiality of the decision of the State (as is the case for the offences under the Criminal Code/Law no. 34/87), but also various interests such as economy.

3.3 Penalties and Mutual Legal Assistance

Under Portuguese law, the provision of mutual legal assistance (MLA) is not conditional upon the length of the term of imprisonment provided for in the criminal law of either Portugal or the requesting state.

However, dual criminality is required in order for Portugal to provide MLA involving coercive measures (article 147 of the Law no. 144/99 of 31 August).

3.4 Penalties and Extradition

Under the Law no. 144/99, the offence for which extradition is requested must constitute an offence for which the maximum term of imprisonment is at least 1 year under the law of both Portugal and the requesting state (article 31.2). In addition, if the request is for an execution of a sentence, the sentence to be served shall be imprisonment of no less than 4 months (article 31.4). Furthermore, it is possible to lower the requirement of a particular imprisonment term by treaty or convention (article 31.6).

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Article 3.3 of the Convention requires each Party to take necessary measures to provide that "the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable".

Confiscation

With respect to confiscation upon conviction[10], the Portuguese authorities state that articles 109, 110 and 111 of the Criminal Code and article 9 of the Decree Law no. 28/84 are applicable to the bribery of a foreign public official. Article 9 of the decree law complements the provisions under the Criminal Code, as article 9.1 states that "the confiscation of goods, declared by virtue of the provisions of this law and of the Criminal Code, includes any illicit profits obtained by the perpetrator of the crime".

Article 109 provides for "*confiscation of instruments and proceeds*". Pursuant thereto, "objects" that were used or intended to be used in the commission of an offence, or that represent the proceeds of an offence shall be confiscated, if "by their nature **or** the circumstances of the case, they constitute a threat to personal safety, morals or public order, or pose a serious risk of being used to commit further offences". The Portuguese authorities state that this provision could apply to the confiscation of bribes and their proceeds, as they would constitute a threat to "morals or public order".

Article 111 provides for the "*confiscation of advantages*". Pursuant thereto, the following advantages shall be confiscated:

- any "compensation" given or promised to the offender for himself/herself or another (paragraph 1);
- any "things, rights or advantages" of any nature directly obtained by the offender through an offence for himself/herself or another (paragraph 2);
- any "things or rights" obtained through a transaction or an exchange with the "things or rights" obtained directly through an offence (paragraph 3). This would appear to enable confiscation of assets that the offender obtained by selling, converting, etc. the proceeds of an offence. The Portuguese authorities state that the competent authority can trace "things", etc. as the result of any subsequent transactions as long as the link to the proceeds could be

10. Confiscation upon conviction is ordered in the course of the criminal proceedings against the alleged offender (i.e. criminal trial).

proved. Thus, even where certain proceeds cannot be confiscated due to their possession by a bona fide third party, it would appear that the assets of their corresponding value could be confiscated under this provision by tracing the subsequent transactions, as long as the requirement under article 110 is satisfied. (see the discussion below).

Article 9 of the Decree Law no. 28/84 states that any "illicit profits" obtained by the offender as well as "goods" obtained with the proceeds of the offence shall be included as those that shall be confiscated. The Portuguese authorities explain that "illicit profits" include all illicit profits resulting from an illicit act. They further state that in respect of foreign bribery, they include bribes and profits resulting from the obtained or retained business, contract, etc. in return for the bribe.

In addition, they state that the proceeds which were obtained directly by a third party beneficiary (e.g. proceeds obtained directly by the company which arise from the contract obtained in exchange of a bribe given by the offender) would be confiscated.

Furthermore, it appears that "objects" or "things, rights or advantages", together with "illicit profits" would cover all types of pecuniary assets including those in an intangible form.

Article 110 of the Criminal Code provides for circumstances under which confiscation shall not proceed. The Portuguese authorities confirm that this rule applies to confiscation under article 109 and 111 of the Criminal Code and article 9 of the decree law. Pursuant to article 110.1, confiscation shall not proceed where one of the following situations exists:

- if at the time of the commission of the offence, the "object" did not belong to an offender or a third party who was involved in the offence or was aware thereof;
- if at the time of the offence, the "object" belonged to an offender or a third party who was involved in the offence or was aware thereof, but at the time of the confiscation order, it belongs to a bona fide third party.

The Portuguese authorities state that under Portuguese jurisprudence, the condition of "at the time of the commission of the offence" is interpreted broadly enough in respect of the bribery offences to cover the time when the briber actually obtains the proceeds which arise from the public official's act/omission that occurs after the completion of the offence itself (i.e. the offer/promise/gift).

Pursuant to article 111.4 ("*confiscation of advantages*"), if the "compensation, rights, things or advantages" cannot be confiscated "in kind", confiscation will be replaced by payment to the state of their respective value. The Portuguese authorities confirm that this applies where confiscation is unavailable due to the fact that the bribes and/or the proceeds, belong/belonged to a bona fide third party, were destroyed or cannot be found.

In addition, Portugal confirms that confiscation under these provisions is available in respect of legal persons either as those suspected of committing an offence or as third party beneficiaries unless the defence under article 3.2 of the Decree Law no.28/84 (i.e. the offence was committed against express orders or instructions from authorised persons) is successfully invoked.

Provisional Seizure

According to the Portuguese authorities, with respect to the seizure of bribes and the proceeds of bribery, articles 46 and 49 of the Decree Law no. 28/84 and article 178 of the Code of Criminal Procedure are applicable. Portugal further states that since articles 46 and 49 of the Decree Law are special norms for the offences thereunder, these articles prevail where they contradict article 178 of the Code of Criminal Procedure.

Pursuant to article 178 of the Code of Criminal Procedure: (i) "objects" used or intended to be used in the commission of a crime or representing the proceeds, profit or prior compensation; (ii) all "objects" left by the offender at the scene of the crime; and (iii) any other "object" that might serve as a proof, shall be seized. Seizures of "goods" or "objects" are authorised, ordered or validated[11] by judicial authorities.

It would appear that under the Code of Criminal Procedure, both bribes and the proceeds of bribery of a foreign public official (i.e. active bribery) would be seized. It would also appear that provisional seizure for the purpose of ensuring future confiscation or a fine is not addressed therein. However, article 49 of the Decree Law no. 28/84 covers provisional seizures for this purpose. Pursuant thereto, where there is a "justified fear" that the offender would become insolvent or that the "goods" would be concealed, and if the fine is likely to be no less than PTE 300,000, the public prosecutor shall, during the "arraignment" or a similar procedure, request the preventive seizure of "goods" belonging to the offender in order to ensure his/her payment of any monetary obligation. Preventive seizure may also be requested during the preliminary hearing if in addition to the conditions for the preventive seizure during the arraignment, etc., there exist certain "unusual circumstances"[12].

Moreover, pursuant to article 46, during the criminal proceedings, "goods" may be seized if they are necessary for the investigation or preliminary hearing, or for discontinuing illegal activities, or if it appears that they would be subject to confiscation.

With respect to these provisions, Portugal explains that "goods" cover all movable and immovable goods while "objects" only cover movable goods. Thus, "objects" would not appear to cover intangible assets. However, since seizure of "goods" is available under both articles 46 and 49 of the Decree Law, with respect to the foreign bribery offence, bribes and their proceeds would appear to be covered regardless of their nature.

In addition, the Portuguese authorities confirm that seizure under these provisions is available in respect of legal persons suspected of committing an offence.

3.8 Civil Penalties and Administrative Sanctions

As mentioned above under 3.1/3.2 "Criminal Penalties for Bribery of a Domestic and Foreign Official", there are several additional criminal penalties for the foreign bribery offence (e.g. temporary disqualification from bidding in public tenders).

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 on the Convention clarifies that "an extensive physical connection to the bribery act" is not required.

---

11. The police may perform a seizure during a search, in case of emergency or where there is a risk of delaying proceedings, in which case, the seizure must be validated by judicial authorities within 72 hours.

12. Such circumstances include those showing that by the time of the conviction, it is highly likely that whereabouts of the accused is unknown, the accused abandons his/her business, etc.

The Portuguese authorities confirm that article 3 of the implementing legislation (*Law no. 13/2001*) applies to the foreign bribery offence without prejudice to the general provisions of the Criminal Code governing jurisdiction rules.

Article 4 of the Criminal Code states as follows:

> *The Portuguese Penal Law, applies, unless otherwise stated in International Treaties or Conventions to acts committed:*
> *a) within the Portuguese territory, regardless of the nationality of the actor,*
> *b) on Portuguese ships or aircraft.*

Pursuant to article 7.1, an "act" is considered to have been committed at the place where: (i) totally or partially, and under any form of complicity, the perpetrator acted (or should have acted, in the case of an omission), or (ii) the "typical result" or the "result not comprehended in a particular type of crime" should have been produced. The Portuguese authorities state that "typical result" would be the offering, promising and giving of a bribe in respect of bribery offences. Thus, where an offence was committed in whole or in part in Portugal or on board a Portuguese ship/aircraft, or where its results were produced in Portugal or on board a Portuguese ship/aircraft, territorial jurisdiction is triggered. The Portuguese authorities confirm that a telephone call, fax, or e-mail emanating from Portugal is sufficient to trigger territorial jurisdiction.

In addition, article 3 of the Law no. 13/2001 provides a jurisdictional rule specifically applicable to the foreign bribery offence. It establishes jurisdiction over Portuguese nationals and foreigners regardless of the place of the commission of the offence where the alleged offender is found in Portugal (see below 4.2 "Nationality Jurisdiction"). This provision does not cover certain foreign bribery cases committed in Portugal (i.e. where the offender committed the foreign bribery offence in Portugal but left Portugal afterwards and cannot be found in Portugal). Thus, article 4 of the Criminal Code covers a broader scope of jurisdiction than that under article 3 of the Law no. 13/2001 as regards territorial jurisdiction. However, the Portuguese authorities confirm that the principle of territoriality under article 4 of the Criminal Code would apply to the foreign bribery offence to complement article 3 of the Law no. 13/2001 in this regard, and thus, whether or not the offender is found in Portugal is irrelevant for establishing jurisdiction as long as the offence is committed in Portugal.

4.2 Nationality Jurisdiction and Extraterritorial Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official". Commentary 26 on the Convention clarifies that where a Party's principles include the requirement of dual criminality, it "should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute".

With respect to offences committed outside of Portugal, articles 5 to 6 of the Criminal Code provide the conditions for establishing jurisdiction. The conditions vary according to the type of offences under article 5. Pursuant thereto, extraterritorial jurisdiction is established over those offences enumerated in paragraph 1.a (i.e. offences relate to terrorism). With respect to the offences enumerated in paragraph 1.b (e.g. abduction, human trafficking, sex offences against children, genocide), jurisdiction is established if the offender is found in Portugal and cannot be extradited.

With respect to other offences, including bribery offences in general, the jurisdiction is established where one of the following conditions are fulfilled: (1) the offender is a Portuguese national or the offence was

committed against a Portuguese national, the offender is found in Portugal, dual criminality, and the act constitutes an extraditable offence and extradition of the person cannot be granted (paragraph 1.c); (2) the offence was committed against a Portuguese national by a Portuguese national regularly residing in Portugal at the time of the commission of the offence and found in Portugal (paragraph 1.d); or (3) the offender is a Portuguese national found in Portugal, the act constitutes an extraditable offence, and extradition is requested for the person but cannot be granted (subparagraph 1.e).

With respect to the foreign bribery offence (article 41-A of the Decree Law no. 28/84, added by article 1 of the Law no. 13/2001), article 3 of the implementing legislation (Law no. 13/2001) applies. Article 3 states as follows:

> *Without prejudice to the general framework governing the territorial application of criminal law and the provisions set forth regarding international judicial co-operation, the provisions laid down in Article 1 of this Law shall be applicable to the acts committed by Portuguese citizens as well as to acts committed by foreigners found in Portugal, regardless of the place where such acts were committed.*

The Portuguese authorities confirm that under article 3, Portugal can establish extraterritorial jurisdiction over (1) its citizens found in Portugal and (2) foreigners found in Portugal. The Portuguese authorities state that the condition of "found in Portugal" could be fulfilled where the alleged offender is found in Portugal irrespective of whether he/she is found as a resident, when stopped while in transit through, or when temporarily staying in, Portugal. Thus, extraterritorial jurisdiction appears to be established under more restrictive conditions under article 5.1, subparagraphs c to e of the Criminal Code, which are applicable to most offences including bribery offences. The Portuguese authorities state that article 3 overrides article 5 in respect of the foreign bribery offence. The Portuguese authorities further state that since the application of the jurisdictional rules for the foreign bribery offence should result in the broadest jurisdiction possible for Portugal, article 4 of the Criminal Code applies to complement article 3 of the Law no. 13/2001, but article 5 of the Criminal Code does not apply. They add that under Portuguese law, extraterritorial jurisdiction is an exceptional rule to the general rule of territoriality.

Pursuant to article 6.2 of the Criminal Code, where extraterritorial jurisdiction is established under the Criminal Code, the offence should be sentenced in accordance with the law of the country in which the offence was committed, "if that law is considered concretely more favourable". The Portuguese authorities state that this provision does not apply to the foreign bribery offence.

Legal persons

The Portuguese authorities state that jurisdiction is established over legal persons under the same rule for natural persons in respect of the foreign bribery offence. They further state that jurisdiction is established over legal persons where one of the following conditions is fulfilled: (i) the jurisdiction over the natural person (i.e. the alleged offender who is a "representative" or "governing body" of the legal person) could be established; or (ii) the legal person is "found in Portugal". The Portuguese authorities state that the condition of "found in Portugal" would be fulfilled where the legal person has a link in the Portuguese territory. They state that such a link would exist where, for instance, the legal person is organised under the laws of Portugal or has a branch office in Portugal.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Consultation procedures may take place at the request to/from the Minister of Justice in accordance with provisions in the Law no.144/99 of 31 August (Part III "Transfer of Criminal Proceedings"). For instance,

a transfer of proceedings to a foreign state may be possible if the case fulfils certain conditions (e.g. the offender is a national/resident of the foreign state).

4.4 Review of Current Basis for Jurisdiction

The Portuguese authorities are of the opinion that it is not yet possible to assess whether the basis for jurisdiction is effective in the fight against the bribery of a foreign public official since the implementing legislation entered into force recently.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles Regarding Investigations and Prosecutions

The Portuguese authorities state that the investigation and prosecution of the foreign bribery offence are initiated, suspended and terminated in the general circumstances provided for in the Criminal Code and the Criminal Procedure Code. They also state that natural and legal persons are investigated and prosecuted under same rules and proceedings.

The principle of mandatory prosecution prevails in Portugal.

Under the Code of Criminal Procedure, the Public Prosecutor's Office is competent to investigate and prosecute every offence including the foreign bribery offence. The Public Prosecutor's Office directly instructs the police which assist the Public Prosecutor's Office with the investigation (article 263). In addition, the Portuguese authorities state that the Judicial Police may also investigate corruption offences including bribery of a foreign public official, under the supervision of the Public Prosecutor's Office in "particular cases".

The Public Prosecutor's Office initiates the investigation on its own initiative after having being informed of the alleged offence through the making of an "accusation" by the police or another source. Where the police become aware of an offence, they are obliged to report it to the Public Prosecutor's Office regardless if the offender is identified (articles 241-243). During the investigation, the Public Prosecutor's Office undertakes necessary measures for identifying the offender and obtaining evidence, etc. However, certain coercive measures must be performed/authorised by an examining judge (articles 267-269).

The Public Prosecutor's Office shall prosecute the case as long as the existence of the alleged offence is proved. The Portuguese authorities confirm that, with respect to the foreign bribery offence, there is no additional requirement such as consent of the Attorney-General or a complaint by a victim. They also state that the Superior Council of the Public Prosecutor's Office, a disciplinary body for public prosecutors, is forbidden to interfere with prosecutions.

A decision not to prosecute a case is not appealable. The Portuguese authorities explain that since prosecutors are obliged to prosecute the case as long as there is sufficient evidence, there need not be remedial measures such as an appeal[13].

Article 276 provides for time limits for concluding the investigation (this is discussed more in detail under 6 "Time-Limits for Investigation").

Articles 281-282 provide for suspension of the proceedings applicable to offences punishable by certain penalties. However, they do not apply to the foreign bribery offence.

The Portuguese authorities state that, with respect to the foreign bribery offence, a competitor is entitled to participate in the criminal proceedings as an assistant. He/she is also entitled to file a complaint to the Public Prosecutor's Office upon which the Public Prosecutor's Office is obliged to initiate the investigation and the prosecution. However, he/she cannot prosecute a case on his/her own initiative (i.e. private prosecution).

Under article 161.f of the Constitution, the Assembly has powers to grant amnesties and general pardons. The Portuguese authorities state that this power is exercised upon the initiative of the Minister of Justice. They further state that amnesties/general pardons by the Assembly are not used often.

The Portuguese authorities state that out-of-court settlements are unavailable under Portuguese law in respect of the foreign bribery offence.

5.2 Considerations such as National Economic Interest

The Portuguese authorities state that the public interest, which means the interest of Portugal, is always taken into account in criminal proceedings. However, they confirm that, subject to the "principle of legality", any considerations of the factors listed in Article 5 of the Convention are excluded in the investigation and the prosecution of cases of bribery.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence.

Statute of Limitations

The Criminal Code provides limitations periods for every offence, including bribery, and the length of the periods is related to the penalty provided for each offence. Pursuant to article 118, the limitations period for the foreign bribery offence is 10 years (i.e. period for an offence for which maximum term of imprisonment is not less than 5 years but not exceeding 10 years). Portugal confirms that this limitations period applies to both natural and legal persons. Pursuant to article 119, the period starts running from the

---

13. However, if the prosecutor wrongly terminated the case, a disciplinary procedure against the prosecutor could be initiated by the Superior Council of the Public Prosecutor's Office. Moreover, a prosecutor who unduly does not prosecute the case is liable for an offence of failure of justice and prevarication under the Criminal Code.

date of the "accomplishment of the act"[14]. The Portuguese authorities state that this would be the date of offering, promising or giving in respect of the foreign bribery offence.

The limitations period is suspended, where one of the events, including the following, enumerated in article 120.1 occurs: the criminal procedure cannot be legally initiated or continued due to the lack of legal authorisation, etc. (subparagraph a), the criminal procedure is pending after the notification of the prosecution or the "decisão instrutória"[15], etc. (subparagraph b), the "contumacy" regime is in force (subparagraph c), and the decision of the court cannot be notified to the accused sentenced in his/her absence (subparagraph d). However, suspension under subparagraph b (i.e. the pending of the criminal procedure after prosecution, etc.) cannot exceed 3 years (article 120.2).

The limitation period is interrupted where one of the events, including the following, enumerated in article 121.1 occurs: proceedings against the defendant have been initiated (subparagraph a), the notification of prosecution, the "decisão instrutória" aimed at the prosecution of the accused, etc. (subparagraph b), and the "contumacy"[16] declaration (subparagraph c). A new limitation period starts running after each interruption (article 121.2). However, if in total, one and a half of the prescribed limitation period, (i.e. 15 years for the foreign bribery offence) in addition to the suspension term, have passed from the date of the commission of the offence, the limitation period shall expire (article 121.3).

Time-Limits for Investigation

Pursuant to article 276 of the Code of Criminal Procedure, paragraphs 1 and 3, where an accused is under detention or "house detention", the Public Prosecutor's Office concludes the investigation within 6 months from the time when investigation was initiated against a specific person or when the person was accused. The time limit is 8 months in other cases (i.e. where no one is under detention or house detention). Pursuant to paragraph 2, the time limit of 6 months can be extended to 8 months in respect of certain offences including corruption offences. If the proceedings become "especially complex" due to, *inter alia*, the number of accused/victims and highly organised nature of the case, it can be extended to 10 months irrespective of the type of the offence, and to 12 months for certain offences including corruption offences.

The Portuguese authorities state that when this time-limit expires, the Public Prosecutor's Office decides whether to prosecute the case or terminate the proceedings, depending upon whether there is sufficient evidence to proceed to trial. However, they further state that the Public Prosecutor's Office can re-open the terminated proceedings if new evidence proving the alleged offence is obtained.

Moreover, the Portuguese authorities state that, due to the complex nature of the cases, there is an obligatory preliminary investigative stage for financial crimes including the foreign bribery offence, in advance of the initiation of the investigation. They also state that this investigative stage should be performed under the control of public prosecutors and examining judges.

---

14. Also, pursuant to article 119.4, whenever a "result that is not included in a particular type of crime is relevant", the limitation period starts running from the date when the result occurs. However, Portugal states that this is not relevant to the foreign bribery offence.

15. The *"decisão instrutória"* is a final decision issued by an examining judge at the end of an optional investigative procedure, which may take place after the obligatory investigative procedure (*"inquérito"*). This optional investigative procedure is objected to reanalyse the case and give the accused the opportunity to produce proofs.

16. The "contumacy" regime is a solution under Portuguese law to try the case in the absence of the accused, although the overall goal is that the accused is heard by the court.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Money Laundering Offences

The Decree Law no. 325/95 of 2 December contains the relevant provisions on money laundering. Article 2.1, which penalises acts of money laundering, enumerates a number of predicate offences including "corruption". Pursuant to article 2 of the Law no. 13/2001 (i.e. the implementing legislation), the foreign bribery offence qualifies as a crime of "corruption" for the purpose of the money laundering legislation. The Portuguese authorities state that the domestic bribery offences under article 374 of the Criminal Code also qualify as predicate offences.

Article 2.1 of the Decree Law no. 325/95 states as follows:

> *Any person who, knowing that certain goods and products proceed from criminal offences amounting to terrorism, arms trafficking, extortion, kidnapping, qualified procuring, corruption or any other offence mentioned in paragraph 1 of Article 1 of Law No 36/94, of 29 September:*
>
> *(a) directly or indirectly converts, transfers, assists in or facilitates any conversion or transfer of all or part of such goods or products, in order, either to conceal or dissimulate its illegal origin, or to assist any person involved in committing any such offences to avoid the legal consequences of his or her behaviour, shall be liable to imprisonment for a term of 4 to 12 years;*
>
> *(b) conceals or dissimulates the true nature, origin, whereabouts, layout, movement or ownership of such goods or products, or rights pertaining thereto, shall be liable to imprisonment for a term of 2 to 10 years;*
>
> *(c) acquires or receives such goods or products, whichever the legal title, and uses, holds or keeps them, shall be liable to imprisoxnment for a term of 1 to 5 years.*

Article 2.1 applies to an act of converting, transferring, etc. certain goods and products derived from a predicate offence. The Portuguese authorities state that the laundering of both the instrumentality and proceeds (i.e. bribes and their proceeds in respect of active bribery) is covered.

The offence requires that the person in question knew that the "goods and products" proceeded from an offence. The Portuguese authorities state that such knowledge should be of any of the enumerated predicate offence but need not be of the specific offence (i.e. the offence of bribing a foreign public official). Moreover, they confirm that it is sufficient if the person believed that the "goods", etc. proceeded from such an offence even if he/she did not know it.

The Portuguese authorities confirm that "goods and products" cover all types of pecuniary and non-pecuniary advantages.

In addition, the Portuguese authorities state that article 2.1 applies to acts of self-laundering.

With respect to subparagraph (a) of article 2.1, Portugal explains that the condition of "to avoid the legal consequences" cover the avoidance of criminal, administrative and civil liabilities.

Despite the sanctions provided for in article 2.1, article 2.2 states that the sanction for a person who committed an offence under article 2.1 "shall comply with such maximum and minimum levels of sanctions" for the predicate offence. Portugal explains that where the predicate offence is the foreign bribery offence, the sanction for the money laundering offence under article 2.1 should not exceed the level of 1-8 years of imprisonment, which is the sanction for the foreign bribery offence. Thus, it is imprisonment for 1-8 years for acts under article 2.1, subparagraphs (a) and (b), and is imprisonment for 1-5 years for acts under article 2.1, subparagraph (c).

Pursuant to article 2.3, the money laundering provisions apply regardless if the predicate offence of bribing a foreign public official takes place in Portugal or abroad. The Portuguese authorities confirm that the condition of dual criminality is not required where the predicate offence is committed abroad. They also state that a prior conviction of the predicate offence is not required.

Reporting Requirements for Financial Institutions, etc.

Under article 3 of the Decree Law no. 325/95, the reporting requirement of the suspected money laundering transactions under article 10 of the Decree Law no. 313/93 of 15 September applies to "financial institutions". The Portugal authorities state that "financial institutions" are defined in Decree Law no. 298/92 and include banking and non-banking financial institutions. A breach of this duty is subject to the following pecuniary sanctions: 1,000,000-5,000,000 PTE for financial institutions or members of financial institutions, and 5,000,000-2,000,000,000 PTE for members of the board or those who gives directions in the institution. The Portuguese authorities state that a breach of duty by negligence is also punishable.

In addition, under the Decree Law no. 325/95, certain non-financial institutions performing activities linked to games or to the trade of goods of high value or immovable property (e.g. casinos, real estate agents) are obliged to identify the person involved in transactions exceeding a certain amount, retain the evidence for identification, report suspected money laundering transactions to the competent judicial authorities, etc. A breach of duty concerning identification, record-keeping, etc. is subject to a pecuniary sanction ("*coima*") for 500,000-50,000,000 PTE (article 12). A breach of duty for reporting suspicious transactions is subject to a pecuniary sanction ("*coima*") for 1,000,000-100,000,000 PTE (article 13). A breach of any of these duties by negligence may also be punished.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting and Auditing Requirements/Companies Subject to Requirements

Accounting

Pursuant to article 2.1 of the Decree Law no. 410/89 of 21 November, the Official Plan of Accounts, which provides for accounting standards, applies to entities which include: national and foreign companies regulated by the Companies Act, individual companies regulated by the Commercial Code, individual limited-liability establishments, public companies, co-operatives, and other entities contemplated by law approving the Official Plan of Accounts. However, pursuant to article 2.2 of the Decree Law, the Official Plan of Accounts does not apply to banks, insurance companies and other financial entities that are subject to specific "plans of accounts". The Portuguese authorities confirm that all legal entities are subject to the Official Plan of Accounts or specific plans of accounts.

The Portuguese authorities state that the Official Plan of Accounts and specific plans of accounts for financial institutions require that accounting information respect the characteristics of meaningfulness, reliability and comparability. They further state that it is understood that they also provide for the principles of continuity, consistency, specialisation and materiality, historical cost accounting and substance over form, thus prohibiting the establishment of off-the-book accounts, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. They add that the principles of clarity and rigor between business records and transactions are also required.

In addition, article 29 of the Commercial Code 1888 states that all "traders" are obliged to keep books, that easily, clearly and precisely reveal their business operations and their wealth. The Portuguese authorities state that "traders" include all businesses and corporations. Pursuant to article 30, the number and types of books and the manner in which the books are organised shall be at the trader's entire discretion as long as the books are kept in the manner which the law specifies "as indispensable". For instance, the books must be correctly used and kept indicating all the operations performed by "traders" and companies in accordance with the principle of continuity and integrity. In addition, under the Commercial Code, commercial companies are obliged to keep books and justification of payments for 10 years. Under the Decree Law no. 313/93, financial institutions are obliged to keep records on realised transactions for 10 years and on identification of the customers for 5 years.

Auditing

The Decree Law no. 487/99 of 16 November governs the activities of statutory auditors. It requires that corporate accounts be audited by independent professional auditors. Pursuant to article 1 of the Decree Law, professional auditors are subject to the supervision of the Institute of Chartered Accountants of Portugal[17] and follow the standards set by the Institute, which respect the international auditing standards.

The Portuguese authorities state that joint stock companies and limited companies (ltd) , which are subject to Portuguese law (i.e. have a principal and effective or statutory seat in Portugal), and fulfil two of the three following conditions for 2 consecutive years, are obliged to have external audits[18]: (1) the balance sheet total exceeds 1,500,000 Euro; (2) annual net sales or profits exceed 3,000,000 Euro; (3) have more

---

17. The Institute of Chartered Accountants of Portugal is a public corporate body and professional auditors are its memberships.

18. In addition, Portugal states that unipersonal limited companies are subject to statutory audits. Also, listed companies are subject to additional requirements under the Code of Stock Exchange.

than 50 employees. Moreover, they state that all limited companies may have a supervisory body according to the statute of the company and are subject to internal audits.

Under article 54, audit service contracts with corporations are non-transferrable and valid for 4 years in order to strengthen the independence of auditors. Furthermore, under the Decree Law, certain persons are prohibited from performing an audit by virtue of their relationship to the company (e.g. shareholders including spouses or children of shareholders and members of management or the Board of Directors).

Pursuant to article 72 of the decree law, auditors are subject to professional secrecy. However, according to the Portuguese authorities, the reporting obligation for officials under article 242 of the Code of Criminal Procedure applies to auditors, and, thus, they are required to report to the Attorney-General, through the Institute, any facts that they discover in the course of their duties indicating the commission of an offence including foreign bribery. A violation of such obligation constitutes a disciplinary offence under the Decree Law no. 487/99. The applicable penalties include warning and exclusion from the Institute.

According to the explanation given by the Portuguese authorities, it would appear that under the Code of Commercial Registers and Companies and the Code of Stock Exchange, the auditor's reports should be publicly available.

8.3 Penalties

The General Regime of Tax Infractions (Law no.15/2001 of 5 June) provides for offences that penalise falsification of books, etc. in relation to tax purposes. Pursuant to article 103, concealment or alteration of facts or values in books of account and bookkeeping for the purpose of obtaining illegitimate tax benefits (not less than 7,500 Euro), etc. constitutes the offence of tax fraud, which is punishable by imprisonment up to 3 years or a fine up to 360 days. Where a certain aggravating circumstance (e.g. the offender is a public official) exists, penalties increase to imprisonment for 1-5 years for natural persons and a fine for 240-1,200 days for legal persons under article 104. Pursuant to article 118, intentionally falsifying, vitiating, concealing, destroying, etc. elements relevant for tax purposes (not constituting tax fraud) is punishable by a fine for 500-25,000 Euro. Pursuant to article 119, an omission or error in the books of account and bookkeeping, etc. concerning the tax situation (not constituting any of the aforementioned offences) is punishable by a fine for 250-15,000 Euro. The Portuguese authorities confirm that these sanctions apply to both natural and legal persons.

In addition, pursuant to article 256.1 of the Criminal Code, a person is liable for imprisonment up to 3 years or a fine of 10-360 days if he/she, with the intent to cause a damage to others or to the state, or to obtain for himself/ herself or others an illegitimate benefit, produces a false document, forges a document, uses the signature of other person to produce a false document, uses such falsified documents, etc.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is

within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Portugal may provide mutual legal assistance on criminal matters on the basis of bilateral and multilateral treaties[19] to which Portugal is a party. In the absence of a treaty (or relevant provisions in the treaty), MLA may be provided in accordance with the Law no. 144/99 of 31 August, which provides for conditions and procedures for MLA and extradition. In principle, reciprocity is required for the provision of MLA (article 4). However, pursuant to paragraph 3 of article 4, MLA is possible in the absence of reciprocity under certain circumstances[20].

The types of assistance that are available in respect of natural and legal persons include search and seizure, expert examination, service of writs, hearing of suspects and witnesses, procuring evidence, handing over property and documents and providing information.

Requests for assistance in the form of letters rogatory may be transmitted directly between the competent judicial authorities, in which cases, judges and/or prosecutors decide and execute the requests. Requests in other forms are received by the Attorney-General's Office and forwarded with its opinion to the Minister of Justice who decides whether to grant the request. A decision of the court/prosecutor/Minister of Justice to refuse assistance is not appealable.

The request shall be refused on grounds provided in articles 6 to 8, which include:

- the request is for the purpose of prosecuting/sanctioning a person on account of race, religion, sex, nationality, etc.;
- the offence concerned is subject to the death penalty, life imprisonment, etc. and no assurances have been provided that such penalties will not be imposed;
- the offence concerned is a political offence, an offence connected with a political offence , or a military offence that does not constitute an offence under ordinary criminal law. The Portuguese authorities state that the case of bribery of a foreign public official who holds a political office or the bribery of a foreign public official intended for political motives/purposes (e.g. a contribution to a foreign political party) do not seem to be considered a political offence or an offence connected with a political offence ;
- criminal proceedings in respect of the same fact resulted in a final sentence carried out or an acquittal or were definitely discontinued in Portugal or another country;

---

19. Portugal is a party to the European Convention on Mutual Assistance in Criminal Matters, its additional protocol, etc. In addition, Portugal has concluded bilateral treaties on MLA with Argentina, Australia, Brazil, Canada, Mexico and Spain.

20. For instance, assistance is possible where the request is "seen to be advisable ... in view of the need to combat certain serious forms of criminality" (article 4.3 subparagraph a). The Portuguese authorities state that this exception (i.e. the need to combat certain serious forms of criminality) could be relevant to a request for assistance in respect of the foreign bribery offence.

- reciprocity is not ensured and none of the exceptional conditions under article 4.3 are fulfilled.

In addition, assistance shall be refused under the circumstances provided in article 152, which include: (i) the measures sought are forbidden by law or contrary to the public order, and (ii) the execution of assistance violates the sovereignty or the security of Portugal.

Moreover, assistance may be refused where "the minor importance of the offence does not justify it" (article 10). The Portuguese authorities confirm that this ground is relevant where the offence is punishable only by a low fine, and, thus, would not apply to requests for the foreign bribery offence.

9.1.2 Non-criminal Matters

The Portuguese authorities state that MLA can be provided to other Parties in relation to non-criminal proceedings against a legal person for the purpose of establishing its liability or imposing on it sanctions for the bribery of a foreign public official by virtue of article 1.3 of the Law no. 144/99, which states that the provisions in the law shall apply as subsidiary provisions in respect of administrative offences subject to a review before the court of law.

9.2 Dual Criminality

As a principle, dual criminality is not required for the provision of MLA. However, pursuant to article 147 of the Law no. 144/99, where the request is for MLA involving coercive measures, the provision of assistance is conditional upon dual criminality unless these measures are requested for the purpose of proving a person's innocence. The Portuguese authorities are of the opinion that the exception where the purpose of the request is proving a person's innocence is not relevant to requests in respect of the foreign bribery offence.

The Portuguese authorities confirm that where the condition of dual criminality is required, it shall be deemed to exist if the offence for which the assistance is sought is within the scope of the Convention. Furthermore, the Portuguese authorities state that the condition of dual criminality is required at the time of the commission of the alleged act of foreign bribery. However, they confirm that the requirement of dual criminality for the purpose of providing MLA is interpreted so broadly that it is deemed to be fulfilled even where the foreign bribery act was committed before the implementing legislation's entry into force, as the domestic bribery offence was punishable in Portugal at that time.

9.3 Bank Secrecy

Pursuant to article 5 of the Law no. 36/94 of 29 September[21], the professional secrecy of credit institutions, financial corporations, their employees and persons providing services to them is lifted if there are grounds to believe that the information and documentation in question would be "of interest in establishing the truth" during the investigation, etc. related to certain offences including the foreign bribery offence. The Portuguese authorities confirm that this covers proceedings for providing mutual legal assistance. In contrast, bank secrecy would not be lifted for the purpose of providing MLA in relation to non-criminal

21. This law was amended by the Law no. 90/99 of 10 July. It was also amended by the Law no. 5/2002 of 11 January [article 2 (lifting secrecy)].

proceedings against a legal person for bribery of a foreign public official. Also, the Portuguese authorities state that the requirement of " interest in establishing the truth" is fulfilled where the competent investigative authorities of the requesting state consider that the information which the financial institution is believed to possess is necessary, relevant and meaningful for the purpose of investigating the offence, perpetrators or participants.

The secrecy is lifted by the issuance of a judicial authorisation or a court order whereby the credit institutions, etc. are obliged to supply the information to the relevant judicial authority or the police. The Portuguese authorities confirm that there are no other additional conditions. The Portuguese authorities state that the refusal of financial institutions, etc. to provide information constitutes an offence punishable by imprisonment for 6 months-3 years or a fine not less than 60 days.

Portugal states that the process to provide bank information does not differ from the one used for other types of requests for MLA.

10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it "may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official".

Portugal may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral or multilateral treaties[22], or in accordance with the Law no. 144/99. In addition, the Portuguese authorities confirm that they consider the Convention to be a legal basis for extradition in respect of the foreign bribery offence.

Requests for extradition are received by the Attorney-General's Office and forwarded to the Minister of Justice, following which the following two stages are taken:

1. The Minister of Justice decides whether to grant extradition on the basis of political reasons or on discretionary grounds (the administrative stage). The Portuguese authorities state that the discretion would be exercised on account of the purpose of the Law (article 2) stating that the enforcement of the law shall be subject to the protection of the interests of sovereignty, security, public order, interests of the state, etc. A decision to refuse extradition is not appealable. However, the Portuguese authorities state that where extradition is refused at this stage, the principle of *aut dedere aut judiare* applies, and the criminal proceedings against the person in question shall be initiated in Portugal;
2. The competent court (i.e. the Tribunal da Relação) makes the final decision pursuant to the conditions under law (the judicial stage). The public prosecutor and the person for whom extradition is sought can appeal this decision to the Supreme Court of Justice.

---

22. Portugal is a party to the European Convention on Extradition, its additional protocols, the Convention on Simplified Extradition Procedure between the Member States of the European Union, etc. In addition, Portugal has concluded bilateral treaties on extradition with Argentina, Australia, Brazil, Mexico and U.S.A.

As is for MLA, under article 4, reciprocity is required for granting extradition in principle. In addition, as mentioned above (see 3.4 "Penalties and Extradition"), the offence for which the extradition is requested must constitute an offence for which the maximum term of imprisonment is at least 1 year under the law of both Portugal and the requesting state (dual criminality). If the request is for an execution of a sentence, the sentence to be served shall be imprisonment of no less than 4 months. The requirement of a particular length of imprisonment might be relaxed under certain bilateral or multilateral treaties.

Moreover, under the Law no. 144/99, extradition shall be or may be refused under circumstances provided in articles 6-8 or article 10, respectively, which also constitute grounds for refusal in respect of MLA (see 9.1.1 "Criminal Matters"). Furthermore, pursuant to article 32, extradition shall be refused where the offence for which extradition is sought was committed in Portugal[23] or where the person in question is a Portuguese national[24]. Pursuant to article 33, where the offence for which extradition is sought is committed outside of the requesting state, extradition may be granted only if: (i) under Portuguese law, Portugal can establish jurisdiction under identical circumstances, or (ii) the requesting state proves that the country in which the offence was committed will not request extradition of the person in question.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Pursuant to article 32 of the Law no. 144/99, Portuguese nationals shall not be extradited unless the applicable treaty or agreement provides otherwise, the offence in question relates to terrorism or to international organised crime, or the legal system of the requesting state guarantees a fair trial[25]. Pursuant to paragraph 5 of article 32, where extradition is declined solely on the ground that the person is a Portuguese national, criminal proceedings against him/her shall be initiated (i.e. the principle of *aut dedere aut judicare*)[26].

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

---

23. However, pursuant to article 32.5, where extradition is refused solely on this ground, criminal proceedings shall be instituted in Portugal (see also the discussion under 10.3/10.4 "Extradition of Nationals").

24. However, there are some exceptions which enables extradition of Portuguese nationals. See the discussion under 10.3/10.4 "Extradition of Nationals".

25. In addition to these conditions, extradition of nationals may be granted only where it is sought for a criminal prosecution, and on the condition that the sentence be served in Portugal after its reviewing and confirmation according to Portuguese law and that the requesting state return the person to Portugal for this purpose after sentencing him/her unless he/she refuses it.

26. In addition, under the same provision (article 32.5), criminal proceeding shall be initiated where extradition was refused on certain other grounds including the possibility that death penalty may be imposed on the person in the requesting state, etc.

As mentioned above, dual criminality is required for extradition. The Portuguese authorities confirm that dual criminality is deemed to be fulfilled if the offence for which extradition is sought is within the scope of the Convention. Furthermore, the Portuguese authorities state that the condition of dual criminality is required at the time of the commission of the alleged act of foreign bribery. However, they confirm that the requirement of dual criminality for the purpose of providing extradition is interpreted so broadly that it is deemed to be fulfilled even where the foreign bribery act was committed before the implementing legislation's entry into force, as the domestic bribery offence was punishable in Portugal at that time.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Portugal has notified the Secretary-General of the OECD that the responsible authority for the making and receiving of requests for consultation, mutual legal assistance and extradition is the Minister of Justice.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

Article 26.9 of the Decree Law no. 127-B/97 of 20 December[27], which provides for personal income tax, states as follows:

> *Article 26 Income derived from freelance work: deductions*
> *9 - Illicit expenses, namely, those expenses that arose in the course of conduct for which there are reasonable grounds indicating a violation of Portuguese criminal legislation shall not be deductible, even if these occurred outside the territorial reach of its application.*

Article 23.2, which provides for corporate income tax, states as follows:

> *Article 23 Costs or losses*
> *2 - Illicit expenditures, namely, those expenses that arose in the course of conduct for which there are reasonable grounds indicating a violation of Portuguese criminal legislation shall not be accepted as costs, even if these were incurred outside the territorial reach of its respective application.*

The Portuguese authorities state that bribes are non-tax deductible as giving a bribe constitutes a violation of "Portuguese criminal legislation". The Portuguese authorities confirm that a "violation of Portuguese criminal legislation" covers offences under the Criminal Code and other secondary criminal laws including the Decree Law no.28/84, which establishes the foreign bribery offence. They confirm that expenses such as introduction fees or facilitation fees paid to a foreign public official, which are clearly made for the purpose of obtaining business, etc., but are not treated as illegal in the foreign public official's country are not deductible since they constitute an offence under Portuguese law.

---

27. This law came into force on 1 January, 1998. According to the information provided by the OCED Committee on Fiscal Affairs, before the law's entry into force, the deductions for bribes paid to foreign public officials were allowed if they were documented and the bribe was shown to have contributed directly to the realisation of the income.

Article 26 is entitled "income derived from freelance work". However, the Portuguese authorities confirm that article 26.9 is relevant to the tax treatment of incomes that arose from any sources in respect of all natural persons who have their own independent income. Moreover, they confirm that article 23.2 applies to all legal persons.

With respect to legal persons, article 23.2 only states that expenditures that arose from a violation of criminal law "shall not be accepted as costs". The Portuguese authorities confirm that "illicit expenditures" including bribes cannot be deducted under any other categories of allowable expenses.

The Portuguese authorities confirm that the deduction of bribes is denied in respect of a legal person where its employee paid a bribe to a foreign public official from the assets of the legal person. They further confirm that it should be denied even in the case where the conditions for establishing criminal liability of the legal person are not fulfilled (e.g. the employee is not a governing body or a representative, the employee acted against expressed orders or instructions from an authorised person). However, in such a case, the legal person can sue the offender for the caused loss.

The Portuguese authorities are of the opinion that a criminal conviction of the natural/legal person is not required in order for tax authorities to deny tax deduction of bribes. They also state that it is the tax payer who has to prove that the payment constitutes a deductible expense under Portuguese tax law.

The Portuguese authorities state that pursuant to article 242 of the Code of Criminal Procedure, tax authorities are obliged to inform the prosecutorial authorities of tax evasion or tax fraud that relates to a bribery act. The Portuguese authorities state that claiming a bribe payment as an expense for avoiding tax payments would constitute tax fraud/tax evasion punishable by imprisonment up to 3 years or a fine up to 360 days.

Under the Portuguese Constitution, the Azores and Madeira have powers of taxation within the framework of the Portuguese tax legislation. The Portuguese authorities confirm that articles 23.2 and 26.9 of the Decree Law no. 127-B/97, which prohibits tax deductibility of bribes apply to these regions.

EVALUATION OF PORTUGAL

General comments

The Working Group appreciates the high level of co-operation of the Portuguese authorities throughout the examination process; in particular, the openness of their responses and timeliness in providing translations of all requested legislative provisions.

Portugal implemented the Convention by establishing the offence of bribing a foreign public official through an amendment to the Decree Law no. 28/84, a secondary criminal legislation penalising offences against the national economy and public health. The Working Group is of the opinion that overall the relevant Portuguese laws, including the implementing legislation, conform to the standards of the Convention. However, some aspects of the Portuguese legislation might benefit from follow-up during Phase 2 of the evaluation process.

Specific Issues

1. Bribery through intermediaries

The offence expressly requires a "consent" or "ratification" of the briber where an intermediary is involved.

The Portuguese authorities state this only requires that the briber be aware that the intermediary is bribing a foreign public official on the briber's behalf and neither requires specific intention nor that the briber be aware of, and give a consent or ratification, on the detail of the intermediary's act, such as the name or position of the foreign public official or the amount of the bribe.

The Working Group took note of the explanation given by the Portuguese authorities and recommends that this issue be followed up in Phase 2.

2. Definition of Foreign Public Official

In defining a foreign public official, Portugal's implementing legislation makes a distinction between a "foreign public official" and a "foreign political official". The definition of "foreign public official" uses certain terms which are not defined in the implementing legislation, such as "public function", "public organisation", public services agency" and "public international or supranational organisation". The definition of "foreign political official" is non-autonomous, in that it expressly refers to the definition in the law of the country of the foreign public official.

The Portuguese authorities state that regarding the non-defined terms in the definition of "foreign public official", the court would consider the definition of foreign public official in the Convention and Commentaries as most important interpretative tools in determining whether a particular person is a foreign public official.

Furthermore, the Portuguese authorities indicate that, for the purpose of article 41-A of the decree law n° 28/84 a foreign legislator would be considered as a "foreign public official" as long as he/she holds an office for which he/she has been appointed or elected (paragraph 2). It is however possible that in certain countries a legislator is considered a "political official" and as such he/she will be covered by paragraph 3.

The Working Group took note of the explanation given by the Portuguese authorities but is of the opinion that there is a risk that the text might be interpreted by the Portuguese courts as covering only a foreign legislator defined as a "political official" by the law of the foreign public official. It recommends that this issue be followed up in Phase 2 in order to see how this definition is applied in practice.

3. Criminal liability of legal persons

The Decree Law no. 28/84 establishes criminal liability of legal persons. Furthermore, it contains a broad range of principal and complementary sanctions.

Under the Decree Law, state-owned and state-controlled legal persons are not excluded from entities subject to criminal liability for the foreign bribery offence. The Portuguese authorities state that although Portugal has had experience in punishing legal persons under the same decree law, there are no cases that apply to state-owned or state-controlled legal persons.

The Working Group agrees that the liability of state-owned and state-controlled legal persons for the foreign bribery offence is a horizontal issue that should be followed in Phase 2.

Corruption Creates Growth when People Aren't Free

Art Carden*
Rhodes College
2000 North Parkway
Memphis TN 38111
901-843-3829
901-843-3736
cardena@rhodes.edu

Lisa Verdon
Florida State University
2888 Bellamy Building
Tallahassee FL 32306-2180
llv04@fsu.edu

This Version August 20, 2009

Comments Welcome to cardena@rhodes.edu.

Abstract

Corruption supposedly reduces economic development by creating an uncertain contracting environment and by preventing the state from efficiently providing public goods and correcting externalities. However, corruption can be efficiency-enhancing in countries with relatively little economic freedom. Corruption in the military appears to reduce economic growth, while corruption in the educational environment appears to increase economic growth. On net, evidence suggests that corruption is growth-increasing when economic freedom is low.

*--Corresponding Author. Carden: Assistant Professor of Economics, Rhodes College. Verdon: Assistant Professor of Economics, College of Wooster. This essay was inspired by a presentation given by Benjamin W. Powell at the 2007 Southern Economic Association meetings in New Orleans, LA. Steele French provided helpful research assistance. Seminar participants at the University of Memphis, George Mason University, Auburn University, and the University of Arkansas at Little Rock as well as conference participants at the 2008 Missouri Valley Economic Association and Southern Economic Association meetings and the 2009 Association of Private Enterprise Education meetings provided useful comments and suggestions. We are grateful to Mike Hammock, Benjamin W. Powell, and numerous others for comments, conversations, and suggestions. An earlier version of this paper circulated under the title "Economic Growth and the Entrepreneurial Environment."

EXHIBIT Q

In terms of economic growth, the only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy is one with a rigid, over-centralized, honest bureaucracy. Samuel P. Huntington, *Political Order in Changing Societies*

1. Introduction

When is corruption bad for economic growth? When is corruption good for economic growth? The answers are ambiguous *a priori*, and it is clear that there are cases in which corruption can be both good for economic growth and bad for economic growth. Using data on corruption taken from Transparency International and the Fraser Institute's *Economic Freedom of the World* data set, we argue that corruption reduces growth when economic freedom is high and increases growth when economic freedom is low. We identify the conditions under which corruption is grease on the wheels and the conditions under which corruption is sand in the gears of commerce. Corruption can create economic growth by greasing the wheels of commerce. When people are not free, corruption can be a shortcut that circumvents institutional barriers to economic growth.

Under the right conditions, entrepreneurship flourishes in the marketplace and creates economic growth. Under the wrong conditions, entrepreneurship flourishes in the political sphere and can prevent economic growth.[1] It is generally thought that corruption reduces economic growth; however, in certain contexts—such as settings in which economic freedom is relatively low—corruption can actually improve the contracting environment and facilitate economic growth. Two recent essays by Heckelman and Powell (2008) and Swaleheen and Stansel (2007) argue that corruption can enhance efficiency in countries with relatively little economic freedom. This essay extends these contributions by estimating the degree to which corruption and economic freedom are

[1] See in particular Holcombe (2007) and the essays in Powell (2008, particularly the reprint of Baumol (1990)). Coyne (2007) offers a perspective on post-war reconstruction.

complements or substitutes and by unpacking how different types of corruption affect economic growth in places with different levels of economic freedom.

Holcombe (2007) discusses the important roles entrepreneurs play in an advancing economy.[2] Entrepreneurs serve both an equilibrating and a dis-equilibrating function. The equilibrating function of entrepreneurs leads to adjustments in the structure of production. They notice that the structure of production is mis-aligned with consumer preferences, and they bring the plans of producers into harmony with the wants of consumers. Entrepreneurs reorganize production processes in such a way as to produce a more advantageous pattern of output.

This stands in contrast to the function of the entrepreneur as discussed by Joseph Schumpeter.[3] In Holcombe's (2007) interpretation, the entrepreneur serves a dis-equilibrating function. By introducing new products or production techniques, entrepreneurs upset the existing structure of production. This changes first the structure of relative prices, as well as the pattern of information in the economy. This creates opportunities for entrepreneurs to exploit local knowledge and, in the process, further the pattern of economic growth. Entrepreneurship is the essence of what Schumpeter called "creative destruction:" according to Schumpeter (1942), entrepreneurs create new products and production processes at the expense of old products and production processes. On net, this increases social welfare because consumers value resources in their new pattern more than they value the resources in the old pattern.

The relationship between corruption and economic development is complicated for several reasons. First, one of the most important inputs to economic development is a

[2] Holcombe relies on and discusses contributions originally made by Joseph Schumpeter and Israel Kirzner.
[3] See McCraw (2007) for a fascinating biography of Schumpeter and a discussion of the development of his system.

structure of high-quality institutions that reduce the costs of transacting and allow entrepreneurs to flourish. Second, regardless of the "quality" of the institutions stability is also an important component of long-run economic growth. Developed countries have, by and large, well-developed markets, secure contracting environments, and stable institutions. By contrast, many of the world's poorest countries have poorly-developed markets, arbitrary contracting environments, and unstable institutions.

A theoretical issue arises when we consider countries with alternative institutional forms. If there are specific institutional barriers that create transaction costs, corruption may be a way to reduce those transaction costs and grease the wheels of the market. At the same time, corruption undermines the continuity and reliability of the institutional framework. Robert Higgs introduces the term "regime uncertainty" to describe the impact of anti-business rhetoric on the duration of the Great Depression. Corruption that undermines the stability of the institutional framework may produce regime uncertainty that ultimately reduces investment in productive activities.

2. The Literature: Corruption, Freedom, and Growth

Where there is no economic freedom, there is no long-run growth. The literature on corruption argues that it can be either grease that facilitates commerce or sand that slows it down. Corruption can be a substitute for economic freedom in places where economic freedom is relatively low, but corruption in high-freedom areas is likely to slow commerce.

Many studies trace the literature on the possible beneficial effects of corruption to the contributions of Leff (1964) and Huntingdon (1968). A survey of the literature on corruption can be found in Bardhan (1997), and Aron (2000) offers a survey of the

literature on economic growth and institutions. Li et al. (2000:155) argue that "corruption alone…explains a large proportion of the Gini differential across developing and industrial countries." Pritchett and Woolcock (2002) argue that big projects are not as important as effective, on-the-ground delivery of public services. Government action creates opportunities for corruption: Brito-Bigott et al. (2008) argue that corruption is the product of extremely complex legal rules. Therefore, corruption can increase growth.

Tanzi and Davoodi (2000:3) suggest that the "romantic view" of corruption—corruption as a process by which capitalism works faster—is flawed and that those who are willing to pay the highest bribes are unproductive rent-seekers rather than efficient businesspeople. Echazu and Bose (2008) explore the relationship between bureaucratic centralization and corruption in the formal and informal sectors, finding that "cross-sector centralization can result in higher bribes and lower welfare" (Echazu and Bose 2008:524); specifically, "vesting the two responsibilities of regulating business operations via licenses and monitoring for violators who operate without such proper authorization with the same bureaucratic agency can be detrimental to welfare if officials are corrupt" (Echazu and Bose 2008:535). Mauro (1995) argues that corruption reduces growth by reducing investment, and Mauro (1998) argues that corruption reduces spending on quasi-public goods like schools and health care.

Meon and Sekkat (2005) find that corruption affects investment but that it also exerts an independent effect that does not work through the investment channel. Specifically, they argue that when governance indicators deteriorate, the effect of corruption worsens. In the immediate post-conflict environment, officials can use the

resulting uncertainty to extract bribes and extort resources from the productive sector (Rose-Ackerman, 2008).

Ehrlich and Lui (1999) construct a model of growth in which the government assigns some resource-allocation responsibilities to a bureaucracy. The shadow prices of these resources under bureaucratic allocation diverge from the prices that would emerge in a competitive market; therefore, there are gains from trade associated with corruption that would close this gap. Corruption comes with government intervention (Ehrlich and Lui, 1999:S272) because of the distortionary effect on prices. Further, bureaucracy is efficiency-reducing because of the way it encourages people to seek to become bureaucrats (Ehrlich and Lui 1999:S272). This investment in what Ehrlich and Lui call "political capital" (Ehrlich and Lui 1999:S272), or what is called "rent seeking" throughout the literature, leads to the social losses created by corruption.

Treisman (2000) identifies several common factors that explain corruption. Countries with protestant heritages, a history of British colonial rule, advanced development, and more imports tended to have less corruption while states with federal systems tend to have higher corruption. Democracy, Treisman argues, appears to be of little importance in the short run but of greater importance over the long run. The existence of bureaucracy creates incentives to invest in political capital rather than human capital. Alatas et al. (2009) argue that perceived differences between men and women in their responses to bribe offers may be culture-specific rather than general.

Easterly (2001, 2005) argues for a re-framing of discussions about foreign aid because of the dismal failure of international aid infrastructure. Carden (forthcoming) integrates Easterly's empirical findings with a broader literature on the importance of

institutions and culture. Tavares (2003) demurs, using the distance from donor to recipient countries to instrument for the endogeneity of foreign aid and to argue that foreign aid reduces corruption.

Media also matters: Brunetti and Weder (2003:1801) argue that press freedom reduces corruption because "any independent journalist has a strong incentive to investigate and uncover stories on wrongdoing." Leeson (2008:155) draws on a variety of data sources to conclude that "where government owns a larger share of media outlets and infrastructure, regulates the media industry more, and does more to control the content of news, citizens are more politically ignorant and apathetic."

Citing a study by Susan Rose-Ackerman, Svensson (2005:20) points out that approximately three percent of global GDP, or roughly one trillion dollars, goes to pay bribes every year; however, Svensson's most compelling finding on corruption may be the claim by a successful manufacturing CEO in Thailand that he wishes to be reborn as a government customs official (Svensson 2005:19).

Gradstein (2004) suggests that initial conditions determine growth paths because economic performance and institutional quality are mutually reinforcing. Pellegrini and Gerlagh (2004:432) argue that corruption slows growth because it reduces investment and the quality of trade policy, and Mo (2001) argues that the key channel through which corruption affects economic growth is political instability. Braguinsky (1996) argues that while corruption can lead to static gains in "totalitarian" regimes, it tends to reduce long-run growth because it becomes entrenched in the economic, political, and cultural environment; Li et al. (2000:156, citing Shleifer and Vishny 1993) argue that corruption reduces long-run growth by redirecting resources away from productive investments and

toward opaque projects like defense and infrastructure, where the opportunities for corruption are greater, where the output is more difficult to measure.

An emerging body of literature argues that the effect of corruption is context-dependent. Meon and Weill (2008) use a stochastic frontier model to argue that "corruption is always detrimental in countries where institutions are effective, but…it may be positively associated with efficiency in countries where institutions are ineffective." Wedeman (1997) offers case studies of Zaire, South Korea, and the Philippines suggesting that the corruption/growth relationship is context-sensitive. Political systems that do not impose economic institutions by force are more likely to have economic institutions determined by the cultural characteristics of the society (Pryor 2007:817). In this sense, these institutions solve an institutional knowledge problem that makes them conducive to growth (cf. Carden and James 2009).

Swaleheen and Stansel (2007) and Heckelman and Powell (2008) argue that corruption increases economic growth when economic freedom is controlled for. Gerring and Thacker (2008) proxy for liberal economic policies using data on trade openness, security of private property rights, and inflation rates to show that liberal economic policies have a direct negative effect on infant mortality even after controlling for economic conditions.

Feldmann (2007) finds that economic freedom creates employment opportunities, particularly for women and the young. Clark and Lawson (2008) argue that high marginal tax rates are correlated with greater income inequality while aspects of economic freedom ("property rights, sound money, trade openness, and government size", p. 30) are associated with lower income inequality while government activism is

not conducive to equality. Further, more economic freedom means more productive investment (Gwartney et al. 2006:255).

The historical processes surrounding regulations often make them immune to political criticism, and the subtlety of regulatory failure makes it difficult to detect (Peltzman 2007:185-186). Identifying the winners from regulation is easy, while identifying the losers is not. Therefore, we have trouble overcoming regulation. Further, the skills needed to evade regulation are often the same skills needed to do other illegal things. Therefore, criminals tend to engage in corruption.

In a classic article, William Baumol (1990) identifies three different kinds of entrepreneurship. Productive entrepreneurship attempts to create new products and new production processes. Productive entrepreneurs earn incomes by creating wealth. Unproductive entrepreneurship is the process of redirecting resources, usually via rent-seeking. Unproductive entrepreneurship is likely to be negative-sum. Destructive entrepreneurship seeks to destroy wealth directly. In many countries and at many points in history, people have been able to enjoy higher incomes by actively destroying wealth. Indeed, as Baumol argues, the "rules of the game differ over time and space, and these different rules have produced different incentives."

The implications are, in Olson's (1996) words, "big bills left on the sidewalk." Olson (1996) evaluates a series of theories of economic growth and comes to the conclusion that institutions are reducing economic development in poor countries; he notes that, contrary to factor-oriented theories of development, capital and labor tend to flow in the same direction. In standard models, one would expect Foreign Direct

Investment (FDI) to flow away from high-wage labor and toward low-wage labor. In contrast to this prediction, however, FDI per capita is highest in rich countries.

Overcoming these barriers create special problems for entrepreneurs and businesspeople. According to North (1981, 1990, 2005), institutions are at the root of underdevelopment. Cultural institutions, legal environments, and enforcement mechanisms influence returns on investment and therefore incentives to invest. Weak institutions, particularly formal barriers to entrepreneurship and exchange as exist in many countries, reduce economic development by altering the relative returns to different kinds of entrepreneurship.

A secure contracting environment has two elements. The first is an institutional structure that allows firms and individuals to exploit gains from trade. Basically, liberal free markets are essential to a secure contracting environment. Also important is secure information about what the institutions actually are and which contracts will be enforced. The first characteristic can be facilitated by corruption; the second, however, might be undermined.

In relatively poor, un-free countries, corruption can overcome some of the barriers presented by formal and informal institutions that would otherwise restrict trade. Bureaucracies and regulators are in a position to exercise veto power over mutually beneficial trades—they can prevent people from picking up the bills left on the sidewalk, so to speak, and thereby reduce specialization, trade, and growth. When this is the case, corruption can increase economic growth by allowing trade.

This is illustrated in an example drawn from Shah and Sane (2008). Trade creates wealth and transaction costs are barriers to trade; therefore, transaction costs inhibit the

creation of wealth. Government intervention can create transaction costs as government organizations are able to observe environments in which they can create rents. As Hernando de Soto (2003) has argued, private property rights are essential to growth. Corruption can be a substitute for well-defined private property rights in an insecure contracting environment.

Consider, for example, a region with a maze of regulations that effectively prevent people from opening businesses. The possibility for growth-enhancing corruption in the business environment is apparent in the context of a study by Hernando de Soto (1989) and his team of researchers at the Institute for Liberty and Democracy in Lima, Peru. In a 1983 experiment, De Soto's team sought to estimate the effect of the Peruvian legal system on access to the formal economy and came to the conclusion that access to and membership in the formal sector is expensive indeed, with much of the country's regulatory infrastructure consisting of "bad law," which they define as a law that "impedes or disrupts" economic efficiency (conversely, a "good law" is a law that "guarantees and promotes economic efficiency") (De Soto 1989:132).

Perceptions of the legal system in Peru vary across sectors. Lawyers felt that the steps needed to establish a legitimate formal business "were very simple and took little time," but people in the country's formal sector were of the opinion that the procedures required for establishing a formal presence "were very cumbersome" (De Soto 1989:133). Participants in the informal economy "shuddered at the very mention of" the procedures required to establish a small industrial concern (De Soto 1989:133).

The ILD researchers resolved to open a small garment factory near Lima and to take every step necessary to do so legally without paying bribes. The experimenters

found that "a person of modest means must spend 289 days on bureaucratic procedures to fulfill the eleven requirements for setting up a small industry" at a cost of approximately $1231, which was "thirty-two times the monthly minimum living wage" (De Soto 1989:134). A similar (but less time-consuming) process was required to set up a small store. De Soto offers these as examples of "bad law" (De Soto 1989:151).

The gains to the bureaucracy from "bad law" were made clear in the ILD study of barriers to entry in industry, where the researchers agreed at the outset "to handle all the necessary red tape without go-betweens…and to pay bribes only when, despite fulfilling all the necessary legal requirements, it was the only way to complete a procedure and continue with the experiment" (De Soto 1989:134). The team was asked for bribes ten times and actually paid bribes in two cases where it was clear that the experiment would not go forward if they refused.

Bribery and corruption have the potential to clear a path through the regulatory thicket. The ILD researchers found that they could have circumvented parts of the regulatory process by bribing those with veto power over their proposal. Bribe-taking bureaucrats are effectively in a position to sell access from gains from trade. Corruption diverts resources from productive uses relative to a first-best scenario in which there is no bribe-extracting regulatory apparatus, but when the relevant alternative is "no trade," corruption can be efficiency-enhancing. It increases the total available gains from trade, and it also speeds up the rate at which those gains are realized by circumventing barriers to entry.

As the ILD researchers point out, the high cost of access to the formal economy means that many entrepreneurs instead take their business into the informal economy.

This brings its own set of problems. First, operating outside the legal system increases uncertainty with respect to an individual entrepreneur's property rights. This increases the variance of expected future income streams and also places limits on the efficient scale of operation. The development of a large informal sector is also advantageous for income-maximizing members of the bureaucracy, who can take advantage of informal entrepreneurs' extra-legal status to extract bribes in exchange for overlooking their rather lax relationship with the law. Again, the bureaucracy has control over access to the gains from trade, and if they can be persuaded to overlook efficiency-improving trades, growth will proceed apace, albeit not as rapidly as it would in an environment of relative economic freedom.

Shah and Sane (2008) offer a comprehensive survey of the experience of India in the last several decades, noting that free-market reforms have reduced poverty substantially while encouraging economic growth. At the same time, however, much remains to be done. While India has achieved international recognition for business process outsourcing, very high barriers to entrepreneurship (and, therefore, very high returns to corruption) are still pervasive across the country.

This has important distributional consequences. Liberal market reforms in India have been concentrated among the middle- and upper classes, and while the benefits have worked their way down to the poorest of the poor in some cases, the gains have gone disproportionately to the top of the income distribution (Shah and Sane 2008:323). Shah and Sane (2008:323-24) discuss the process of business licensing in India:

> Setting up a factory or a call center requires no license. But anyone wanting to run a tea stall or to become a street hawker or a cycle-rickshaw puller or to work

> as a railway porter requires a license. For entry-level professions that require low skills and little capital, licenses are still required. The number of some of these licenses was fixed thirty to forty years ago and never revised. Because the street entrepreneurs operate illegally, they are open to harassment and extortion by the police and municipal officers.

They continue, pointing out that "(m)ore than 80 percent of the [approximately 500,000 cycle-rickshaws in Delhi] are illegal" (p. 324). These barriers open the door for corruption; as Shah and Sane note, extortion and bribery is pervasive in the underground markets of urban India. Nonetheless, willingness to accept bribes in this case would be productivity-increasing because it would actually allow investment in tea stalls, rickshaws, etc. rather than creating pure deadweight loss by shutting off the market completely. On one hand, this is clearly inefficient relative to a counterfactual in which markets are unhampered. On the other hand, this is efficient relative to perfect law enforcement. Since a completely unhampered market is infeasible in many countries, corruption provides an imperfect substitute.

Growth rates in GDP per capita will be determined in part by the institutional environment that determines where an economy operates relative to its production possibilities frontier. Investments in inputs and entrepreneurial activity which expand the PPF and which therefore increase economic potential will depend in part on the institutional environment. Countries with large degrees of corruption may see reduced economic growth; at the same time, corruption may be an effective substitute for market institutions in areas with little economic freedom.

3. Data

The dependent variable of interest is the average annual growth rate of per capita GDP from 1995 through 2005. The independent variables of interest are corruption, economic freedom, their various components, and the interactions among them. "Corruption" can take many forms, and not all forms of measured corruption may actually be that corrupt. Thus, we consider the available indices of aggregate corruption as well as the components to get a finer view. Our intent is to differentiate the impact of different types of corruption on growth, given a level of economic freedom.

The corruption values are from the Transparency International Global Corruption Barometer (GCB). The GCB is a public opinion survey that measures the affect of corruption in different sectors on the daily lives of individuals. Using the GCB allows us to look at different types of corruption rather than an overall level of corruption. We narrow our focus to the sectors of business environment, education system, legal system, military, police, and tax system. The index is on a scale from 1 to 5, with 1 indicating, "not at all corrupt" and 5 indicating "completely corrupt."

The GCB survey has been conducted annually since 2003. The 2005 report is based on over 55,000 interviews from people in 69 countries. The original CGB covered only 45 countries. The GCB was chosen as our measure of corruption because of data availability, country coverage, and ability to compare our results to other studies. Although the GCB has not been used in many studies, the Corruption Perception Index (CPI) by Transparency International has been used extensively. According to Transparency International, the GCB and CPI correspond well indicating that people's perception of corruption (as measured by the GCB) strongly correlates with expert

perceptions (as measured by the CPI).[4] We confirm this high level of correlation, the results of which are presented in Table 9.

To measure institutional quality, we employ the Fraser Institute's Economic Freedom of the World (EFW). The EFW is calculated based on freedoms in five areas: freedom from government intervention, secure private property rights, sound money, freedom to trade internationally, and freedom from regulation. Each area is scored from 0 to 10 (based on the average of subcomponents) with 10 being the most free and the overall EFW is the simple average of the five areas.

The data must be adjusted because the fifth area of EFW provides a broad measure of regulation. The measures of business regulation within this area include a measure of irregular payments. These irregular payments could be perceived as a measure of corruption. As such, this subcomponent is dropped and the EFW is recalculated. The recalculation of EFW has been provided for 83 countries by Robert Lawson and is used in Heckelman and Powell (2008).

The authors of the *Economic Freedom of the World* data define "economic freedom" in terms of several categories, including money and banking, the contracting environment, and arbitrariness of the legal system. Data limitations affect what we can and cannot learn from the dataset—in particular, countries with the lowest presumed levels of economic freedom like North Korea are conspicuously absent—but these limitations do not necessarily reduce our ability to draw inferences about the relationships between institutions and the dependent variables of interest.

[4] The CPI is scaled from 0 to 10 with 0 being the most corrupt. We invert this scale so that 10 is the most corrupt and an increase in CPI is an increase in corruption. The inverted CPI compares more readily to the GCB where the highest value (5) is the most corrupt and in increase in the GCB value represents an increase in corruption.

Previous research on corruption and economic growth suggests many possible control variables. Control variables for all regressions include the log of per-capita GDP in 1995, to capture convergence effects, and latitude that has been argued to be an important determinant of economic performance.[5] We also include additional controls for human capital and fractionalization in some regressions. Because of many data limitations, which keep our sample size small, we tend towards parsimony and employ minimal controls.

4. Estimation and Results

We estimate linear models in which GDP growth from 1995 through 2005 is modeled as a function of economic freedom, corruption, and an array of control variables. For economic freedom, we use the average EFW from 1995 to 2000. This reflects that changes in economic freedom are likely to have a delayed affect on GDP growth. The corruption values are the values reported for 2005. Given the informal nature of corruption, corruption should change rapidly and always reflect the current operating environment at any point in time. We always control for the initial GDP using the natural log of GDP per capita in 1995 and geographic differences using latitude.

All regressions are estimated using weighted least squares; the weight is the population at the beginning of the sample period (1995), which is the standard weighting practice when using country averages. Given the small size of the dataset, we also calculate bootstrapped standard errors. The general form of our regression is:

$$GDP\,growth = \beta_0 + \beta_1 EFW + \beta_2 GCB + \beta_3 EFW * GCB + \beta_4 Controls + e$$

[5] See, e.g., Easterly and Levine (2003).

4.1 Analysis of the Full Sample

We first look at the basic relationship between growth, corruption, and economic freedom using the entire dataset. Using the adjusted economic freedom score, there are four types of corruption that are significant: education system, legal system, military, and taxes. Corruption in the military and tax system is associated with decreased growth in GDP. These negative impacts are the expected result. Corruption in the military means there is a real threat of physical violence to confiscate or destroy wealth. Military corruption may also suggest a great deal of regime uncertainty where the military could overthrow the standing government at any time. Tax corruption also represents a real threat to wealth. If the tax system is corrupt, wealth can be confiscated through "legal" government channels, which discourages wealth accumulation and entrepreneurship.

In contrast to military and tax corruption, corruption in the legal and education systems is associated with increases in GDP growth. The positive impact of legal system corruption may come from a number of sources. An overly complex legal system with lots of red tape or long wait times to get a hearing may be made more efficient by "grease" type bribes that move things through the system faster. The positive impact of education system corruption is more difficult to understand.[6]

Perceived corruption in the education system could take on many forms. The structure of higher education in many developing countries is to produce civil servants. Government involvement in the education system can be stultifying; corruption may be a

[6] We took a very close look at the education system corruption data. The values by country are available in Table 10 and a plot of education system corruption versus GDP growth is available in Figure 1. The distribution of education corruption is not bi-modal as we had original suspected. It also does not appear to be normally distributed, but rather random.

means to the improvement of the educational system itself. At the same time, however, one might expect a great deal of diversion in a corrupt educational system, which would reduce economic growth. The possibility of reverse causality is also a candidate explanation as richer countries may be able to devote more resources to education and, therefore, creates more resources to be extracted. Another possibility is that better students get better opportunities. There is a tendency for wealthy students to be better students because they don't have to work, they have educated parents, more support, etc. This could result in the perception that wealthy students get better educational opportunities. Similarly, wealthy families can afford to send their children to private schools. Private schools are generally thought to be better than public schools. Alternatively, it may be that private schools are the only schools, so only wealthy have access to education.

Another type of corruption within the education system takes the form of special payments to teachers. In developing countries, it is not uncommon for a single teacher to be assigned to a large number of students. The teacher simply doesn't have the time or proper incentives to make sure the students learn. In these situations, parents often pay the teacher to "tutor" or pay special attention to their children. The children whose parents pay receive the teacher's efforts while the rest are ignored.

We further disaggregate economic freedom into its basic components (economic freedom from government intervention, secure private property rights, sound money, freedom to trade internationally, and freedom from regulation). In this case, freedom to trade internationally is also statistically significant. The standardized coefficients (interpreted in terms of standard deviation changes rather than unit changes) are reported

in Table 1. These standardized coefficients are calculated based on the non-bootstrapped standard errors.

We also calculate bootstrapped standard errors because of the small sample sizes. The bootstrapping is conducted over observations, not errors. The coefficient estimates for corruption in the military and education system remain statistically significant at the five percent level. Freedom to trade internationally also remains significant after bootstrapping, at the ten percent level.

We test directly the hypothesis that corruption and economic freedom are substitutes by including interaction terms in the estimations. The interaction terms are interactions between economic freedom and various measures of corruption. A negative sign on an interaction term indicates that corruption and economic freedom are substitutes. In an environment where economic freedom is relatively low, the wheels of commerce can be greased (i.e., transaction costs can be reduced) via corruption and, therefore, growth can be increased.

The simple interaction between economic freedom and corruption (CPI) is not statistically significant, but if we interact economic freedom with different kinds of corruption, we get different results. In this regression, business corruption and economic freedom are both associated with increases in GDP growth while the interaction term has a negative coefficient estimate. The negative coefficient estimate on this interaction indicates that economic freedom and business corruption are substitutes.[7] In other words, if economic freedom is relatively low, business corruption can increase growth. This suggests specifically that corruption may "grease the wheels" of commerce in

[7] When we bootstrap the errors, the coefficient estimate on the interaction of economic freedom and business corruption is no longer statistically significant.

environments with relatively insecure contracting institutions. Further explanation into the contents of corruption in the business environment is necessary before we can reach conclusions that are more concrete. These results are presented in Table 2.

4.2 Sub-Samples by GDP Growth

The results to this point have used the entire dataset. It may be informative to look at different types of countries to determine if the effects of corruption vary. One way to split the sample is by per capita GDP growth. The data is split into two groups, above and below the median GDP growth. The countries that fall into the group below the median are most likely to be developed countries, as mature economies tend to have slower growth rates. However, this group may also contain undeveloped or under-developed countries that have stagnated.

For both groups, corruption in the military and the education system are statistically significant and have the same signs as the full sample results. That is military corruption has a negative effect while education system corruption has a positive effect. For the below median group, tax corruption is also statistically significant and has a negative impact on GDP growth. People in developed countries expect to pay taxes but increases in taxes deter wealth accumulation, which slows GDP growth. If taxes are perceived to be unfair, corrupt, or wasted; people will look for ways to protect their wealth from taxes, which often involves moving wealth to non-productive resources like being stuffed in a mattress or moved to offshore bank accounts. This inactivity of wealth also contributes to slowed growth in GDP. The regressions for these subgroups include the interactions of economic freedom and corruption, although none of the interactions are significant in either subgroup. The results are presented in Table 3.

4.3 Sub-Samples by EFW

Another way to split the sample is by economic freedom. The data is split into two groups, above and below the median economic freedom. The countries that fall into the group above the median are most likely to be developed countries with well-established institution while those that fall below are most likely to be developing countries with weak institutions. While corruption is generally bad for growth in countries with well-developed institutions, it may be that certain types of corruption can be advantageous in countries that lack these institutions. Corruption might "grease the wheels" of commerce in countries where the institutional environment is antagonistic to growth. A first-best environment would feature both high economic freedom and low corruption, but substitution of corruption for quality institutions may be a second-best outcome in the relatively un-free world.

The regressions for these subgroups do not include the interactions of economic freedom and corruption because the sample is already split by economic freedom. Additionally, the regressions on the group with economic freedom above the median fit very poorly as measured by adjusted R-squared and the F test. This suggests that GDP growth in economically free countries is determined primarily by other factors. In contrast, the models fit very well for the low economic freedom countries, suggesting that economic freedom and corruption are very important determinants of GDP growth. Therefore, the remainder of this section only discusses the results for the below median group. The results for both groups are presented in Tables 4 through 6.

In basic regressions on the relatively un-free countries (Table 4) we again find that corruption in the military and education system are statistically significant and carry

the same signs as previously found. We also find that police corruption is statistically significant and has a positive effect on GDP growth.[8] The positive coefficient estimate on police corruption supports the idea of a second-best outcome through "grease the wheels" type corruption. These results can also be interpreted as police corruption and corruption in the education system can act as substitutes for economic freedom in countries where there are weak institutions.

In Table 5, we add an additional control for human capital. The measure of human capital is the average years of education from 1995 to 2000 based on the data of Barro and Lee (2001). Controlling for years of education does not change the results for military and education system corruption. They remain statistically significant and maintain the same signs as all other regressions. However, legal system corruption is now statistically significant and has a positive effect on GDP growth in relatively un-free countries. This means that legal system corruption can act as a substitute for economic freedom in countries where there are weak institutions. This suggests that the type of corruption here may be getting in front of a judge or cutting through red tape rather than the ability to buy a verdict. After bootstrapping the errors in this model, legal system and military corruption remain statistically significant.

In addition to the control for human capital, we include additional variables of diversity to our final model presented in Table 6. The measures of diversity are ethnic, linguistic, and religious fractionalization as measured by Alesina, Devleeschauwer, Easterly, Kurlat, and Wacziarg (2002). The idea of fractionalization captures differences within a countries population, which may affect cooperation and corruption. More ethnic

[8] Using bootstrapped standard errors renders only military corruption statistically significant in these regressions.

fractionalization means more diversity. Including these measures of fractionalization does not change the sign or statistical significance of military and education system corruption. The positive and statistically significant effect of legal system corruption is also maintained from the last regression, which included human capital. Additionally, business corruption is now statistically significant with a positive impact on GDP growth. This can also be interpreted as business corruption acting as a substitute for economic freedom in countries with weak institutions. Unfortunately, none of the estimates are statistically significant after bootstrapping the errors.

4.4 Three-Stage Least Squares

It is quite likely that the relationships being analyzed here are more complicated than a simple linear regression. We now take a simultaneous equations approach to the relationship of GDP growth, economic freedom, and corruption. We take two different approaches that are presented in Tables 7 and 8. In the first approach, we include foreign direct investment (FDI) as a determinant of GDP growth, while FDI is a function of economic freedom, corruption, and other variables. In the second approach, we include overall corruption (CPI) as a determinant of GDP growth, while CPI is a function of economic freedom and fractionalization. See Tables 7 and 8 for the details.

In the FDI approach, FDI has a positive impact on GDP growth as expected but FDI is negatively impacted by tax corruption. The negative impact of tax corruption on FDI is logical in that foreign investors will reduce their investment if there is a chance that all of their profits will be "taxed" away. In this model GDP, growth is still affected by military and education system corruption as it has been through all previous models.

In the corruption approach, only military corruption maintains it's statistically significant negative impact on GDP growth. Corruption does not have a statistically significant impact on economic freedom but economic freedom does have a statistically significant negative impact on corruption. This indicates that more freedom and better institutions reduce corruption, either directly through better functioning institutions or indirectly by removing institutional barriers that create the need for corruption.

Another interesting result from this approach is that ethnic and linguistic fractionalization increase corruption while religious fractionalization decreases corruption. With ethnic fractionalization, it suggests that you may be more inclined to cheat people who are not like you. With the linguistic fractionalization, the same could be true or it could be that miscommunication due to language difference results in perceived cheating or corruption. With religious fractionalization, it's possible that countries with more religious diversity are more tolerant of differences of all kinds and provide more open access to all dimensions of life. Another way to look at religious fractionalization is to look at the opposite extreme, which is a country that has a single religious majority. In these types of countries, the people of the religious majority often hold political power and use it to restrict the lives of religious minorities. The strong religious influence of the majority may lead to high levels of both actual and perceived corruption of all varieties.

5. Conclusions and Implications

The results reported above suggest that the conventional thesis that corruption is always and everywhere a bad thing may not necessarily be true. These results are consistent with the findings of Heckelman and Powell (2008) and Stansel and Swaleheen

(2007), who argue that corruption and economic freedom can be substitutes. The result does not hold across all possible samples: in particular, it appears that a corrupt business environment and a corrupt police force will increase growth in countries that are relatively un-free while they have little or no effect in countries with relatively high economic freedom.

Military corruption appears to have a robust negative effect on economic growth. The ability to use force gives one the ability to specify and enforce private property rights; if military force can be used to attain private ends rather than "the good of all," it can be used to rearrange property rights to the benefit of those holding the guns and to the detriment of everyone else.

Corruption in the education system appears to have a positive correlation with economic growth. When the sample is split by economic freedom, the relationship is still statistically significant for countries with low economic freedom but has no effect on relatively free countries. Corruption here may reflect several things. First, some countries may have arbitrary rules restricting attendance and availability of resources. More likely, the corruption here takes the form of side payment to teachers by parents so their children get more attention while the other students are ignored.

It is important to note that the findings in this study are limited by the available data. There are far more sovereign states than those for which data are currently available; however, we would expect corruption to predict data availability. Therefore, including the data that are omitted from the current analysis would likely strengthen the results. However, further exploration is warranted before more robust conclusions can be reached.

Broadly speaking, a "fight against corruption" that is not explicitly targeted toward areas where corruption reduces growth could backfire. Policies aimed at reducing corruption should focus on reducing corruption in areas where corruption has clear negative effects. Moreover, policies aimed at increasing economic freedom can reduce the necessity for corruption, particularly in relatively un-free countries.

Tables

Table 1: Freedom, Corruption, and Growth in GDP per Capita, 1995-2005

(Standardized coefficient estimates)

ln gdp per capita (1995)	-0.1756	-0.2877
latitude	0.4300***	0.5911***
corrupt business	0.1004	-0.0308
corrupt education system	0.5722***	0.8589***
corrupt legal system	0.2698*	0.2501*
corrupt military	-0.4678***	-0.5647***
corrupt police	0.1849	0.2879
corrupt tax	-0.2854*	-0.3534**
economic freedom	0.1779	
economic freedom - government		0.0821
economic freedom - property rights		-0.1146
economic freedom - sound money		0.2051
economic freedom - trade		0.4619***
economic freedom - regulation		-0.0698
Adjusted R^2	0.8249	0.8539
Prob F	0.0000	0.0000
Weighted mean	29.2850	29.2850
N	52	52

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Regression weighted by the 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer by Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World by the Fraser Institute.

Table 2: Economic Growth and the Interactions Between Corruption and Economic Freedom

(Standardized coefficient estimates)

ln gdp per capita (1995)	-0.1674	-0.1111
latitude	0.4499***	0.2547*
corrupt business	0.0897	1.3228**
corrupt education system	0.5879***	0.2015
corrupt legal system	0.2766*	-0.5502
corrupt military	-0.4643***	1.4180
corrupt police	0.1709	-0.2828
corrupt tax	-0.3007*	-0.4035
economic freedom	0.1844	3.3588**
economic freedom * cpi	0.0433	
corrupt business * economic freedom		-2.6269**
corrupt education system * economic freedom		0.3800
corrupt legal system * economic freedom		0.9771
corrupt military * economic freedom		-2.5455
corrupt police * economic freedom		0.3493
corrupt tax * economic freedom		0.0536
Adjusted R2	0.8210	0.8503
Prob F	0.0000	0.0000
Weighted mean	29.2850	29.2850
N	52	52

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Regression weighted by the 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer by Transparency International except CPI which is the 1995 - 2000 average of the Corruption Perception Index by Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World by the Fraser Institute.

Table 3: Corruption, Economic Freedom, and Growth: Split by GDP Growth

(Standardized coefficient estimates)

	Below Median GDP Growth		Above Median GDP Growth	
ln gdp per capita (1995)	-1.6276***	-1.1732	-0.0429	0.2144
latitude	-0.0556	-0.0758	0.9053***	0.2765
corrupt business	0.4955	-2.3622	0.1022	-0.4939
corrupt education system	1.6052*	-5.3384	0.5101*	-0.0648
corrupt legal system	0.3110	3.2292	-0.0319	-1.7976
corrupt military	-1.1866**	1.7361	-0.6414*	3.6671
corrupt police	0.0027	4.3982	0.5966	-2.8481
corrupt tax	-1.2182**	2.0454	-0.2522	0.7389
economic freedom	1.1282***	0.2149	0.3596	-1.4780
economic freedom * cpi	-0.4859		0.4407	
corrupt business * economic freedom		7.2928		0.9057
corrupt education system * economic freedom		5.2857		1.0072
corrupt legal system * economic freedom		-2.5009		2.7422
corrupt military * economic freedom		-2.5097		-6.4964
corrupt police * economic freedom		-3.2217		2.1635
corrupt tax * economic freedom		-3.7675		-2.0181
Adjusted R2	0.4904	0.3250	0.8039	0.7904
Prob F	0.0161	0.1747	0.0000	0.0016
Weighted mean	13.8312	13.8312	37.7026	37.7026
N	26	26	26	26

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Regression weighted by the 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer by Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World by the Fraser Institute.

Table 4: Corruption, Economic Freedom, and Growth: Split by EFW

(Standardized coefficient estimates)

	Below Median EFW		Above Median EFW	
ln gdp per capita (1995)	0.0954	0.0779	-0.3990	-0.1303
latitude	0.2370	0.3961*	0.2393	0.3400
corrupt business	0.2437	0.2102	-0.2363	-0.2992
corrupt education system	0.2470*	0.5574**	1.0054	0.9814
corrupt legal system	0.0378	0.0399	0.7699	0.5433
corrupt military	-0.6612***	-0.6929***	-0.4069	-0.4032
corrupt police	0.3444*	0.4204*	-0.3443	0.17143
corrupt tax	-0.1160	-0.3389	-0.7984	-0.3107
economic freedom	-0.1170		0.0235	
economic freedom - government		-0.0423		-0.4918
economic freedom - property rights		-0.3062		-0.0628
economic freedom - sound money		0.2409		-0.5055
economic freedom - trade		0.1164		0.5252
economic freedom - regulation		-0.0569		0.3114
Adjusted R^2	0.8850	0.8830	0.0729	-0.1180
Prob F	0.0000	0.0000	0.3494	0.6556
Weighted mean	34.3855	34.3855	19.5840	19.5840
N	26	26	26	26

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Regression weighted by the 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer by Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World by the Fraser Institute.

Table 5: Split by EFW, Controlling for Education

(Standardized coefficient estimates)

	Below Median EFW		Above Median EFW	
ln gdp per capita (1995)	-0.0014	-0.0531	-0.3829	-0.2450
latitude	0.1052	-0.1028	0.0696	-0.1727
years of education	-0.0487	-0.0946	0.3318	0.8244
corrupt business	0.1536	0.2061	-0.3340	-0.3344
corrupt education system	0.2903***	0.0936	0.6659	0.1959
corrupt legal system	0.4493**	0.5376**	0.8010	0.2361
corrupt military	-0.6842***	-0.6032***	-0.2567	0.0051
corrupt police	-0.1413	-0.3230	-0.4159	-0.2224
corrupt tax	-0.2552	-0.1607	-0.6761	0.5040
economic freedom	0.1244*		-0.2673	
economic freedom - government		-0.0176		-1.5949
economic freedom - property rights		0.3431		-0.5034
economic freedom - sound money		0.0402		-1.2853
economic freedom - trade		0.0308		0.3966
economic freedom - regulation		0.0803		1.0776
Adjusted R^2	0.9620	0.9624	0.0136	-0.0967
Prob F	0.0000	0.0000	0.4653	0.6210
weighted mean	34.5314	34.5314	19.5776	19.5776
N	22	22	25	25

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Regression weighted by the 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer by Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World by the Fraser Institute. Years of education are the 1995 - 2000 average from Barro & Lee (2001).

Table 6: Split by EFW, Controlling for Education and Fractionalization

(Standardized coefficient estimates)

	Below Median EFW		Above Median EFW	
ln gdp per capita (1995)	-0.1776	-0.2927	-0.0618	-0.3900
latitude	0.1010	-0.2485	-0.2282	-0.9225
years of education	-0.0546	-0.1398	0.0439	0.5612
corrupt business	0.1821*	0.2052	-0.8457	-0.6167
corrupt education system	0.3078*	-0.1410	0.6767	0.2349
corrupt legal system	0.4232**	0.5811*	1.4163*	0.9197
corrupt military	-0.7288***	-0.3944	-0.2085	0.1226
corrupt police	-0.1784	-0.3128	-0.7246	-1.2859
corrupt tax	-0.2797	-0.1992	-0.8304	0.4964
economic freedom	0.2201*		-0.6608	
economic freedom - government		-0.2263		-2.2043
economic freedom - property rights		0.5735		0.0841
economic freedom - sound money		-0.0701		-1.9228
economic freedom - trade		0.1779		-0.1422
economic freedom - regulation		0.2202		1.5748
ethnic fractionalization	-0.0071	0.0108	-0.5141	-0.6924
linguistic fractionalization	-0.2198	0.1865	0.2289	0.3901
religious fractionalization	0.0775	-0.2500	0.4502	0.2960
Adjusted R^2	0.9569	0.9564	-0.0496	-0.2773
Prob F	0.0000	0.0027	0.5678	0.7472
weighted mean	34.5314	34.5314	19.5776	19.5776
N	22	22	25	25

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Regression weighted by the 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer by Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World by the Fraser Institute. Years of education are the 1995 - 2000 average from Barro & Lee (2001). Fractionalizations are the 1995 - 2000 average from Alesina, Devleeschauwer, Easterly, Kurlat, & Wacziarg (2002).

Table 7: 3SLS with Foreign Investment

Dependent Variable:	Growth in GDP per Capita	Economic Freedom	Foreign Direct Investment
ln gdp per capita (1995)	-2.7108	0.7193***	1.6150*
	(6.2512)	(0.0525)	(0.9442)
latitude	0.0046		
	(6.2456)		
corrupt business			-0.5221
			(2.0408)
corrupt education system	19.6208***		
	(4.8257)		
corrupt legal system			1.4983
			(1.0958)
corrupt military	-16.0067**		
	(7.2056)		
corrupt police	5.6928		
	(4.0151)		
corrupt tax			-3.0719***
			(0.8657)
economic freedom	0.0046		-0.7090
	(6.2456)		(0.9808)
years of education	0.9233	0.0779	
	(1.6578)	(0.0674)	
domestic investment	-0.5042		
	(0.5407)		
foreign direct investment	3.2844*	-0.1160	
	(1.8161)	(0.0879)	
research and development			-0.5910
			(0.4420)
Adjusted R^2	0.9654	0.9918	0.7011
Prob F	0.0000	0.0000	0.0000
Weighted mean	31.5562	6.6142	1.8550
N	34	34	34

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Standard Errors reported in parentheses. Weight is 1995 population as reported by the World Bank. Corruption variables are from the 2005 Global Corruption Barometer from Transparency International. Economic freedom variables are the 1995 - 2000 average of the Economic Freedom of the World from The Fraser Institute. All investment type data from the World Bank.

Table 8: 3SLS with Corruption

Dependent Variable:	Growth in GDP per Capita	Economic Freedom	Corruption (CPI)
ln gdp per capita (1995)	-12.8218	0.8016***	2.9461***
	(16.2223)	(0.2071)	(0.6152)
latitude	-0.2193		
	(0.9920)		
corrupt business	19.6610		
	(27.0634)		
corrupt education system	19.6225	-0.0423	
	(27.1194)	(0.1769)	
corrupt military	-19.1130***		
	(6.7111)		
corrupt police	-1.8053		
	(19.3196)		
economic freedom	2.4201		-3.3977***
	(6.3460)		(0.9219)
years of education	4.8031		
	(5.8550)		
domestic investment	0.4906		
	(0.5730)		
foreign direct investment	7.2870		
	(15.5355)		
corruption		-0.0183	
		(0.1002)	
ethnic fractionalization			1.8669*
			(1.0259)
linguistic fractionalization			6.4863***
			(0.9183)
religious fractionalization			-3.7403***
			(1.4073)
Adjusted R^2	0.8911	0.9933	0.9452
Prob F	0.0000	0.0000	0.0000
Weighted mean	28.7982	6.4682	5.7933
N	47	47	47

* Statistically significant at the 10% level, ** statistically significant at the 5% level, *** statistically significant at the 1% level. Standard errors reported in parentheses. Weighted by the 1995 population as reported by the World Bank. Corruption is the 1995 - 2000 average of the Corruption Perception Index (CPI) by Transparency International. Economic Freedom is the 1995 - 2000 average of Economic Freedom of the World from the Fraser Institute. (This value has been adjusted for irregular payments.) All investment data is from the World Bank.

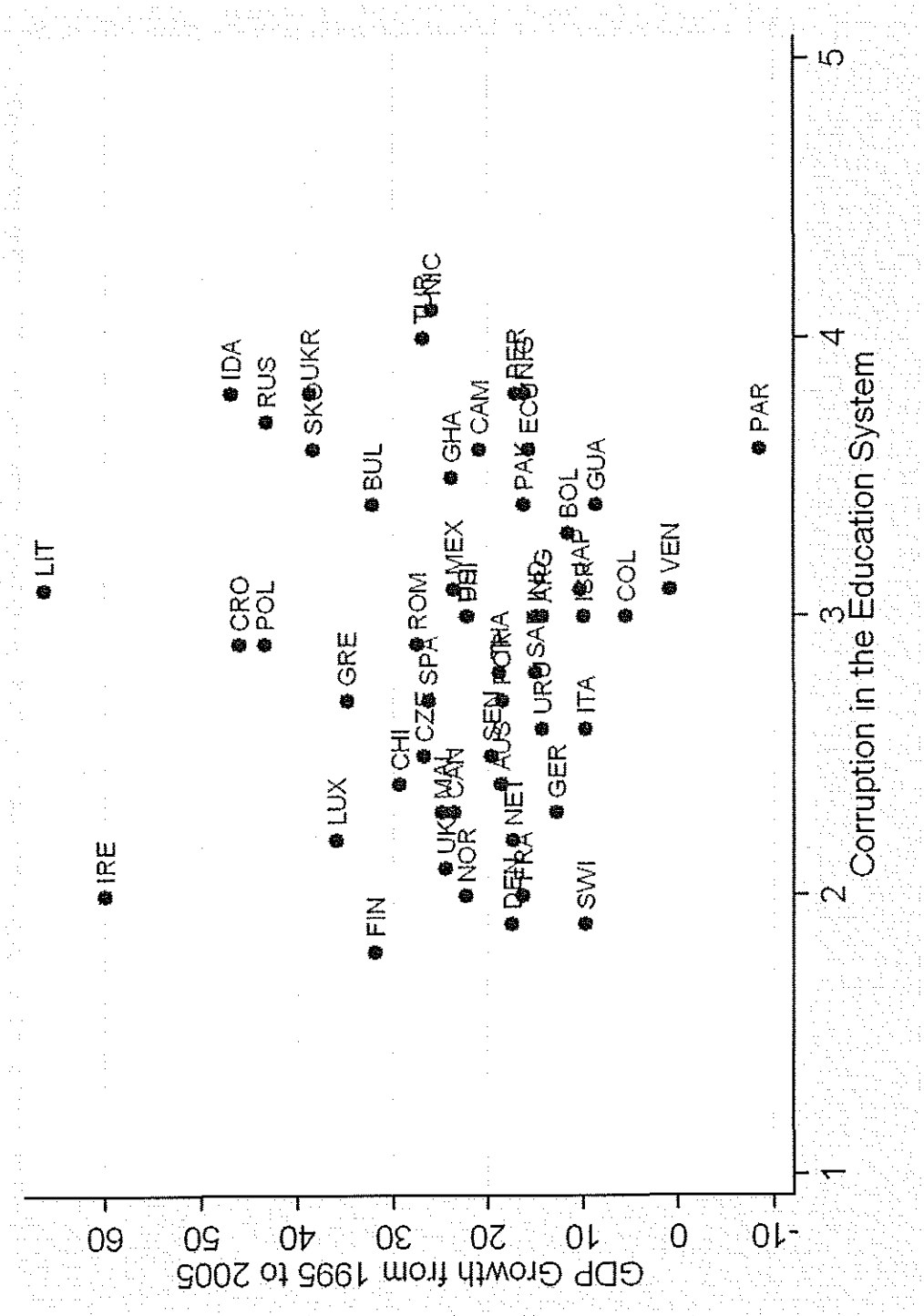
Table 9: Correlations

	average cpi	corrupt business	corrupt education system	corrupt legal system	corrupt military	corrupt police	corrupt taxes	average efw	average efw government	average efw property	average efw money	average efw trade	average efw regulation	ethnic fractionalization	linguistic fractionalization	religious fractionalization
average cpi	1.0000															
corrupt business	0.4404	1.0000														
corrupt education system	0.4804	0.7867	1.0000													
corrupt legal system	0.6664	0.9350	0.7674	1.0000												
corrupt military	0.5801	0.7257	0.7544	0.7045	1.0000											
corrupt police	0.5507	0.8037	0.9395	0.8709	0.6984	1.0000										
corrupt taxes	0.7573	0.8058	0.7509	0.9561	0.5900	0.8918	1.0000									
average efw	-0.7149	-0.3087	-0.5708	-0.3616	-0.4531	-0.4050	-0.4278	1.0000								
average efw government	-0.3003	-0.1216	-0.1699	-0.0137	-0.6267	0.0555	0.1251	0.4936	1.0000							
average efw property	-0.7790	0.1154	0.0657	-0.1412	-0.0014	0.0116	-0.3094	0.6219	0.1551	1.0000						
average efw money	-0.4435	-0.3391	-0.8291	-0.3584	-0.5234	-0.6797	-0.4416	0.7683	0.2690	0.1506	1.0000					
average efw trade	-0.4719	-0.4955	-0.6268	-0.3867	-0.5618	-0.3809	-0.3214	0.8870	0.6341	0.2731	0.6908	1.0000				
average efw regulation	-0.5276	-0.1701	-0.0624	-0.2113	0.0311	0.0283	-0.2515	0.7175	0.2081	0.7308	0.1684	0.6347	1.0000			
ethnic fractionalization	0.6710	0.4239	0.2407	0.5396	0.7610	0.3302	0.4639	-0.1875	-0.5472	-0.3093	-0.0075	-0.1519	0.0024	1.0000		
linguistic fractionalization	0.2743	0.3273	0.0678	0.3339	0.6695	0.1377	0.1753	0.1734	-0.5320	0.0895	0.2278	0.0613	0.3246	0.8961	1.0000	
religious fractionalization	0.0016	0.4112	0.4232	0.4463	0.4852	0.5874	0.4012	0.4045	0.1782	0.5110	-0.0857	0.3531	0.7755	0.3899	0.5282	1.0000

Table 10: Summary Statistics by Country

Count	Country	GDP Growth	Avg EFW	Avg CPI	Education Corruption
1	Argentina	14.20	6.88	6.51	3.0
2	Austria	18.62	7.15	2.48	2.4
3	Bolivia	11.45	6.53	7.31	3.3
4	Bulgaria	32.09	4.75	6.77	3.4
5	Cameroon	20.92	5.32	8.16	3.6
6	Canada	23.63	7.81	0.91	2.3
7	Chile	29.31	7.40	3.02	2.4
8	Colombia	5.32	5.49	7.22	3.0
9	Croatia	46.00	4.82	6.80	2.9
10	Czech Republic	26.73	6.30	5.15	2.5
11	Denmark	17.47	7.42	0.27	1.9
12	Ecuador	15.64	5.68	7.38	3.6
13	Finland	31.91	7.49	0.49	1.8
14	France	16.31	6.79	3.23	2.0
15	Germany	12.74	7.49	1.98	2.3
16	Ghana	23.91	5.47	6.63	3.5
17	Greece	34.78	6.55	5.15	2.7
18	Guatemala	8.52	6.52	6.85	3.4
19	India	46.98	5.86	7.21	3.8
20	Indonesia	14.79	6.31	7.88	3.0
21	Ireland	60.05	8.05	1.93	2.0
22	Israel	9.87	6.21	2.76	3.0
23	Italy	9.70	6.78	5.78	2.6
24	Japan	10.26	7.07	3.58	3.1
25	Lithuania	66.49	5.45	6.05	3.1
26	Luxembourg	35.90	7.65	1.32	2.2
27	Malaysia	24.83	6.98	4.87	2.3
28	Mexico	23.58	6.22	6.81	3.1
29	Netherlands	17.38	7.77	1.11	2.2
30	Nicaragua	26.05	5.89	6.95	4.1
31	Nigeria	16.19	4.50	8.57	3.8
32	Norway	22.33	7.25	1.10	2.0
33	Pakistan	16.22	5.56	7.86	3.4
34	Paraguay	-8.58	6.50	8.25	3.6
35	Peru	17.15	6.51	5.53	3.8
36	Philippines	22.08	7.09	6.97	3.0
37	Poland	43.38	5.55	5.29	2.9
38	Portugal	18.48	7.21	3.56	2.7
39	Romania	27.45	4.18	6.84	2.9
40	Russia	43.20	4.39	7.65	3.7
41	Senegal	19.67	5.21	6.60	2.5
42	South Africa	14.95	6.46	4.76	2.8
43	South Korea	38.44	6.68	5.73	3.6
44	Spain	26.33	7.09	4.29	2.7
45	Switzerland	9.65	8.00	1.25	1.9
46	Thailand	18.77	6.89	6.90	2.8
47	Turkey	26.89	5.76	6.39	4.0
48	Ukraine	38.71	4.24	7.70	3.8
49	United Kingdom	24.45	8.06	1.46	2.1
50	United States	22.20	8.28	2.36	3.0
51	Uruguay	14.28	6.17	5.72	2.6
52	Venezuela	0.72	4.99	7.41	3.1

Figure 1: GDP Growth vs. Education Corruption



References

Alatas, Vivi, Lisa Cameron, Ananish Chaudhuri, Nisvan Erkal, and Lata Gangadharan. 2009. Gender, Culture, and Corruption: Insights from an Experimental Analysis. *Southern Economic Journal* 75(3):663-680.

Aron, Janine. 2000. Growth and Institutions: A Review of the Evidence. *World Bank Research Observer* 15(1):99-135.

Bardhan, Pranab. 1997. Corruption and Development: A Review of Issues. *Journal of Economic Literature* 35:1320-1346.

Baumol, William J. Entrepreneurship: Productive, Unproductive, and Destructive. *Journal of Political Economy* 98(5):893-921. Reprinted on Powell (2008).

Braguinsky, Serguey. 1996. Corruption and Schumpeterian Growth in Different Economic Environments. *Contemporary Economic Policy* 14(3):14-25.

Brito-Bigott, Osmel, Hugo J. Faria, Jose Miguel Rodriguez, and Alejandro Sanchez. 2008. Corruption and Complex Business Rules. *Journal of Private Enterprise* 24(1):1-21.

Brunetti, Aymo and Beatrice Weder. 2003. A free press is bad news for corruption. *Journal of Public Economics* 87:1801-1824.

Carden, Art and Harvey S. James, Jr. 2009. Time Under Authoritarian Rule and Economic Growth. Contracting and Organizations Institute Working Paper 2007-02.

Clark, J.R. and Robert A. Lawson. 2008. The Impact of Economic Growth, Tax Policy, and Economic Freedom on Inequality. *Journal of Private Enterprise* 24(1):23-31.

Coyne, Christopher. 2007. *After War: The Political Economy of Exporting Democracy*. Stanford: Stanford Economics and Finance.

De Soto, Hernando. 1989. *The Other Path*. New York: Basic Books.

De Soto, Hernando. 2003. *The Mystery of Capital*. New York: Basic Books.

Easterly, William. 2001. *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics*. Cambridge, MA: MIT Press.

Easterly, William and Ross Levine. 2003. Tropics, Germs, and Crops: How Endowments Influence Economic Development. *Journal of Monetary Economics* 50(1):3-39.

Echazu, Luciana and Pinaki Bose. 2008. Corruption, Centralization, and the Shadow Economy. *Southern Economic Journal* 75(2):524-537.

Ehrlich, Isaac and Francis T. Lui. 1999. Bureaucratic Corruption and Endogenous Economic Growth. *Journal of Political Economy* 107(6-2):S270-S293.

Feldmann, Horst. 2007. Economic Freedom and Unemployment around the World. *Southern Economic Journal* 74(1):158-176.

Gerring, John and Strom C. Thacker. 2008. Do Neoliberal Economic Policies Kill or Save Lives? *Business and Politics* 10(3):Article 3.

Gradstein, Mark. 2004. Governance and Growth. *Journal of Development Economics* 73(2):505-518.

Gwartney, James D., Randall G. Holcombe, and Robert A. Lawson. 2006. Institutions and the Impact of Investment on Growth. *Kyklos* 59(2):255-273.

Heckelman, Jac and Benjamin W. Powell. 2008. Corruption, Economic Freedom, and Growth. Working Paper: Wake Forest University and Suffolk University.

Higgs, Robert. 1997. Regime Uncertainty: Why the Great Depression Lasted So Long and Why Prosperity Resumed after the War. *Independent Review* 1(4):561-590.

Holcombe, Randall G. 2007. *Entrepreneurship and Economic Progress*. London: Routledge.

Huntington, Samuel P. 1968. *Political Order in Changing Societies*. New Haven, CT: Yale University Press.

Li, Hongyi, Lixin Colin Xu, and Heng-Fu Zou. 2000. Corruption, Income Distribution, and Growth. *Economics and Politics* 12(2):155-182.

McCraw, Thomas. 2007. *Prophet of Innovation*. Cambridge: Harvard University Press.

Mauro, Paolo. 1995. Corruption and Growth. *Quarterly Journal of Ecnoomics* 110(3):681-712.

Mauro, Paulo. 1998. Corruption and the Composition of Government Expenditure. *Journal of Public Economics* 69:263-279.

Meon, Pierre-Guillaume and Khalid Sekkat. 2005. Does corruption grease or sand the wheels of growth? *Public Choice* 122(1-2):69-97.

Meon, Pierre-Guillaume and Laurent Weill. 2008. Is Corruption an Efficient Grease? Laboratoire de Recherche en Gestion et Economie Working Paper 2008-06.

Mo, Pak Hung. 2001. Corruption and Economic Growth. *Journal of Comparative Economics* 29(1):66-79.

North, Douglass C. 1981. *Structure and Change in Economic History*. New York: W.W. Norton.

North, Douglass C. 1990. *Institutions, Institutional Change, and Economic Performance*. New York: Cambridge University Press.

North, Douglass C. 2005. *Understanding the Process of Economic Change*. Princeton: Princeton University Press.

Olson, Mancur Jr. 1996. Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor. *Journal of Economic Perspectives* 10(2):3-24. Reprinted in Powell (2008).

Pellegrini, Lorenzo and Reyer Gerlagh. 2004. Corruption's Effect on Growth and its Transmission Channels. *Kyklos* 57(3):429-456.

Peltzman, Sam. 2007. Regulation and the Wealth of Nations: The Connection between Government Regulation and Economic Progress. *New Perspectives on Political Economy* 3(2):185-204.

Powell, Benjamin (ed). 2008. *Making Poor Nations Rich*. Stanford: Stanford Economics and Finance and the Independent Institute.

Rose-Ackerman, Susan. 2008. Corruption and Government. *International Peacekeeping* 15(3):328-343.

Schumpeter, J.A. (1942). *Capitalism, Socialism, and Democracy*. New York: Harper & Row.

Stansel, Dean and Mushfiq Swaleheen. 2007. Economic Freedom, Corruption, and Growth. *Cato Journal* 27(3):343-358.

Shleifer, Andrei and Robert W. Vishny. 1998. *The Grabbing Hand: Government Pathologies and Their Cures*. Cambridge: Harvard University Press.

Shah, Parth J. and Renuka Sane. 2008. India: The Elephant in the Age of Liberation, in Benjamin W. Powell, ed., *Making Poor Countries Rich: Entrepreneurship and the Process of Economic Development*. Stanford: Stanford Economics and Finance and The Independent Institute, pp. 309-341.

Svensson, Jakob. 2005. Eight Questions about Corruption. *Journal of Economic Perspectives* 19(3):19-42.

Tanzi, Vito and Hamid R. Davoodi. 2000. Corruption, Growth, and Public Finances. IMF Working Paper 00/182.

Tavares, Jose. 2003. Does foreign aid corrupt? *Economics Letters* 79(1):99-106.

Treisman, Daniel. 2000. The Causes of Corruption: a Cross-National Study. *Economics and Politics* 76(3):399-457.

Wedeman, Andrew. 1997. Looters, Rent-Scrapers, and Dividend-Collectors: Corruption and Growth in Zaire, South Korea, and the Philippines. *Journal of Developing Areas* 31(4):457-478.