



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

June 2013

This Phase 3 Report on Poland by the OECD Working Group on Bribery evaluates and makes recommendations on Poland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 June 2013.

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EXECUTIVE SUMMARY

The Phase 3 Report on Poland by the OECD Working Group on Bribery (WGB) evaluates and makes recommendations on Poland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and related instruments. The Report focuses on developments since Poland's Phase 2 review in January 2007, and takes into account Poland's Phase 2 Written Follow-Up Report in October 2009. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 review.

The WGB regrets that Poland has not successfully prosecuted a foreign bribery case in the twelve and a half years since its foreign bribery offence came into force. Poland is currently prosecuting one case of bribery of foreign public officials. Two investigations of allegations of foreign bribery were terminated; both involved allegations of bribery of foreign public procurement authorities by SOEs in sensitive sectors. A third allegation of bribery of a foreign public procurement authority in a sensitive sector has not been investigated. The WGB also observes that due to increasing international business activities by Polish companies, the risk of foreign bribery could increase in the medium to long term.

Unimplemented and partially implemented Phase 2 recommendations at the time of Poland's Phase 2 Written Follow-Up Report still have not been fully implemented. These include recommendations on the "impunity" provision in the foreign bribery offence, the effectiveness of the liability of legal persons, and the tax treatment of bribe payments. Further, Poland has not implemented the recommendation to consider amending the cap on fines for legal persons; instead, Poland has decreased the level of fines from PLN 20 million (around EUR 5 million) to PLN 5 million (around EUR 1.2 million).

In the current report, the WGB recommends that Poland take measures to ensure that the "impunity" provision in the Penal Code that applies to foreign and domestic bribery cannot be applied to the bribery of foreign public officials. This provision allows perpetrators of bribery to automatically escape punishment by notifying the law enforcement authorities of the offence before the authorities learn about it from other sources. Such a provision might also have an impact on the effectiveness of the liability of legal persons, the provision of mutual legal assistance and extradition. The WGB also recommends that Poland take urgent steps to eliminate a requirement for the conviction or discontinuance of proceedings against a natural perpetrator in order to be able to institute proceedings for foreign bribery against a legal person. In addition, the WGB recommends that Poland establish an investigation and prosecution strategy for foreign bribery cases to address concerns about whether adequate resources and expertise are available to effectively investigate and prosecute highly complex cases, and the extraordinary length of proceedings for corruption cases in Poland.

The WGB makes further recommendations to Poland in a number of areas for preventing foreign bribery. For instance, Poland needs to raise greater awareness of the risk of foreign bribery and the relevance of the foreign bribery offence in the general public, accounting and auditing profession, industry, including SOEs, FIU and entities subject to money laundering reporting requirements, and among institutions involved in public procurement contracting, including ODA-funded procurement contracting. Poland needs to reform its law on whistleblower protections, which are not clearly stated in the law or contained in any statutory provisions expressly for this purpose. The WGB also recommends that Poland's public procurement and official export credit support authorities consider systematically checking whether applicants and contractors have been included on the publicly available debarment lists of international financial institutions for the purpose of triggering enhanced due diligence. Finally, as the tax law does not contain a clear statement that bribes to foreign public officials are not tax-deductible, the WGB recommends that Poland clarify this matter.

The Working Group commends Poland in certain areas. The on-site visit involved excellent participation by the private sector and civil society. The WGB welcomes Poland's efforts to train law enforcement authorities on asset recovery. Poland has also made significant efforts to raise awareness in the tax administration on the detection of bribes in the course of tax inspections. The WGB commends the Polish authorities for their efficient and effective response to mutual legal assistance requests concerning foreign bribery and active cooperation with foreign jurisdictions.

The Report and the Recommendations, which reflect the findings of the lead examiners from Argentina and Turkey, are adopted by the OECD Working Group on Bribery on 14 June 2013. Poland is invited to present its enforcement strategy for foreign bribery in writing one year from adoption of this report. The WGB also requests that the strategy address in writing the recommendation on the application of the "impunity" provision in the Penal Code to foreign bribery cases, and the recommendations on the liability of legal persons and the prevention and detection of foreign bribery through tax measures. At the same time, in accordance with the normal procedure, Poland will provide on oral report on implementation of recommendation 3c) on sanctions for legal persons. In accordance with the normal procedure, a further written follow-up report on progress implementing the recommendations will be given within 2 years.

This report is based on the laws, regulations and other materials submitted by Poland and information obtained by the lead examiners during their three-day on-site visit to Warsaw from 5 to 7 February 2013, during which the lead examiners met with representatives of Poland's public administration, private sector and civil society.

A. INTRODUCTION

1. The On-Site Visit

1. On 5 to 7 February 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (the Working Group) visited Warsaw as part of the Phase 3 evaluation of Poland's implementation of the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (Convention) and related anti-bribery instruments. The 40 States that make up the Working Group were represented at the on-site visit by lead examiners from Argentina and Turkey. The lead examiners were supported by members of the OECD Secretariat¹.

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

3. Prior to, during and following the on-site visit, the Polish authorities provided responses to significant requests for information from the evaluation team, including legislation, statistics, and questions about enforcement practices. Prior to the on-site visit, Poland responded to the standard questionnaire and a supplementary questionnaire with country-specific questions, which together comprise the Phase 3 Questionnaire. The responses to the Questionnaire helped the evaluation team focus on the most important issues regarding implementation and enforcement during and following the visit.

4. The evaluation team held several meetings with various stakeholders during the three-day visit, including key government ministries and agencies, law enforcement authorities, the private sector and civil society.² The Polish authorities made significant efforts to ensure that meetings with non-governmental representatives were well-attended, including by sending invitations several weeks in advance of the on-site visit. As a result, 11 large companies were represented, including 5 SOEs, 5 business associations that include SMEs in their membership, three financial institutions, and a large number of representatives of the accounting and auditing profession, legal profession, NGOs and a media representative. This turn-out was a major improvement compared to the Phase 2 on-site visit, and provided the evaluation team with substantial opportunity to discuss at length all the main issues that it had placed on the agenda for the on-site visit.

¹ Argentina was represented by Mr. Fernando Andrés Marani, First Secretary, Legal Adviser's Office, Ministry of Foreign Relations and Worship; and Mr. José Ipohorski Lenkiewicz, Coordinator of Investigations, Anti-Corruption Office, Ministry of Justice and Human Rights. Turkey was represented by Ms. Hatice Seval Arslan, Judge, Ministry of Justice, General Directorate of International Law and Foreign Affairs; Mr. Uzeyir Karabiyik, Judge, General Directorate of International Law and Foreign Affairs, Ministry of Justice; and Mr. Cebraail Yilmazer, Chief Tax Inspector, Ministry of Finance. The OECD Secretariat was represented by Ms. Christine Uriarte, Senior Legal Analyst and Counsellor, Directorate for Financial and Enterprise Affairs, Anti-Corruption Division; Mr. Chiawen Kiew, Legal Analyst, Anti-Corruption Division; and Ms. Kathleen Kao, Legal Analyst, Anti-Corruption Division. Ms. Marta Rilling, Financial Affairs Division, OECD, provided the Evaluation Team with timely research using Polish language resources before and after the on-site visit.

² See Annex 3 for a list of participants.

5. All participants in the on-site visit were open and forthcoming, and made best efforts to provide follow-up information if unable to respond to questions during the initial meetings. For instance, the Ministry of Defence and State Treasury returned for a second set of meetings with the evaluation team on the last day of the on-site visit. They also provided further written information after the on-site visit. Despite the use of consecutive interpretation services during the meetings, the evaluation team was able to cover in adequate depth all the major issues identified by it for this evaluation. This was due to the excellent organisation of the meetings and the strong level of preparation for the discussions, along with the willingness of the Polish authorities to provide significant written clarifications following the meetings.

6. The discussions at the on-site visit were focussed and targeted on the main issues identified by the evaluation team. The evaluation team covered all the unimplemented, partially implemented and follow-up issues from the Phase 2 Review on Poland, as well as a few new areas that it identified in Phase 3 as warranting exploration. The evaluation team's focus throughout was on identifying major obstacles to implementing the Convention and related OECD anti-bribery instruments in Poland, in particular taking into account the absence of any successful prosecution of the bribery of foreign public officials in Poland since Poland's foreign bribery offence came into force in February 2001.

2. Summary of monitoring steps leading to Phase 3

7. Poland has already undergone a number of monitoring steps leading up to Phase 3, according to the regular monitoring procedure that applies to all Parties to the Convention as follows: 1) Phase 1 (February 2001); Phase 2 (January 2007); and Phase 2 Written Follow-up Report (October 2009).

3. Outline of the Report

8. This Report is divided into three parts. Part A provides the introductory sections; Part B examines Poland's efforts to implement and enforce the Convention, 2009 Anti-Bribery Recommendation, and 2009 Tax Recommendation; and Part C presents the Working Group's recommendations and issues for follow-up. Part B, which comprises the bulk of the analysis in this Report, focuses on three kinds of issues: 1) Poland's efforts to enforce its foreign bribery offence; 2) efforts to address remaining weaknesses identified in previous evaluations of Poland; and 3) new major issues, including those arising from amendments to the current legislative framework, and others that may have not been identified in Phase 2.

4. Poland's Economic Background

9. The OECD reports that "since 2007, Poland has been the best economic performer within the OECD as measured by real GDP".³ Poland's GDP grew approximately by 4.5% in 2011,⁴ and Poland's turnover in foreign trade has increased by ten times in the last ten years.⁵

10. In 2012, Poland's exports amounted to USD 182.72 billion.⁶ In 2011 Poland was ranked as the 27th largest exporter of merchandise and the 30th largest exporter of commercial services in the world.⁷ Poland's major export partners in 2012 were Germany, United Kingdom, Czech Republic, France, Russia,

³ See: OECD Economic Surveys: Poland Overview" (March 2012) (<http://www.oecd.org/eco/49971872.pdf>)

⁴ The Polish Central Statistical Office on the Updated 2011-2012 GDP estimate (22 April 2013)

⁵ See: <http://www.tradingeconomics.com/poland/exports>

⁶ See: "Poland Quarterly Statistics No.2/2012" (Polish Central Statistical Office, April 2013) (http://www.stat.gov.pl/cps/rde/xbcr/gus/as_poland_quarterly_statistics_4_2012.pdf)

⁷ "International Trade Statistics" (World Trade Organisation, 2012) ([ww.wto.org/statistics](http://www.wto.org/statistics))

Italy and Netherlands.⁸ The most important sectors involved in its exports in 2012 were electromechanical products (vehicles, aircraft and vessels), chemicals and agricultural products.⁹ In 2012, Poland's imports amounted to USD 195.44 billion.

11. In 2011, Poland's outflow of Foreign Direct Investment (FDI) was USD 5.87 billion, and its stock of outward FDI was 49.66 billion, ranking it 37th in the world in its outward FDI position.¹⁰ The greatest stocks of Polish investment were held in the following countries in 2011: Luxembourg, United Kingdom, Cyprus¹¹, Netherlands, Belgium, Switzerland, Lithuania, Czech Republic, United States, and Germany. The most prominent sectors involved in Poland's outward FDI in 2011 were: services (professional, scientific and technical); manufacturing (motor vehicles, trailers and semi trailers; and construction.¹² Among the major players in Poland's outward FDI are PKN Orlen, PGNiG (both are state-owned enterprises in the oil, gas and petroleum sectors), and KGHM (partly state-owned company in the mining sector). PKN Orlen is the largest MNE in Poland and one of the biggest companies in Central and Eastern Europe (CEE). In 2011, Poland's inward FDI stock position amounted to USD 198.2 billion, making Poland a net receiver of FDI.¹³

12. Poland's defence sector has gone through substantial reorganisation and restructuring since the Cold War. The "Strategy of Structural Reforms on the Defence Industry for 2002-2005" divided the industry into two groups – ammunition, rocket and vehicle manufacturers in the first group, and aerospace, radio and electronics in the second group. Bumar Group, a state-owned company, was entrusted with consolidating and integrating companies into the first group. PZL Swidnik, a Polish private company owned by a foreign parent company, is involved in the second group of activities.

13. State-owned/controlled companies continue to play an important role in the Polish economy; although a mass privatisation programme began in 1994, and continues with the "Privatization Plan for 2012-2013". In Poland, approximately 1 million people are employed by SOEs, but this number is probably higher since it is not always obvious that a company is an SOE due to the government's indirect control through corporate subsidiaries.

14. Several participants (including from academia, the private sector and a major NGO) reminded the evaluation team that the risk of corruption in international business transactions is a new issue for Polish companies, which have not traditionally operated abroad and generally-speaking are only beginning to develop export markets. However, the Polish government is taking major steps to boost the international competitiveness of Polish companies through, for instance, investment support measures, such as subsidies

⁸ *Ibid*, footnote 3.

⁹ *Ibid*

¹⁰ According to UNCTAD data.

¹¹ Footnote by Turkey: The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Footnote by all the European Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

¹² *Ibid*, footnote 3.

¹³ *Ibid*, footnote 3.

from the State Budget granted by the Ministry of Economy.¹⁴ This initiative seeks to enhance the innovativeness and competitiveness of Polish companies in various sectors, including the automotive, electronics, aviation, and biotechnology sectors, by providing aid for certain eligible costs.

15. The evaluation team recognises that initiatives such as these will increase overseas activity by Polish companies in the medium to long-term, with the result that the risk of foreign bribery in Polish international business transactions will also increase. Since SOEs are venturing abroad, the evaluation team focussed on what Poland is doing right now to adequately address these risks through implementation of the Convention and related instruments. The evaluation team also focussed on what Poland is doing now to be ready to effectively address in the medium to long-term the foreign bribery risks in other sectors, in particular those that it considers of major importance and for which it is providing significant investment support.

5. Cases involving the Bribery of Foreign Public Officials

a) Overview

16. The on-site visit focussed on five allegations of the bribery of foreign public officials involving Polish companies and/or nationals, including three allegations that were reported by the media. These five cases have been anonymised to protect confidentiality interests. In summary, investigations regarding two of these investigations have been terminated, a third case has not resulted in an investigation, and proceedings are ongoing in the fourth and fifth cases. The first two cases involve major Polish SOEs in sensitive sectors, the third involves a foreign owned subsidiary in a sensitive sector, the fourth involves exporting retail goods, and the fifth case does not *per se* involve international business transactions, but is discussed in this report since it provides context to Poland's efforts to combat transnational corruption.

b) Terminated investigations

Case #1 ("SOE Case No. 1")

17. According to at least two international media articles, a major Polish SOE operating in a business sector at high-risk for corruption was involved in a foreign procurement contract worth close to USD 400 million in a country that is not a Party to the Convention. The public procurement official had been charged in relation to several earlier transnational corruption scandals. With regards to the contracts with the Polish SOE, he was charged with the misappropriation of public funds. Information in Poland regarding this case was generated by Poland's FIU, and a money laundering investigation was launched.

18. An MLA request was sent by Poland to the foreign procurement official's country in relation to the money laundering information. At the time of the on-site visit, the Polish authorities stated that there was "probably" no response to the MLA request that enabled Poland to lay money laundering charges. Following the on-site visit, Poland stated that as a result of the MLA requests, information was obtained that the charges laid in the foreign public official's country concerned acting against the country's State Treasury and misappropriation of state property, not bribery.

19. The SOE's president denies the accusations, and the foreign official who was allegedly bribed states that he was under pressure to complete the tender process as quickly as possible. The Polish authorities explain that the investigation was terminated by the competent Regional Prosecutors Office in early 2012, because it did not reveal any evidence that money transferred via the Polish bank accounts

¹⁴ Such subsidies are based on the Programme for Supporting Investment of Major Importance to the Polish Economy for the Years 2011-2020, adopted by the Council of Ministers on 5 July 2011.

originated from the commission of the offences investigated by the foreign law enforcement authorities. At the on-site visit, the lead examiners were informed that the Regional Prosecutors Office also took into account in its decision to terminate the money laundering investigation that a foreign intermediary was involved. However, the OPG later clarified that this was just one element of the description of the case in the findings of the investigation.

20. One of the Polish state agencies that supervises the Polish company (because it is an SOE) had contact with the Polish embassy in the relevant foreign country about this case, as well as the foreign law enforcement authorities and Ministry of Foreign Affairs. The Polish State Treasury is also aware of the allegations, but cannot confirm the date when it found out about the investigation from the Polish law enforcement authorities. Partly as a result of the investigation, the company's Management Board was transformed, and the law enforcement authorities checked on activities of the previous members of the Board.

Case #2 ("SOE Case No. 2")

21. According to media articles in a another country that is a Party to the Convention, a major privatisation deal in 2005 involving a Polish SOE operating in a business sector at high risk for corruption was investigated by a Parliamentary Commission of Inquiry in that country for alleged corruption. Part of the alleged corrupt transaction was recorded.

22. An investigation in Poland took place from May 2004 to December 2012. Several highly qualified firms competing against the Polish SOE for the tender did not make the shortlist, and a few of them were more economical choices. Two MLA requests were sent to the foreign country by Poland, and one was fulfilled. Poland explains that the second request was not fulfilled due to "national security" reasons.

23. During the on-site visit, the OPG explained that the findings of the foreign country's investigation commission are not binding in Poland. However, the OPG considers that there is a lack of evidence to proceed with this case, in part due to questions about the testimony of one of the witnesses in the foreign country. Following the on-site visit, the Polish authorities added that possible corruption involving senior level managers in the Polish SOE had been examined, but there was no disclosure of any reliable evidence of corruption of foreign public officials by representatives of the SOE.

24. A Polish Parliamentary Commission was also established to investigate irregularities in the State Treasury's supervision of the SOE. The State Treasury states that the Supervisory Board of the company ordered audits, and currently, as a result of these audits, procedures are being implemented to limit the risk of corruption in similar situations in the future.

c) Allegation that has not progressed to investigation

Case #3 ("Procurement Case")

25. According to an international media article and an industry forum website, in 2010, a major public procurement contract in a foreign country that is not a Party to the Convention that involved a private Polish company (subsidiary of a foreign parent) in an industry at high risk for corruption was allegedly marred by corruption. An investigation was reportedly opened in the foreign official's jurisdiction when suspicions were raised by the media and the issue was discussed in the foreign country's parliament. Suspicions arose because other highly qualified bidders dropped out of the tender process, leaving only the Polish company.

26. At the on-site visit, the OPG stated that the articles did not give rise to grounds for allegations of foreign bribery. The OPG therefore requested that the MOFA verify through the Polish consular office in the foreign country whether more information is available. At the time of the on-site visit, OPG stated that so far they had not received a response, but they would consider sending a formal MLA request if information were received. Following the on-site visit, the Polish authorities stated that they received a reply from MOFA stating that no corruption occurred in connection with the procurement, and that public officials of the foreign country had made public statements to this effect, and the procurement contact had not been cancelled.

27. OPG has not contacted the Polish agency with knowledge of companies in this sensitive sector to see if it has more information. It also has not contacted the tax authorities to see if anything turned up in its tax audit of the company. OPG says that at this stage it does not have enough information to make such inquiries. OPG is also taking into account that the foreign jurisdiction stated that the procurement tender process could not be rigged in this case. OPG was not able to explain why there was a two year gap between the time the allegations came to light in the media, and the request to MOFA to obtain further information. OPG has not looked at the company's internal controls because it would need a search warrant to do so.

28. The CBA also confirms that it has not taken investigative or pre-investigative steps. One of the Polish state agencies with a direct interest in this matter, due to the sensitive sector involved, was aware of the allegations but did not take any steps because it does not have actual supervisory power over the company. It also states that it cannot audit the company.

d) Ongoing proceedings

Case #4 ("False documents case")

29. In Poland's responses to the Phase 3 Questionnaire, it states that the Regional Prosecutor's Office in Gorzow Wielkopolski has indicted a Polish individual for the bribery of a foreign public official under Article 229.5 of the Penal Code, in conjunction with offences under Article 229.3 (induce a person to perform public functions that violate the law), Article 229.4 (material benefit of considerable value given in relation to official's capacity), Article 18.2 (instigation), Article 271.3 (offence committed to gain personal wealth), and Article 11.2 (concurrent offences). The proceedings in Poland are based on information gathered in the investigation in the foreign public official's country, which is a Party to the Convention. The case involves the alleged bribery of a foreign public official between April 2009 and March 2010 to falsely certify documents related to the export of items that would be transported to a third country, which is also a Party to the Convention. The foreign public official and the Polish intermediary have both been convicted in the foreign jurisdiction. The proceedings in Poland concern the Polish individual who authorised the bribe transaction. In total the bribes allegedly amounted to around EUR 64 500. According to the Regional Prosecutor's Office in Gorzow Wielkopolski, the foreign authorities asked Poland to institute proceedings against the individual in Poland. The individual charged in Poland has been subject to three month's temporary detention as a preventive measure. Information about this suspect was obtained in proceedings in Poland against a Polish individual convicted in the foreign country. An MLA request has been sent to the foreign jurisdiction.

Commentary

The lead examiners note that there have been three allegations to date (Cases #1, #2 and #3) of the bribery of foreign public officials by Polish companies reported in the media, in which two were the subject of terminated investigations, and one was not investigated at all. These allegations concern major public procurement contracts in high risk and sensitive sectors, and

two involve Polish SOEs. The Polish authorities have launched criminal proceedings for the bribery of foreign public officials in international business transactions in one other case (Case #4).

Due to efforts being taken by the Polish government to encourage the international competitiveness of Polish enterprises, and Poland's recent economic performance, the risk of foreign bribery by Polish companies and nationals could increase in the medium to long term.

6. Legislative Amendments since Phase 2

30. The following main legislative changes made since Phase 2 and relevant to standards under the Convention are discussed in relevant parts of this report:

- a) On 31 March 2010, the Prosecution Act was amended to introduce fundamental changes to the framework of the Office of the Prosecutor General, including separation of that office from the Minister of Justice, and establishment of the National Prosecution Council to ensure and protect prosecutorial independence;
- b) Since Phase 2, the fine range for legal entities under the Liability of Collective Entities Act has been reduced from a maximum of PLN 20 million (approximately EUR 5 million) to PLN 5 million (approximately EUR 1.21 million), and the cap on fines has been reduced from 10% to 3% of the revenue generated in the tax year when the offence was committed; and
- c) On 1 January 2011, relevant articles of the Corporate Income Tax Act and Personal Income Tax Act were amended to provide further language about the tax treatment of expenses related to committing an offence under article 229 of the Penal Code.

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

1. Foreign bribery offence

31. Poland's foreign bribery offence is contained in Article 229.5 of the Penal Code. In Poland's Phase 2 evaluation, the Working Group recommended that Poland review the "impunity" provision in article 229.6 of the Penal Code in order to either exclude its application to the foreign bribery offence, or significantly limit its scope to ensure that it does not contravene the Convention. As of the Phase 2 written follow-up report, this recommendation had not been addressed by Poland. In addition, in Phase 2, the Working Group recommended following-up certain other aspects of the foreign bribery offence, including: the scope of the definition of "foreign public official", the coverage of bribes made to third parties (with respect to bribes of a non-pecuniary nature) and the exception for "service type work".

*a) Impunity provision*¹⁵

32. Article 229.6 of Poland's Penal Code contains an "impunity" provision, which, subject to conditions such as revelation of all essential details and cooperation with the authorities in subsequent proceedings against co-perpetrators, allows a perpetrator of a bribe to automatically escape punishment by notifying the authorities of the offense before they independently learn of the bribe through other sources. The "impunity" provision applies to the bribery of domestic public officials and the bribery of foreign public officials. In Phase 2, the Working Group recommended that Poland either exclude application of the impunity provision to foreign bribery, or significantly limit its scope by applying Article 229.6 as an "extraordinary mitigation of punishment" rather than a mandatory measure. However, at the on-site, Polish authorities indicated that changing the provision with respect to only foreign bribery was "impossible" due to considerations of equal treatment enshrined in the Polish Constitution (this issue is discussed further below).¹⁶ Since the impunity provision applies to both the bribery of domestic public officials and the bribery of foreign public officials, the only option would be to abolish it altogether, which the Polish authorities unequivocally stated was not under consideration, since this provision has been the underpinning of the successful detection and prosecution of cases of the passive bribery of Polish public officials.

33. Although having value in the context of domestic bribery cases, the impunity provision is almost certain to be problematic in the enforcement of the foreign bribery offense. Poland's rationale for maintaining Article 229.6 is that it breaks the solidarity, or bond, of conspirators and encourages cooperation with law enforcement officials. The Polish authorities state that in this respect the impunity provision has been highly effective in the context of domestic bribery; Polish legal experts reported at the on-site that the impunity provision was the primary source of detection for domestic bribery cases.¹⁷ The OPG remarked that confessions arising under Article 229.6 have led to numerous successful prosecutions. Indeed, Article 229.6 was applied in 361 cases of domestic bribery in 2010, and 430 cases in 2011. The Polish authorities also provided that between 2007 and 2012, the "impunity" provision was applied 19 times at the stage of judicial proceedings.

34. The Polish authorities point out that the provision has not been applied in either of the ongoing foreign bribery proceedings – i.e., in the "Procurement Case" (Case #3) and the "Case Unrelated to International Business" (Case #4). However, the lead examiners do not consider that the non-application of the provision in these two cases, which have still not been tried, is an adequate basis to conclude that the provision would not be an obstacle to the effective enforcement of the foreign bribery offence. The Polish authorities confirmed that Article 229.6 would apply even if the act of bribing had been completed, and in such a case it would still be possible to confiscate the proceeds under article 45 and article 100 of the Penal Code, but supporting examples have not been provided. In addition, it is not necessary to be able to proceed against the public official who was bribed in order for the "impunity" provision to apply.

35. While in Phase 2 the WGB acknowledged the utility of the impunity provision in combating domestic bribery and corruption in Poland, they were doubtful that Poland could benefit from this

¹⁵ The impact of the "impunity provision" on the liability of legal persons is discussed below under B.2.b). The impact of the provision on Poland's ability to provide MLA to other Parties to the Convention is discussed under B.9.a), and the impact of the provision on Poland's ability to provide extradition is discussed under B. 9. b).

¹⁶ Article 32.1 of the Polish Constitution states: "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities".

¹⁷ The Annual Reports of the Department for Organised Crime and Corruption of the General Prosecutor's Office for 2010 and 2011 state that Article 229.6 was applied in 361 cases in 2010 and in 430 cases in 2011; none of the cases involved bribery of a foreign public official.

provision as applied to transnational bribery cases as the foreign public official would likely be outside Poland's jurisdiction and therefore could not be prosecuted for soliciting or receiving a bribe following the briber's confession. When asked at the on-site whether Polish authorities would have the jurisdiction to prosecute a foreign public official after granting immunity to a Polish briber, the prosecution authorities answered in the affirmative, should an essential "Polish national interest" have been implicated. Following the on-site visit, Poland clarified that the grounds for applying extraterritorial jurisdiction are in fact much broader, and pursuant to article 110 of the Penal Code the Polish penal law can also be applied to aliens who committed an offence abroad if it is against the interests of a Polish citizen, a Polish legal entity or a Polish organisational unit that does not have legal personality. However, Poland appears to use this provision rarely in practice, citing only one example that took place in 2006.

36. Following the on-site visit, the Polish authorities provided case law on the constitutional guarantee of "equality before the law", which they said prevented them from repealing the "impunity" provision only for foreign bribery. One decision (Judgement of 23 August 2006, case file no. II AKz 307/06, Appellate Court in Krakow) states that "the imperative of equal treatment concerns an identical situation of specific people or a specific group", and another decision (Judgement of 17 February 2012, case file no. II SA/Wa 2566/11, Regional Administrative Court in Warsaw) states that "a violation of the constitutional principle of equality occurs when [two individuals are treated differently] under the same circumstances". The Polish authorities explain that this means that the perpetrators of the supply-side of domestic bribery cannot be treated differently than perpetrators of the supply-side of foreign bribery. The lead examiners point out that the offence of bribing a foreign public official and the offence of bribing a domestic public official have different policy goals, and the legal consequences for the official who has been bribed are different in practice (i.e., because it will be practically very difficult to charge and convict the foreign public official; whereas in the case of domestic bribery, it will be easier to charge and convict the official who was bribed due to invocation of the "impunity" provision). In response, the Polish authorities state that foreign bribery was introduced into the Penal Code as a "variant" of domestic bribery, and the differences between the two offences are not as fundamental as stated by the lead examiners.

Commentary

The lead examiners recommend that Poland urgently take appropriate measures feasible within the Polish legal system to ensure that the "impunity" provision cannot be applied to the bribery of foreign public officials.

b) Exception for service type work

37. Article 115.19 of Poland's Penal Code excludes the application of the foreign bribery offense to employees of state administrations performing exclusively "service type work." In Phase 2, the Working Group questioned whether the language of this provision was too vague and could be widely interpreted to cover categories of people not originally intended by the drafters. Accordingly, the Working Group noted the issue and sought to follow-up on whether the provision could potentially create an exception for certain public officials.

38. The Polish authorities explained in Phase 2, and then again in the Phase 3, that this provision was intended to exclude from the scope of the definition people undertaking cleaning services and similar service functions. In the responses to the Phase 3 Questionnaire, Poland states that "the exception for 'service type work' excludes persons employed in organisational entities of government administration, territorial self government, inspection agencies or entities disposing public funds who have no discretionary powers or powers to dispose public funds". At the on-site visit, the Polish Prosecution Authority explained that the provision is specifically intended to apply to persons who, although employed in organisational units of public administration, perform tasks that are not linked in any way with acts of

authority or power. The evaluation team therefore posed several hypothetical situations involving public officials who, according to the definition contained in Article 115.19, would fall within the “service type work” category, including: (i) a situation in which a public official who has no discretion over the granting of permits, but who is in charge of processing the paperwork, is bribed to move a company’s application from the bottom of the pile to the top (to be processed first); and (ii) a situation in which a secretary is bribed to divulge confidential details of other bidders in a public procurement bid (a scenario that is also outside the scope of the secretary’s official duties). At the on-site visit, the OPG conceded that it would be “reluctant” to prosecute in either case. Following the on-site visit, the Polish authorities stated that the term “service type work” is sufficiently precise and should be broadly assessed. Moreover, they felt that the hypothetical examples presented by the lead examiners were not realistic.

39. Following the on-site visit, the Polish authorities provided in writing that there are not any judicial decisions on interpretation of the definition of “service type work”, because it is clear that it applies solely to technical persons. They also stated that the term was introduced to clarify that persons doing exclusively “service type work” do not enjoy the status of “official” as such a status provides certain entitlements such as the right to legal protection. Furthermore, doubts about whether a person performs “service type work” would be evaluated by the courts on a case-by-case basis.

Commentary

In Phase 2 the Working Group recommended follow-up of the application in practice of the exception for “service type work”. However, since Phase 2, there has not been any judicial decision on this point. In addition, during and following the on-site visit, the Polish authorities have provided information on the exception, which shows that the term is very imprecise, thus providing a potential loophole of indeterminate scope in implementation of the definition of “foreign public official” in Article 1.4(b) of the Convention (i.e., “persons performing a public function for a foreign country”). The lead examiners therefore recommend follow-up of this issue as practice develops.

c) Bribing through intermediaries

40. The Polish offence of bribing a foreign public official does not expressly cover bribing through an intermediary. The lead examiners were satisfied in Phase 2 that domestic case summaries satisfactorily demonstrated the coverage of intermediaries; however, to date, Poland has no jurisprudence demonstrating the coverage of intermediaries in a *foreign* bribery case.

41. During the on-site visit, the Polish authorities affirmed that Polish law would apply to a Polish national, including a legal person, who authorised an intermediary to bribe a public official abroad. The lead examiners note; however, that as such a case has not yet been successfully prosecuted, this contention remains theoretical. On the other hand, it is a very positive development that in the “False Documents Case” (Case #4 under A.5.b)), the Polish authorities are proceeding against the Polish individual who authorised bribery of a foreign public official through an intermediary abroad.

42. Furthermore, following the on-site visit, the Polish authorities provided citations of a number of recent cases of the bribery of domestic public officials involving bribery through intermediaries, including several that were successfully prosecuted after Phase 2. These cases included the bribery of the following kinds of domestic public officials through intermediaries: driver’s license examiners; physicians; police officer, and prison service officer.

Commentary

The lead examiners recommend that the Working Group continue to follow-up on the application of the foreign bribery offense to bribes made through intermediaries as case law and practice develops.

d) Bribes in the form of non-pecuniary benefits

43. In Phase 1, the Working Group observed that Article 229.5 of the Penal Code did not cover non-pecuniary bribes to third party beneficiaries. By Phase 2, Poland had amended its legislation to clarify that “material or personal benefit[s]” to third parties were covered (Phase 2, para. 149). However, a question remained as to whether Poland’s legislation adequately covered *non-pecuniary* bribes to third parties since the amendments do not define the term “personal benefit”. As of Phase 3, there is no relevant jurisprudence to shed light on whether non-pecuniary benefits to third parties is covered.¹⁸ Polish authorities state that “personal benefits” clearly refers to non-pecuniary benefits.

Commentary

The lead examiners recommend that the Working Group continue to follow-up on the application of the foreign bribery offense to bribes that are in the form of non-pecuniary benefits.

2. Responsibility of Legal Persons

44. The effective implementation of responsibility of legal persons in Poland is hampered by legislation that requires the conviction of a natural person (or a discontinuance of proceedings against a natural person) in order to convict a legal person. This constitutes a *prima facie* contravention of Annex 1 of the 2009 Recommendation, which provides criteria for compliance with Article 2 of the Convention. It also prevents prosecution against the legal person where the natural person cannot be identified, proceedings have not been formally discontinued against the natural person, or the natural person has fled the jurisdiction. Additionally, the requirement poses procedural barriers to effective enforcement since proceedings against the natural person must be finalised before prosecution of the legal person. One academic at the on-site stated that a primary reason for the lack of enforcement of foreign bribery in Poland was the difficulty imposed by this requirement in imposing liability on a legal person. This problem has led some non-governmental participants at the on-site visit to note that liability of legal persons in Poland is “dead”.

a) The Act on Liability of Collective Entities

45. The Act on Liability of Collective Entities (the “Act”) provides for the liability of legal persons (“collective entities”) in Poland, including state-owned and –controlled entities and organisations (Art. 2). Under the Act, a collective entity may be liable for the criminal conduct of a natural person if the criminal conduct “did or could have given the collective entity an advantage” (Article 3). The Act also requires that the offence was a result of the “absence of due diligence” in electing the natural person or the “absence of due supervision” over the perpetrator (Art. 5). Finally, as discussed in greater detail below, the Act requires the valid conviction or discontinuance against a natural person (Art. 4).

¹⁸ After the on-site visit, the Polish authorities provided a commentary from 2010 by a legal scholar that “personal benefits” in the Penal Code include non-pecuniary benefits.

46. The conduct of the following natural persons may give rise to liability for the collective entity: (1) persons who are authorised to act in the name or on behalf of the collective entity (i.e., higher management); (2) persons who are allowed to act due to the neglect of higher management; and (3) lower-level employees acting on the consent or knowledge of higher management (Art. 3). In 2011, the Act was amended to add to this list “entrepreneur[s] who directly co-operate with the collective entity”.

b) Requirement of Conviction of a Natural Person

47. Of significant concern is the requirement in the Act that proceedings be discontinued or finalised against a natural person before liability may be imposed on a collective entity. Specifically, Article 4 mandates that the natural person committing the offence must either have been convicted or pleaded guilty, or there must have been a decision to discontinue the proceedings because “circumstances exclude[d] prosecution of the perpetrator” (Art. 4). Such “circumstances” include those where prosecution was prevented by the application of the “impunity” provision or by the expiration of the statute of limitations (Phase 2, para. 161).¹⁹ However, and importantly, the Article 4 requirements would not be satisfied where the natural person fled beyond the jurisdictional reach of the Polish authorities (since verdicts may not be handed down *in absentia*), where the natural person cannot be identified.

48. The requirement of a conviction of a natural person in order to impose liability on a legal person is in direct contravention of Annex I to the 2009 Recommendation. In Phase 2, after the Working Group recommended the amendment of the Act to eliminate the requirement that a natural person be finally and validly convicted, the Ministry of Justice (MOJ) formulated a special task force that prepared a draft law to eliminate this requirement (Phase 2 Written Follow-Up, p. 24). However, this draft law was never submitted to Parliament. In 2012, the MOJ attempted again to eliminate the requirement, but this attempt was also unsuccessful due to technical concerns: The MOJ expressed concern that delinking corporate liability from natural person liability could lead to inconsistent results; the MOJ also stated that it could not contemplate a practical way to impose liability on the entity without reference to criminal acts by the natural person. Poland explains that the principles of liability of collective entities will be among the subjects evaluated as part of the work of the Criminal Law Codification Commission.

49. As recounted in Phase 2 (paras. 161, 163), the problems with the Article 4 requirements are manifold. Often in foreign bribery cases, the natural person(s) who committed the offence is beyond the reach of Polish prosecutors or can flee the jurisdiction. In addition, it may be impossible to identify one natural person as the perpetrator. For instance, where a string of intermediaries is stretched across several jurisdictions, the intent and actions that form the offence may not be concentrated in a single natural person.

50. The Article 4 requirements also pose procedural difficulties. Polish authorities explained that they must obtain a conviction or discontinuance against the natural person before proceeding against the legal person. According to Polish authorities, this facilitates the imposition of liability on the legal person because the court is bound by the factual findings in the proceedings against the natural person. But Polish lawyers at the on-site visit were doubtful. The lawyers stated that investigations of legal persons only take place after the conviction of the natural person. According to the lawyers, there is little motivation to pursue the legal person after a natural person has been prosecuted, since the offence has been punished. The incentives for pursuing the legal person are further diminished due to the low cap on fines that may be imposed on legal persons.

19 Polish authorities also stated that proceedings could be taken against a legal person where the perpetrator is deceased or suffered from a mental disability.

51. Polish authorities argue that, in fact, the Act does not require conviction of the natural person. They point out that, under Article 4, it is also possible to pursue a legal person in the event of discontinuance against the natural person for, *inter alia*, the impunity provision or the expiration of the statute of limitations. These circumstances, however, are of little comfort, since prosecution against the legal person remains inextricably linked to the procedural happenstance of the natural person. Additionally, it is impractical to await the expiration of the statute of limitations before proceeding against a legal person since evidence and witnesses may have disappeared.

52. The Polish authorities consider that conviction of a natural person before a legal person is necessary in order to conform to Polish constitutional requirements for due process. In 2004, the Constitutional Tribunal struck down several provisions of the Act as unconstitutional. In its decision, the Constitutional Tribunal explained that, because the Act imposed liability on legal persons as a consequence of the natural person's liability, a final conviction of the natural person was a necessary basis to imposing liability on the legal person.²⁰ However, it is unclear whether an Act that imposed legal persons liability entirely independently of the natural persons would pass constitutional scrutiny.

53. Although these requirements are imposed by Article 4, the problem with the Polish framework for sanctioning legal persons goes beyond the fact that legal person liability is not independent from liability of the natural person. Accordingly, one academic stated that eliminating Article 4 alone is insufficient to establish proper legal persons liability. The academic explained that Poland fundamentally lacks a system to sanction legal persons for their illegal acts wholly apart from the natural person, even if those acts are accomplished through natural persons or statutory bodies. Consistent with that view, the evaluation team heard repeatedly from several governmental participants, that the conviction of a natural person was a "necessary safeguard" of the legal person's rights, since there could be no assurance that a crime had been committed absent a conviction of the perpetrator. They also repeatedly stated that the liability of legal persons is "secondary" or "derivative" of the criminal liability of the natural person. These views miss the point of Article 2 of the Convention. A legal person, as a distinct entity, may commit the bribery of a foreign public official independent of whether the perpetrator committed an offence.

c) "Advantage" to the Legal Person

54. In Phase 2 (para. 160), the Working Group agreed to follow up on how Poland would apply the requirement that the conduct of a natural person "did or could have" given an advantage, even of a non-financial nature, to the legal person. The Working Group questioned whether this requirement would allow liability to be imposed in cases where bribery of the public official did not or could not have resulted in an advantage for the legal person, such as when the foreign public official is bribed to provide a public procurement contract that the legal person could not fulfil, or the foreign public official does not have the authority to provide the advantage sought by the briber. In Phase 2, Poland stated that these situations would have to be decided on a case-by-case basis. Since Phase 2, there have been no developments to shed light on how this requirement may be interpreted. The issue should therefore continue to be followed up by the Working Group.

Commentary

Annex I of the 2009 Recommendation provides that "systems for the liability of legal persons . . . should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted". The Act on Liability of Collective Entities directly contravenes this principle, and thus severely hinders the ability of Polish authorities to impose liability on legal persons. The lead examiners therefore recommend that Poland take

²⁰ Judgement of 3 November 2004, K 18/03, Constitutional Tribunal (OTK-A 2004/10/103).

urgent steps to establish effective liability of legal persons that is not limited to cases where the natural person who perpetrated the offences are prosecuted or convicted.

The lead examiners also recommend that the Working Group continue to follow up on the application of the requirement that the conduct of a natural person “did or could have” given an advantage to the legal person.

d) Application of Collective Entities Liability in Practice

55. To date, application of the Act has been weak, even according to Polish authorities. From 2007 to 2011, Poland initiated 116 cases related to the liability of collective entities. Even so, the vast majority of these cases resulted in acquittals, discontinuances, or rejection of the public prosecutor’s motion as to the establishment of liability of a collective entity. Accordingly, from 2006 to 2011, Poland has had only 47 convictions against legal persons, mostly relating to tax fraud. Poland has had no convictions of a legal person for domestic or foreign bribery. In the “False Documents Case” (Case #4 under A 5 d)) and an ongoing proceeding for a foreign bribery case that does not involve international business, Polish authorities have not identified a legal entity to pursue.

56. One reason why enforcement against legal persons may be low is a lack of awareness and knowledge on the part of Polish authorities of how to investigate and prosecute collective entities. In Phase 2 (Recommendation 1(e)), the Working Group recommended that Poland raise awareness about the Act, including measures to assist police and prosecutors on investigation, prosecution, and the operation of the Act. It appears little has been done specifically with respect to raising the awareness of the Act or how to investigate and prosecute crimes involving collective entities.

57. Non-governmental participants at the on-site visit cited a number of other reasons for the disappointing enforcement against collective entities. Some participants stated that the requirements to impose liability on the collective entity are difficult to satisfy, especially the requirement of a conviction of the natural person. Some lawyers cited the lack of awareness and experience on the part of prosecutors in pursuing legal persons as well as the lack of political and prosecutorial will.

58. There was also a concerning lack of awareness of the liability of collective entities among the private sector. Many of the representatives from business associations were entirely unaware that collective entities could be held liable. Others expressed the opinion that collective entities could avoid liability due to actions of its agents as long as it structured the contract with the agent in a certain way (See B. 7.c) for further discussion on this issue). The participants were also generally unaware of the number of cases that had imposed liability on legal persons. Most were under the impression that there had only been none or a handful of cases, when in fact there have been 47 over the last five years.

Commentary

In addition to the requirement that a natural person be convicted, the lack of awareness of liability of legal persons among the private and public sector may be a reason why enforcement of the Act is disappointingly low. The lead examiners recommend that Poland take steps to ensure that police and prosecutors are adequately trained and made aware of the importance of effectively enforcing liability of legal persons, so that they will be better equipped and more proactive in investigating and prosecuting legal persons for foreign bribery offences. Such training should address the difficulties in investigating and prosecuting legal persons posed by the requirements under Article 4 (mentioned above in the Commentary in B.2.c)).

e) Nationality Jurisdiction of Legal Persons

59. In Phase 2, the Working Group agreed to follow up on the application of nationality jurisdiction over legal persons (Follow-Up 6(d)). Under Article 109 of the Penal Code, Polish criminal law is applicable to “Polish citizens” who have committed an offence abroad. Although Polish officials in Phase 2 stated that the nationality of a legal person is determined on the basis of the place of its registry, there was no provision of statutory law or case law to substantiate this position (para. 144). Given the low number of cases against legal persons, there continues to be a lack of case law to address how the nationality of legal persons should be determined. In addition, given that the liability of a legal person under the Act on Liability of Collective Entities is inextricably linked to the liability of a natural person, it is questionable whether in practice Poland could proceed against a legal entity that uses a non-Polish natural person to bribe on its behalf abroad.

Commentary

The lead examiners recommend that the Working Group continue to follow up on the application of nationality jurisdiction to legal persons as case law and practice develops.

3. Sanctions

60. This section discusses the sanctions imposed on natural and legal persons for foreign bribery in Poland. The section in particular focuses on Poland’s efforts to draw the attention of authorities to the importance of applying sanctions (including confiscation, other sanctions, and the use of suspended sentences) that are sufficiently effective, proportionate and dissuasive for both natural and legal persons (Recommendation 4(a); Follow-up Item 6(c)). Sanctions for accounting-related offences are discussed in section 8.

a) Sanctions against Natural Persons for Foreign Bribery

61. Under the Penal Code, a natural person may be subject to imprisonment and fines for foreign bribery. As detailed in Phase 2 (para. 169), the term of imprisonment may range from 6 months to 12 years depending on the severity of the bribery.²¹ Courts may impose a fine in addition to deprivation of liberty “if the perpetrator has committed the act in order to gain a material benefit or when he/she has gained such a benefit” (Art. 33.2), or where the imprisonment sentence is suspended” (Art. 71). For cases of bribery of “less significance”, the court may impose a fine as an alternative to imprisonment (Art. 229.2). As stated in Phase 2, the sanctions for foreign and domestic bribery are identical and are comparable to those for other economic crimes such as fraud, theft, extortion, and embezzlement (Phase 2, para. 169).

62. Since Phase 2, Poland has not concluded any cases of foreign bribery against natural persons. Statistics for active domestic bribery, however, indicate that sanctions in Poland on natural persons may not be effective, proportionate, and dissuasive in practice. In 2010-2011, there were 3984 convictions for domestic active bribery.²² A sentence of imprisonment (i.e., deprivation of liberty) was imposed in almost all of these cases (i.e., 98%), and fines were imposed in addition to imprisonment in approximately 60% of cases. Despite these relatively high numbers, two concerns become apparent upon further investigation.

²¹ Bribery of person performing public functions (Section 229.1) carries a sentence between 6 months to 8 years of imprisonment. Bribery of “less significance” (Section 229.2) carries a sentence up to 2 years. Bribery of a public official to breach a law (section 229.3) carries a sentence between 1 to 10 years of imprisonment. Bribery of a “material benefit of considerable value to a person performing public functions in connection with his official capacity” carries a sentence between 2 and 12 years.

²² Sections 229.1, 229.2, 229.3, 229.4, and 229.5 of the Penal Code.

63. First, the low level of the sanctions imposed for active bribery under Sections 229.1 through 229.5 is concerning. In 2010-11, almost 90% of sentences imposed on natural persons for active bribery were between 1 and 2 years. A sentence of greater than 2 years was imposed in only 12 of the almost 4000 convictions for active bribery (i.e., 0.03%). Fines imposed were similarly low. During those years, approximately 98% of fines imposed for active bribery were for less than PLN 5000 (EUR 958).

64. In addition, the vast majority of sentences for imprisonment and fines are suspended. Based on analysis of the statistics provided by the Ministry of Justice, 94.8% of imprisonment sentences in 2010-2011 for active domestic bribery under Sections 229.1 to 229.5 resulted in suspended sentences, and 98% of fines imposed in addition to imprisonment were also suspended in the same years for the same offences. In 2010-2011, a high proportion of sanctions for passive bribery under Sections 228.1 to 228.4 were suspended as well: 91% of imprisonment sentences were suspended, and 92% of fines were suspended. Taken together with the low level of fines imposed, there may be concerns that sanctions for active bribery are not effective or dissuasive.

b) Sanctions against Legal Persons for Foreign Bribery

65. The Liability of Collective Entities Act (the “Act”) provides that a collective entity may be sentenced to a fine between PLN 1000 (around EUR 242) and PLN 5 million (around EUR 1.21 million). In assessing the fine, a court may consider factors such as the severity of the collective entity’s conduct, the size of the advantages obtained or possibly obtained, its financial situation, the social consequences of the penalty, and the influence of punishment on further functioning of the collective entity (Art. 10). In any event, the fine is capped at 3% of the revenue generated in the tax year when the offence was committed (Art. 7).

66. In Phase 2, the Working Group recommended that Poland consider amending the cap on fines for legal persons, which at the time was 10% of the revenue generated in the tax year when the offence was committed (Recommendation 4(b)). The Working Group was concerned that a shell company with little or no assets or revenues may pay a disproportionately low fine. There were also concerns that a company could avoid a high fine simply by reporting its income in tax years before and after the offence (para. 174).

67. Rather than increasing or removing the cap, Poland has instead lowered the cap from 10% to 3% of the revenue generated in the tax year. In addition, the range for fine penalties was reduced from PLN 20 million (around EUR 5 million) to PLN 5 million (around EUR 1.2 million). Poland explains that “if a legal person who has no income [is] liable under the Act ..., a maximum pecuniary penalty for them would be zero” (Responses, p. 16). At the on-site visit, Polish authorities stated that the decision to lower the cap was largely political, and stemmed from strong lobbying by the business community that pushed for business-friendly policies in light of the economic crisis. According to participants at the on-site visit, the Parliament was swayed by arguments from the business community that the cap was too high since it applied to gross revenue and did not deduct for costs. In addition, the businesses argued, it would be unfair to impose sanctions on a company where the ownership had changed. Nonetheless, the 3% cap on fines is troubling since it significantly limits the ability of courts to impose a sentence that is appropriate to the severity of the misconduct.

68. Poland has not yet imposed fines on a legal person for foreign bribery, but statistics provided for other offences illustrate the low level of sanctions imposed on legal persons to date. From 2006 through 2011, 47 judgments were handed down on legal persons, mostly for tax-related offences. The highest fine imposed was PLN 12 000 (around EUR 2875), the lowest fine imposed was PLN 1000 (around EUR 239), and the average fine imposed was PLN 2095 (EUR 502). These numbers convey the overall impression that, in general, the level of sanctions imposed on legal persons in practice is extremely low.

69. These statistics also demonstrate that fines imposed are disproportionately low relative to the severity of the offence. In one case, a collective entity was fined PLN 1000 (around EUR 249) in connection with the submission of a false tax declaration for a deduction in the amount of PLN 14 049 (around EUR 3388). In another case, a collective entity was fined PLN 4 000 (around EUR 967) in connection with an illicit tax deduction in the amount of PLN 18 003 (around EUR 4341).

70. In addition, there is little application of debarment and other sanctions on legal persons. Under the Liability of Collective Entities Act, a legal entity may be subject to: (i) a ban on promoting or advertising the business it conducts, (ii) a ban on using grants and subsidies from public funds, (iii) a ban on using aid from international organisations, (iv) a ban on applying for public procurement contracts, and (v) public pronouncement of the ruling (Art. 9). However, other than a public pronouncement of the ruling – which has been applied in 7 of the cases – none of the other bans has been imposed on a legal entity, including debarment upon conviction.

Commentary

The level of sanctions imposed on natural persons for active domestic bribery, both in terms of the low fines as well as the high proportion of suspended imprisonment sentences, is concerning. The lead examiners thus recommend that as a matter of priority Poland draw the attention of Polish investigators and prosecutors to the importance of imposing effective, proportionate and dissuasive sanctions on natural persons in foreign bribery cases.

Despite a recommendation in Phase 2 to consider increasing the maximum fines for legal persons, Poland has instead significantly decreased them from PLN 20 million (around EUR 5 million) to PLN 5 million (around EUR 1.2 million). This maximum level, in addition to the cap on fines of 3% of the revenues generated in the tax year of the offence, prevents the imposition of effective, proportionate, and dissuasive sanctions on legal persons. Under this provision, companies may avoid significant penalties by operating through shell entities or by shifting revenues to other tax years. While there have been no foreign bribery cases to date, the sanctions imposed on legal persons for other similar crimes are underwhelming.

The lead examiners therefore recommend that Poland either eliminate the cap on fines or increase the maximum penalty in law applicable to legal persons to a level that allows for effective, proportionate, and dissuasive sanctions. The lead examiners also recommend that Poland draw the attention of the relevant Polish authorities to the availability of additional sanctions, including debarment, upon conviction of a legal person under the Liability of Collective Entities Act. Finally, the lead examiners recommend that the Working Group follow-up on the application of other sanctions, such as debarment, on legal persons.

4. Confiscation

71. In Phase 2, the Working Group recommended that Poland take measures to draw the attention of authorities to the importance of applying sanctions (including confiscation). The Working Group agreed to follow up on the use of confiscation upon conviction as a sanction for foreign bribery against natural and legal persons.

72. Poland provides for confiscation in foreign bribery and related offences. Courts are required to order the forfeiture of the proceeds of a bribe on natural persons where the offence brought “material benefits”, whether directly or indirectly acquired as a result of the offence (Penal Code, Arts. 44, 45, 52). Courts are not required to order forfeiture if all or part of the proceeds are due as restitution to another

party (Penal Code, Arts. 44.5, 45.1; Law of Collective Entities, Art. 8.2). In addition, courts have the discretion to order the forfeiture of the instruments of the offence (Penal Code, Art. 44.2).

73. Legal entities are also subject to forfeiture. Courts are required to order the forfeiture of “objects” and financial gains derived from the offence or the equivalent amount (Law of Collective Entities, Art. 8(1)). The “objects used or designated for use as tools to perpetrate the crime” must also be forfeited. As with natural persons, forfeiture is not mandatory if the proceeds or instruments of the crime are due as restitution to another party (Art. 8(2)).

74. In general, forfeiture is rarely applied to legal persons as a sanction in practice. From 2006 to 2011, forfeiture was applied in 4 of the 47 judgments against legal persons, but none of these involved foreign bribery (Responses, p. 16). Polish authorities speculated that forfeiture may not have been ordered in the remaining cases because forfeiture may have already been ordered in related proceedings against the natural person. However, this would appear doubtful since forfeiture was applied in only roughly one-third of convictions for domestic bribery from 2008 to 2011.

75. In Phase 2, Poland was also recommended to conduct training for investigators and prosecutors on tracking down the proceeds of bribery and assessing the value of such proceeds (Recommendation 4(a)). Poland has taken significant efforts to train investigators in asset recovery and tracing. In 2008, an Asset Recovery Division (ARD) was established within the Criminal Service Bureau of the National Police Headquarters as a national asset recovery office. That division provides training that covers the international exchange of information on property across the EU network of asset recovery offices and the Camden Asset Recovery Inter-Agency Network (CARIN). In addition to training for police officers, ARD has also conducted training for the public prosecution service, the Central Anti-Corruption Bureau (ACB), and the Internal Security Agency and the Border Guards. As a result of these efforts, Poland has recovered over PLN 700 million (EUR 167 million) in 2010 and 2011.

Commentary

The lead examiners welcome Poland’s efforts to train investigators and prosecutors in asset recovery. However, the use of confiscation as a result of conviction remains disappointing. The lead examiners thus recommend that Poland continue to draw the attention of law enforcement authorities to the importance of the forfeiture of the proceeds of bribery.

5. Investigation and Prosecution of Foreign Bribery Offense

a) Need to more proactively investigate cases²³, resources and court delays

i) Proactivity

76. In Phase 2, the Working Group recommended that Poland take necessary measures to ensure that all credible foreign bribery allegations are proactively and conscientiously investigated, and remind police

²³ There is no specialisation among prosecutors in Poland regarding the type of investigations they conduct; therefore all prosecutors can be involved in the investigation/prosecution of foreign bribery cases. As of 20 March 2013, there are 6295 prosecutors in service, including 14 prosecutors in the Department for Organised Crime and Corruption of the OPG doing supervisory work. Within the OPG, there are 112 criminal analysts. In the divisions for combating corruption of the regional headquarters of the police and the Capital City of Warsaw Headquarters of the Police there are 281 posts (the divisions are responsible for all types of bribery, including foreign). As of 31 December 2011, the CBA employed 779 officers and 77 civil servants. Data on the CBA for 2012 is not yet available, but significant changes have not been made.

and prosecutors of the importance of actively looking into the range of possible sources of detection of foreign bribery.

77. Poland explains a number of steps it has taken to be able to more proactively investigate foreign bribery cases in its responses to the Phase 3 Questionnaire. For instance, police training, the dissemination of materials to police, and an annual briefing of police heads has occurred. In addition, the General Prosecutor's Office, through the Deputy Prosecutor General's order, monitors investigations of corruption in a number of situations, including the bribery of foreign public officials in violation of article 229.5 of the Penal Code. Monitoring includes gathering detailed information on relevant criminal proceedings, analysing the substantive legal elements of the cases, and analysing relevant judicial decisions. Annual reports on the monitoring function have been prepared since 2010 by the Department of Organised Crime and Corruption of the OPG.

78. Moreover, progress on the "False Documents Case" (Case #4 under A.5.b)) and an ongoing proceeding for a foreign bribery case that does not involve international business, Poland's first two proceedings for the bribery of foreign public officials, demonstrates increased proactivity in investigating and prosecuting foreign bribery cases. Although Case #4 was brought to the attention of the Polish authorities by the foreign public official's jurisdiction, the Polish authorities have taken proactive investigative steps, including MLA requests and provisional detention of the suspect as a preventive measure. In the ongoing proceeding for a foreign bribery case that does not involve international business, Poland has also taken proactive steps including MLA requests, and is proceeding with the case despite not having identified the exact public official who was allegedly bribed. However, these cases are fairly straightforward, involving relatively minor payments to low level foreign authorities in neighbouring jurisdictions to obtain licenses and other routine documents. Investigating and prosecuting these cases should not entail complex financial analysis or forensic accounting measures.

79. On the other hand, in "SOE Case No. 1" (Case #1 under A.5.b)) and "SOE Case No. 2" (Case #2 under A.5.b)), allegedly involving major Polish SOEs, and in which the stakes were much higher than in the "False Documents Case" (Case #4 under A.5.b)) and the ongoing proceeding for a foreign bribery case that does not involve international business, it appears that Poland should have done much more to proactively investigate the cases. For instance, in Case #1, Poland does not appear to have taken any proactive investigative steps other than sending an MLA request to the foreign procurement official's government. It also appears that Poland relied entirely on information received in response to the request that the foreign public procurement official had misappropriated State property, without considering whether proactive steps should be taken in Poland to determine whether bribery by the SOE was also part of the equation. Similarly, in Case #2, the Polish authorities do not appear to have diligently pursued MLA from the foreign public official's country. Poland states that one MLA request was rejected on "national security" grounds, but does not say what it did to follow up this response, or find a way to readjust the request so that it did not impinge on the requested country's national security concerns. In addition, the Polish authorities appear to have rejected testimony by a witness as not being credible without taking steps to confirm whether it could be confirmed through other witnesses.

80. In the "Procurement Case" (Case #3 under A.5.b), another major allegation involving a highly sensitive sector, Poland has not taken any proactive investigative steps, choosing instead to wait for information from the Polish consular office in the foreign jurisdiction. It has not contacted the tax authorities in Poland to see if anything suspicious has turned up in the company's tax audit. In addition, no explanation is given regarding the two year gap between the time allegations came to light in the media, and the request by the Polish law enforcement authorities to the Ministry of Foreign Affairs to find out if more information is available. OPG is also relying on the statement by the foreign jurisdiction that the procurement process could not be rigged, but OPG has not requested information about the foreign procurement process to independently verify this statement, choosing instead to trust the information on its

face value. In addition, a Polish state agency with an interest in this matter due to the sensitive nature of the business sector involved in this case does not appear to have communicated its concerns to the law enforcement authorities, instead stating that it did not take any steps because it lacks supervisory power over the company, and has no authority to audit its books. Following the on-site visit, Poland stated that it received a reply from MOFA stating that no corruption occurred in connection with the procurement, and that statements to this effect had been made public by the foreign government. As a result, Poland states that the allegations are not justified, and therefore no investigative steps are needed.

81. During the on-site visit, the overwhelming opinion of the legal profession and civil society representatives was that the focus on fighting corruption today in Poland continues to be on domestic corruption. Indeed, although the evaluation team was aware of the five cases in which Polish companies and/or nationals had allegedly bribed foreign public officials, they were also aware of seven allegations in which companies from OECD countries had allegedly bribed Polish officials.

ii) Resources

82. The OPG, National Police Headquarters, and CBA all claimed to have adequate resources to investigate and prosecute complex foreign bribery cases. The evaluation team was of the impression that the Polish authorities were well-intentioned in this regard, but the Polish authorities did not provide concrete information indicating that they have adequate resources and expertise for conducting the complex forensic accounting and other analysis that would be needed to effectively investigate the kind of foreign bribery allegations contained in Cases #1, #2 and #3.

83. The evaluation team was therefore convinced that although Poland likely has the capacity to investigate and prosecute relatively minor foreign bribery allegations, such as in Cases #4 and #5, complex allegations such as those in Cases #1, #2 and #3 would be unlikely to progress beyond the “wait and see” stage – i.e., waiting for concrete evidence from the foreign jurisdiction – without a major overhaul of the level and nature of resources at the disposal of Poland to address such cases.

iii) Court delays

84. During and following the on-site visit, the Polish authorities demonstrated a high level of willingness to discuss the problem of court delays, and provided comprehensive and detailed statistical information to show that the problem is being addressed. For instance, statistics were provided to the evaluation team showing that the number of “lengthy investigations” (i.e., ones that last for more than one year) has declined overall in recent years. Whereas 1293 investigations lasted more than one year in 2010 (including 130 that lasted more than 5 years); in 2011 the number had declined to 1027 (including 101 that lasted more than 5 years).

85. The Polish authorities also provided detailed statistics on the average length of proceedings in corruption cases, from the commission of the offence until the verdict becomes valid and final. In this regard the lead examiners did not observe a clear downward trend, which might reflect the complicated nature of corruption cases. In the years between 2009 and 2011 proceedings in corruption cases varied from 15 months at the lower end of the scale to 177 months at the higher end, with a large number of proceedings lasting for more than 60 months. For instance, proceedings under article 229.4 of the Penal Code (i.e., active bribery where the benefit is of considerable value and is given to a person performing public functions in relation to his/her official capacity) lasted on average 69 months in 2009, 145 months in 2010 and 147 months in 2011. Clearly, the length of proceedings in these cases could be an obstacle to the effective enforcement of Poland’s foreign bribery offence, and since complex foreign bribery cases such as those in Cases #1, #2 and #3 would likely take even longer, the length of proceedings might even be a disincentive to bringing these cases forward.

Commentary

The lead examiners are not convinced that Poland has in place the resources and expertise to effectively investigate and prosecute highly complex cases, including in sensitive sectors, and also involving major SOEs. The lead examiners are also not convinced that Poland will be able to effectively address the increased risk of the bribery of foreign public officials in other sectors and involving non-SOEs that should begin to emerge in the medium to long term as Polish companies increase their overseas activities. As a result, the lead examiners recommend that Poland establish a strategy to address these risks. In particular, this strategy should comprehensively address the short term, and medium to long term risks, and how specifically the need for forensic financial and accounting expertise will be fulfilled to effectively investigate and prosecute complex foreign bribery cases.

The lead examiners note that although the overall length of proceedings in Poland has recently declined, this trend has not extended to corruption cases, and indeed the length of proceedings under article 229.4 of the Penal Code appears inordinately long (e.g., 147 months in 2011). The lead examiners therefore recommend that the Polish authorities include in the strategy on investigating and prosecuting foreign bribery cases, a comprehensive plan on how to reduce the length of time for foreign bribery proceedings to a workable and reasonable period.

b) Prosecutorial and judicial independence

86. On 31 March 2010, the Prosecution Act was amended to introduce fundamental changes to the Prosecution Service. Most importantly, for the first time, the OPG was separated from the Minister of Justice, and the National Prosecution Council (NPC) was established to protect prosecutorial independence. The NPC consists of: the Prosecutor General, Minister of Justice, representative of the President of Poland, four Members of Parliament, two Senators, one elected prosecutor representing the Military Prosecutor, one elected prosecutor representing the Institute of National Remembrance, three prosecutors elected by prosecutors of the Prosecutor General, and eleven prosecutors elected by local gatherings of the appellate level. It has so far adopted 109 resolutions concerning personal cases of prosecutors and on rules of procedure. It will also create a permanent commission to adopt professional rules of ethics for prosecutors.

87. During the on-site visit, non-government participants, including representatives of the legal profession, a major NGO and the media profession, could not exclude the potential for political interference in foreign bribery investigations and prosecutions. However, they all pointed out that the potential is unlikely to come to fruition in major and well-publicised cases, such as “SOE Case No. 1” and “SOE Case No. 2” (Cases #1 and #2 under A.5.b)), because once something goes public, any form of perceived interference would be seriously criticised by the political opposition.

88. The evaluation team noted that the newly established NPC includes various political level officials. They also noted that the Prosecutor General files an annual report with the Prime Minister, and the CBA is under the direct supervision of the Prime Minister. They also noted that Cases #1, #2 and #3 were disclosed before the separation of the OPG and Minister of Justice in the amendments to the Prosecution Act, and that Cases #1 and #2 were at least partly investigated before the split. However, the Polish authorities have assured the lead examiners that the NPC has not taken any decisions or made any resolutions regarding Cases #1, #2 and the “Procurement Case” (Case #3 under A.5.b.), the Prime Minister of Poland has not been informed of any of these cases, and the Minister of Justice also was not involved in any of these cases. In addition, the Polish authorities informed the lead examiners that thorough reasons for discontinuing the investigations in Cases #1 and #2 have been kept on file. Moreover, the decision to

discontinue the investigation in Case #1 was reviewed by the Appellate Prosecution Office in Warsaw exercising supervision over the cases carried out by the Regional Prosecution Office of Warsaw, and the decision to discontinue the investigation in Case #2 is under review in the Department for Organised Crime and Corruption in OPG, which acts as a formal supervisor of the appellate prosecution offices.

89. The lead examiners also questioned whether the rather notorious problem in Poland of the backlog of cases in the criminal courts could have an impact on the investigation and prosecution of foreign bribery cases in Poland. The lead examiners noted that several complaints had been made to the European Council of Human Rights that were related to the backlog of cases, and the Stefan Batory Foundation, a major independent civil society organisation in Poland dedicated to improving democratic institutions and human rights, had stated publicly that a very serious risk factor for corruption in Poland is the lengthiness of court proceedings, which is due to inefficiencies in the system.²⁴ The US Human Rights Report cites major systemic problems in the Polish court system, including poor administration and inadequate staffing.²⁵ Furthermore, according to Freedom House, judges and prosecutors in Poland are underpaid, which could make them vulnerable to political pressure. Freedom House did not observe progress in this regard in 2011.²⁶

Commentary:

The lead examiners have not found any evidence of the influence of political factors in the decisions to terminate the investigations in “SOE Case No. 1” and “SOE Case No. 2” (Cases #1 and #2 respectively under A.5.b)). They have also not found any evidence of the influence of political factors in the decision to not open an investigation in the “Procurement Case” (Case #3 under A.5.b)). However, the lead examiners note that these cases were highly publicised, and that according to the non-governmental experts who participated in the on-site visit, it is unlikely that political factors would be taken into account in well-known cases due to potential criticism by the political opposition. The lead examiners therefore recommend following-up this issue as further practice develops, to ensure that the recent separation of the role of the OPG and Minister of Justice in Poland effectively safeguards investigative and prosecutorial decision-making in foreign bribery cases from consideration of the factors prohibited in Article 5 of the Anti-Bribery Convention (i.e., “the national economic interest, potential effect upon relations with another State, or the identity of the natural or legal persons involved”).

c) Jurisdiction over natural persons

90. In Phase 2 the Working Group agreed to follow-up Poland’s application of jurisdiction including over natural persons for foreign bribery cases committed wholly or partly abroad. Follow-up of this issue was recommended since the Polish Penal Code does not elaborate on the degree of a physical link that is needed to establish territorial jurisdiction over foreign bribery cases, and relevant case law was not available.

91. In the responses to the Phase 3 Questionnaire, the Polish authorities explain how jurisdiction has been established so far in the two ongoing foreign bribery proceedings in the “False Document Case” (Case #4 under A.5.b)) and the ongoing proceeding for a foreign bribery case that does not involve

²⁴ “How to Fight Corruption: Principles for Developing and Implementing an Anti-Corruption Strategy for Poland” (Anti-Corruption Program, Batory Foundation, 2010).

²⁵ “2010 Human Rights Report: Poland” (U.S. Department of State, 2010)

²⁶ “Poland: Nations in Transit” (Freedom House, 2012)

international business . In Case #4, territorial jurisdiction has been established because the conduct of the Polish person who authorised the bribery in the foreign country took place in Poland. In the ongoing proceeding for a foreign bribery case that does not involve international business, the Polish authorities explain that they established territorial jurisdiction over those individuals who committed the foreign bribery offence in Poland, and nationality jurisdiction over those individuals who committed the offence in the foreign jurisdiction.

Commentary:

The lead examiners recommend continuing to follow-up on the application of territorial jurisdiction to natural persons as practice develops.

6. Money Laundering

92. The lead examiners identified a new issue regarding Poland's Anti-Money Laundering (AML) System, which was not assessed in Phase 2. Due to a highly publicised ongoing case involving a fraudulent scheme by an unregulated Polish lender and investment company, which allegedly conducted banking activities without the necessary licenses, the lead examiners explored in some depth at the on-site visit whether the so-called unregulated "para-banking" activities could pose a risk for laundering the proceeds of foreign bribery that could go undetected. Indeed, there are reportedly about fourteen entities conducting "para-banking" on the Polish FSA's "blacklist", which is published on the FSAs website. In addition, media articles raise growing concerns about the existence of "quasi-banking activities" in Poland in the absence of required licenses.²⁷ However, since no government body is responsible for monitoring this activity, information about the size of the problem in Poland is not available. The lead examiners acknowledge that the highly publicised ongoing case did not relate to money laundering suspicions by the entity in question. Poland emphasises that "para-banking" should be perceived as posing a possible risk of the predicate crime of money laundering, and not as a channel of money laundering.

93. The Polish authorities confirmed in writing following the on-site visit that unregulated financial institutions are not supervised by the FSA or the General Inspector of Financial Information (FIU). They also confirmed that article 2.1 of the Anti-Money Laundering Act, which provides an exhaustive list of institutions required to make STRs, does not include entities conducting "para-banking". However, when these unregulated institutions open accounts at regulated banks, they are subject to rules on customer due diligence, and the financial institutions in which they hold accounts are subject to STR requirements, which means that at least in theory money laundering activities conducted through "para-banking" could be indirectly detected by the financial institutions in which they hold accounts. The Polish authorities also explained that FSA inspectors check whether financial institutions take into account the published list of entities conducting "para-banking" when creating a customer's risk profile.

94. However, during the on-site visit there was some confusion in the financial sector about whether entities conducting "para-banking" were subject to STR obligations. For instance, one major institution representing the banking sector believed that such entities are subject to STR obligations, and that although they are not regulated by the FSA, they are regulated by other relevant parts of the Polish government. Moreover, the Ministry of Justice was not sure if Poland has the legal tools to deal with the "para-banking" issue, the CBA considered that there is a gap in AML legislation in respect of "para-banking", and the FIU did not foresee any reform in this area. Poland points out that Article 2.1 of its Anti-Money Laundering Act, which lists entities and individuals subject to STR obligations, is fully compliant with the relevant

²⁷ See for instance: "Poland's Amber Gold to Liquidate" (Financial Times, 13 August 2012); "Prosecutors under Fire in Amber Gold Banking Scandal" (Polskie Radio, 28 August 2012); and "Poland's Shadow Banking Scandal: After the Gold Rush" (The Economist, 30 August 2012).

FATF Recommendations and Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The lead examiners' comments on the "para-banking" issue are provided in the context of Poland's AML system overall to effectively prevent and detect foreign bribery, and not in relation to any specific rules or directives from regional or international money laundering bodies.

95. In addition to the specific issue of "para-banking" and the risk of laundering the proceeds of foreign bribery through them, the lead examiners explored at the on-site visit the effectiveness of the AML system as a whole at detecting the proceeds of foreign bribery. To date, it does not appear that the AML system has generated leads that have resulted in foreign bribery investigations or proceedings, except in "SOE Case No. 1" (Case #1 under A. 5.b), in which a report was made by the FIU, and followed-up by a request for MLA to ascertain the predicate offence. One institution that represents Polish Banks did not think that Poland's AML system looked deeply at whether corrupt proceeds formed the basis of a money laundering offence. Another institution representing the banks agreed with this assessment, and said that the extent to which corrupt proceeds are being laundered in Poland is not known. He said that he was not aware of any foreign bribery case being detected through the AML system in Poland. He also said that the banks received useful feedback from the FIU on STRs but not from the prosecution authorities. The FIU said that it had detected domestic corruption cases through STRs, but did not indicate that it has also detected foreign bribery cases.

96. Moreover, following the on-site visit, the Polish authorities explained that since the FIU is not a law enforcement authority, it has limited powers to determine the nature of the predicate offence in suspicious transactions. It is the job of the prosecution authorities to link the suspicious transaction to the predicate offence. The FIU therefore provides guidance to reporting entities on detecting suspicious transactions in general, as it is not possible for the FIU to provide reporting entities with specific guidance or typologies on detecting money laundering involving the proceeds of foreign bribery. The guidance that is provided to the reporting entities by the FIU covers issues such as "politically exposed persons" (PEPs), transactions involving SOEs, and transactions involving countries at high risk for corruption, including in public procurement contracting. Still, the lead examiners feel that it would be much more efficient for the FIU to have specific knowledge of red flags for specifically detecting money laundering involving the proceeds of foreign bribery, and that sharing knowledge and guidance in this respect with reporting entities would increase the effectiveness of detecting foreign bribery transactions through STRs. Money laundering where foreign bribery is the predicate offence does not necessarily follow the same methodology as other money laundering offences (for instance PEPs are often not involved and instead, for instance, mid-level procurement officials may be involved), and therefore detection of such money laundering activities would be enhanced by specific information about their methodology. The Polish authorities "strongly" disagree with the lead examiners in this regard, and believe that providing information and guidance to reporting entities specifically on detecting money laundering where foreign bribery is the predicate offence is "highly inadvisable", as it is the duty of the prosecution authorities to link money laundering to the predicate offence.

Commentary

The lead examiners believe that there could be a risk that "para-banking" could be used in Poland to launder the proceeds of the bribery of foreign public officials, and that indirectly detecting such proceeds through financial institutions in which entities that conduct "para-banking" hold accounts is too far removed from the actual source of the relevant transactions to be an effective means of detection. However, in the absence of information on the size of the "para-banking" sector in Poland, they are not able to identify the extent of the risk. The lead examiners therefore recommend that the Polish authorities examine whether para-banking poses a risk of laundering the proceeds from foreign bribery.

The lead examiners also believe that Poland must urgently take substantial steps to raise the awareness of and provide training for the FIU and all reporting entities of the risk of laundering the proceeds of the bribery of foreign public officials, and provide them with guidance on what constitutes such proceeds, and how to effectively detect them.

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

97. This section of the report considers Poland's implementation of outstanding Phase 2 recommendations relating to accounting and auditing and summarises developments in corporate compliance, internal controls and ethics programs among Polish companies.

a) Awareness-raising and training activities within accounting and auditing profession

98. In Phase 2, the Working Group encouraged the accounting and auditing profession to develop further initiatives to (i) provide training and raise awareness concerning the foreign bribery offence and the relevant accounting and auditing requirements under Polish law; and (ii) publicise within the profession the obligation to report suspicions of foreign bribery to the appropriate bodies.

99. In the responses to the Phase 3 Questionnaire, the Polish authorities reported that, starting in 2010, the Training Commission of the National Council of Statutory Auditors assisted its regional branches in conducting over 100 training courses and seminars, although primarily on issues connected with AML and prevention of terrorism financing. Courses on ethics were also included in the curricula of all the training courses and post-graduate studies organised by 26 Regional Branches of the Accountants Association in Poland and the Institute of Professional Certification for Accountants. At the on-site, the Ministry of Finance stated that, in an effort to promote more training courses on foreign bribery, it had provided the Convention to the Chamber of Auditors and asked them to disseminate it among their members. The National Council of Statutory Auditors informed the lead examiners that for 2013, it is planning to organise training seminars on issues connected to the Convention and 2009 Recommendation. Information on the Convention, and related material, is now also featured on the websites of the National Chamber of Statutory Auditors, Accountants' Association in Poland and the Ministry of Finance.

100. The on-site discussion with members of the accounting and auditing profession revealed that, although knowledge of the Convention among the panellists was quite good (particularly among the statutory auditors present), the topic of foreign bribery, and how to detect it through a review of books and records, constituted fairly new territory among most auditors and accountants. One representative present at the on-site stated that the Convention was a "novel issue" to the profession. Another clarified that bribery from the demand-side is familiar, but supply-side bribery is a new subject as Poland is not traditionally a large exporter of capital. The same auditor observed that this issue even might be unfamiliar to some businesses as not many Polish companies are operating overseas. Panellists agreed, however, that as the Polish economy grows and increases its exporting capacity, awareness of foreign bribery is also on the rise. Panellists noted that operations abroad, particularly in Eastern Europe, carried with it an increased risk of exposure to foreign bribery.

101. When asked about the ease with which auditors can detect foreign bribery through an inspection of books and records, the auditors were in agreement that, with the exception of egregious examples, foreign bribery was not an easy offence to detect through auditing (although the larger the bribe, the easier the detection). Auditors at the on-site explained that in most cases, they do not have clear evidence that a transaction is linked to an illegal activity. Several auditors compared the detection of foreign bribery to that of fraud. In both cases, usually cases are detected by an insider, or by accident.

102. The reporting obligation of the statutory auditor (as well as general auditors) is to the prosecuting authority directly. However, the general consensus among the accounting and auditing representatives that participated in the on-site visit was that the reporting channels were in and of themselves almost a deterrent to reporting. They stated that the first challenge is to collect sufficient evidence to substantiate the report. Without adequate proof, going to the authorities jeopardises the auditor's employment. The panellists noted that gathering evidence for bribery offences was quite difficult, collecting the requisite evidence for fraud being easy by comparison. However, following the on-site visit, the Polish authorities clarified that the relevant legislation (the Act on Statutory Auditors and Audit Firms) does not impose an obligation on the auditor to collect sufficient evidence confirming a suspicion. Instead, auditors are only required to provide certain indications to report a suspicion to the law enforcement authorities. It is up to the law enforcement authorities to collect supporting evidence.

103. As for training sessions for the auditing and accounting profession, it appears that most of the trainings that have occurred in the past have been on the subject of money laundering and fraud. Although none of the panellists present at the on-site had detected a predicate offence to money laundering, they stated that recently some cases have been discovered and are presently pending.

Commentary

In recent years, Polish companies have been increasing their global presence, with the result that the risk of foreign bribery involving these companies has also increased. The lead examiners therefore recommend that Poland intensify its efforts to encourage the accounting and auditing profession to raise awareness and provide training on the detection of foreign bribery in companies' books and records.

In addition, the lead examiners are concerned that the accounting and auditing profession believes that it must collect substantial evidence to justify reporting suspicions of foreign bribery to the law enforcement authorities, as this may hinder the effective detection of foreign bribery through companies' books and records. The lead examiners therefore also recommend that Poland provide clarification and guidance to the accounting and auditing profession on the evidentiary standards that must be met in order to justify reporting.

b) False accounting

104. Article 8 of the Convention requires Parties to prohibit bribery-related accounting misconduct by companies, and to provide effective, proportionate and dissuasive sanctions for such misconduct. In Phase 2, the Working Group highlighted the level of sanctions for false accounting offences as a follow-up issue as there was insufficient information at the time of the Phase 2 on-site visit to determine whether the level of sanctions for the offence of false accounting was effective, proportionate and dissuasive. In particular, the Working Group wanted further information on sanctions imposed against natural and legal persons (including the application of confiscation measures, additional sanctions and the use of suspended imprisonment terms by courts)

105. The Accountancy Act, Polish Penal Code and the Fiscal Penal Code cover the establishment of off-the-books accounts, falsification of financial statements and inaccurate or unreliable bookkeeping. Under article 77 of the Accountancy Act, if books of accounts are not kept pursuant to the standards articulated in the Act, or include unreliable information, the person responsible shall be subject to a fine ranging from PLN 100 to 720 000 (around EUR 24 to 172 829) or a deprivation of liberty for a period of 2 years or both. Likewise, if financial statements are not created, or include dishonest information, the person responsible shall be subject to a fine or imprisonment for a period of up to 2 years or both. According to article 79 of the Accountancy Act, a person failing to submit a financial statement for auditing or

publication is subject to the same fine or a restriction of liberty for a period from one month to a year. Under article 77 of the Accountancy Act, failing to keep books of accounts could result in a fine of between PLN 100 to 720 000 ((around EUR 24 to 172 829) or a deprivation of liberty for a period of 2 years or both. Under article 61 of the Fiscal Penal Code, dishonest bookkeeping could result in a fine in an amount up to 240 daily rates [one daily rate ranging from 1/30 of the minimum wages up to 400 times of this amount – approximately PLN 53 to 21 300 (around EUR 13 to 5113)]. Pursuant to article 270 of the Penal Code, falsification of an accounting document, which could constitute the offence of forgery, carries a penalty of imprisonment for a period of 3 months to 5 years.

106. Since Phase 2, Poland's false accounting offence has not changed, and the same questions relating to sanctions remain. In the Phase 2 on-site visit, Polish Treasury authorities reported that there had been no cases of accounting crimes related to bribery. They were also asked about the relationship between offences created under the Accountancy Act and those under the Law on Liability of Collective Entities (as the list of prohibited acts contained in the Law of Collective Entities did not include the relevant ones under the Accountancy Act). It was also noted that the relevant articles of the Fiscal Criminal Code (including provisions covering dishonest bookkeeping, refusing to issue an invoice for service and issuing an invoice in an improper manner) only covered natural, and not legal, persons. Polish authorities responded that, in the case of falsification of an accounting document, a legal entity theoretically could be held liable for forgery under the Law of Collective Entities. At the time of the Phase 3 on-site, Polish authorities still had not demonstrated that the Law on Liability of Collective Entities has been applied to a single case of a false accounting offence involving a legal person.

107. The Polish authorities have provided detailed statistics about the application of the book-keeping offences in the Penal Code and Accountancy Act to natural persons for the years 2007 to 2011. For the purpose of this report, the lead examiners have analysed the statistics from 2009 to 2011. In the three years, the following number of convictions was obtained respectively: 3611, 3307 and 3368. In each of those years, the proportion of convictions under the Penal Code to those under the Accountancy Act was approximately three to one. The number of fines imposed without imprisonment in the three years that were over PLN 5000 (around EUR 1200) was as follows: 12 in 2009, 7 in 2010, and 12 in 2011. The vast majority of fines were under PLN 5000, and a small proportion was suspended. The number of sentences of "restriction of liberty" without fines that were imposed in the three years was as follows: 29 in 2009, 35 in 2010 and 32 in 2011. A small proportion was suspended. The number of sentences of "deprivation of liberty" without fines that were imposed in the three years was as follows: 1637 in 2009, with suspension of sentences in all except 164 cases; 1467 in 2010, with suspension of sentences in all except 142 cases; and 1502 in 2011, with suspension of sentences in all except 138 cases. The number of sentences of fines over PLN 5000 (around EUR 1200) combined with a "deprivation of liberty" imposed in the three years was as follows: 166 in 2009, with suspension in 145 cases; 134 in 2010, with suspension in 115 cases; and 124 in 2011 with suspension in 115 cases. The vast majority of fines combined with imprisonment were under PLN 5000, and the sentence was suspended in over 90% of the cases. The lead examiners recognise that there has been significant law enforcement activity for book-keeping offences under the relevant statutes. However, the level of sanctions appears quite low, especially in view of the proportion of suspended sentences.

108. At the on-site, none of the auditors were aware of the application of the Law on Liability of Collective Entities to a legal person for book-keeping offences, including forgery. This impression was confirmed by the Polish authorities, who stated following the on-site visit that due to the overall insignificant number of proceedings against legal persons to date, it is not possible to draw conclusions on the application of the Law to legal persons.

Commentary

The lead examiners recommend that Poland find a way that is appropriate and feasible in its legal system to ensure that natural and legal persons are subject to effective, proportionate and dissuasive penalties for fraudulent accounting for the purpose of bribing foreign public officials or hiding such bribery, in compliance with Article 8 of the Convention.

c) Internal controls, ethics and compliance

109. In Phase 2 the Working Group noted that in general Polish companies had not taken steps to raise awareness of their employees of the risk of bribery in international business transactions, and few Polish companies had adopted anti-bribery provisions in their codes of conduct or put into place mechanisms through which employees could anonymously provide information on possible violations.

110. Since Phase 2, there is still room for extensive improvement. Before the on-site visit, the evaluation team canvassed publicly available information about the codes of conduct/ethics of seven major Polish companies, and discovered the following trends in the materials:

- a) They do not expressly refer to the bribery of foreign public officials;
- b) Most of the companies encourage or require reporting of illegal conduct, but only one has a dedicated whistleblower channel or hotline;
- c) Anonymous reporting is not expressly permitted by any of the companies, although generally whistleblowers may request that their reports are treated confidentially (one company considers anonymous reporting to be a “denunciation and irresponsible”); and
- d) Only one company’s code of ethics applies to agents, consultants and other intermediaries (i.e., agreements with third parties must contain an express anti-corruption clause), and the same company as well as one other company enable third parties to report illegal conduct.

111. Discussions at the on-site visit with private sector representatives disclosed similar findings regarding companies’ codes of ethics/conduct and other preventive measures. Although essentially all the large companies interviewed had in place some kind of measures for preventing and detecting bribery and corruption, none had established measures specifically on the bribery of foreign public officials, and none had provided training and awareness-raising activities specifically on this issue.

112. In addition, the companies that participated in the on-site visit, including large SOEs, and several large companies representing sensitive sectors, such as defence, oil and gas, mining, energy and telecommunications, were rather unconcerned about the risk of foreign bribery posed by the use of third parties abroad, including agents, consultants and other business partners. Moreover, six major companies and one business association that represents SMEs doing business in a region of the world at high risk for corruption believed that it is possible to construct an agency contract so that a company can avoid criminal liability for the foreign bribery offence. One major company and two major business associations thought that the foreign bribery offence did not apply under any circumstances to bribery through an agent. One major business association that represents Polish companies of all sizes and in all sectors stated that Poland’s foreign bribery offence would apply to bribery by a Polish company of an official in the EU market, but would apply differently to the bribery of an official outside the EU in a country in which corruption is endemic.

113. Poland has conducted a number of activities to raise awareness in the private sector of the foreign bribery offence. For instance, information has been disseminated by the Ministry of Economy, divisions

for the promotion of trade and investment in Polish embassies and consulates, the Permanent Representation of Poland to the WTO, and the Economic and Trade Section of the Permanent Representation of Poland to the EU. Information is provided on the Ministry of Economy's web portal.²⁸ In addition, the Ministry of Economy has requested that major Polish business associations disseminate information about the Convention and the Good Practice Guidance on Internal Controls, Ethics and Compliance. MOFA states that "from time to time" it cooperates with the Ministry of Economy to support business abroad, and toward this end "some" conferences on foreign bribery and the Convention have been held by the Ministry of Economy. However, none of the companies that participated in the on-site visit, including the SOEs, or business associations, was aware of these government initiatives.

114. Perhaps the most disconcerting finding of all by the evaluation team was an overall lack of awareness about the risk of solicitation for bribes in foreign markets. Indeed, not one of the six business associations was aware of their member companies facing bribe solicitations, even those business associations representing companies that conduct business in high risk regions. A representative of a major accounting and auditing firm explained that this lack of awareness might be due to a lack of practical experience in foreign markets by Polish companies.

Commentary

The lead examiners recommend that Poland urgently make significant efforts to raise the awareness of large companies, SOEs, and SMEs (through business associations) of the following: 1) the risks of foreign bribery in international business transactions; 2) application of the foreign bribery offence and the Law on Liability of Collective Entities to bribes made through agents abroad; and 3) the need to adopt effective internal controls, ethics and compliance measures for preventing foreign bribery.

8. Tax Measures for Combating Bribery

a) Non-tax deductibility of bribes

115. In Phase 2 the Working Group recommended that, with respect to the non-tax deductibility of bribes, Poland amend its legislation to clearly confirm that bribes are not tax deductible, and in that regard consider an express prohibition on the tax deductibility of bribes. The Working Group was concerned that the Polish approach to the non-tax deductibility of bribes might not effectively exclude tax deductibility in certain circumstances, as non-tax deductibility was related to whether expenses resulted from "an activity that could not be an object of a legally valid agreement". The Working Group was concerned whether, for instance, the cost of a bribe that results in the award of a public procurement contract might be tax deductible since the public procurement contract might be considered a "legally valid contract".

116. On 1 January 2009, Poland slightly amended the relevant articles of the Corporate Income Tax Act and Personal Income Tax Act to clarify that the following expenses were not tax deductible: "...expenses incurred and the value of objects or rights transferred or services provided, resulting from an activity that could not be an object of a legally valid agreement". At the time of Poland's Phase 2 written follow-up report, the Working Group considered its Phase 2 recommendation in this regard "partially implemented".

117. Since Phase 2, the 2009 Tax Recommendation was adopted by OECD Council, which recommends that Parties to the OECD Anti-Bribery Convention "explicitly disallow the tax deductibility

²⁸ See: <http://www.mg.gov.pl/node/7843>

of bribes to foreign public officials, for all tax purposes in an effective manner”. The 2009 Tax Recommendation also states that such disallowance should be established by law or any other binding technique, such as by “prohibiting tax deductibility of bribes to foreign public officials” or “prohibiting tax deductibility of all bribes or expenditures incurred in furtherance of corrupt conduct in contravention of the criminal law or any other laws of the Party to the Anti-Bribery Convention”.

118. On 1 January 2011, Poland further amended article 16.1(66) of the Corporate Income Tax Act, and article 23.1(61) of the Personal Income Tax Act, to clarify that the following expenses are not tax-deductible:

“...expenses incurred and the value of objects or rights transferred or services provided, resulting from an activity that could not be an object of a legally valid agreement, particularly in connection with committing an offence stipulated in Article 229 of the Penal Code are not considered as revenue earning costs”. (The underlined text was added by the amendment.)

119. On its face, it would appear that the new language does not comply with the 2009 Tax Recommendation, because it does not either: 1) expressly prohibit the tax deductibility of bribes; or 2) prohibit the tax deductibility of all bribes incurred in furtherance of corrupt conduct in contravention of Polish law. Instead, the new language seems convoluted, and suggests that some bribes in contravention of Article 229 of the Penal Code could result in legally valid contracts, and that in such cases, the cost of the bribe would be tax deductible.

120. During the on-site visit, the lead examiners stated that they were concerned that the language on non-tax deductibility in the tax law could cause confusion, by differentiating between two types of contracts that could result from bribery. On the one hand, a bribe could be for the purpose of obtaining a contract for legal business, such as a public procurement contract, or a mining concession. On the other hand, a bribe could be for the purpose of obtaining a contract for illegal business, such as to smuggle drugs or human beings. The lead examiners were concerned that the language in the tax law would make bribes non tax-deductible in the latter case but not in the former case. In response, the Ministry of Finance said that it is clear to Polish taxpayers that in any bribe transaction there are two contracts – the “bribe contract” and the contract that is obtained through bribing, and that without doubt the former “contract” is not legally valid. The Polish authorities underline that according to Polish civil law, a legal act that is contrary to a statute (e.g., the bribery of foreign public officials) is void under the law. Thus, according to Poland, a taxpayer may not claim any legal consequences, including under the tax law, from an act that is not legally valid.

121. Following the on-site visit, the Polish authorities stated in writing that no general interpretation has been issued regarding these provisions in the tax law, and that two individual interpretations have been issued, but that they do not relate to the tax treatment of expenses connected to the commission of an offence under article 229 of the Penal Code. The Polish authorities also stated that pursuant to the Tax Ordinance Act, general interpretations are issued to ensure the uniform application of the tax law; however no such interpretation has been issued clarifying that bribes are non-tax deductible, because there are no signals from the tax authorities that the application of these provisions is not uniform. Following the on-site visit, the evaluation team asked Poland to provide references to leading jurisprudence that shows clearly that contracts obtained through bribery are void and of no legal effect in Poland. In response, the Polish authorities stated that “under the law, parties may never agree on criminal behaviour and claim it to be legally valid and enforceable”.

Commentary

The lead examiners acknowledge that Polish taxpayers well-versed in Polish tax law may be aware that bribes to foreign public officials are not tax deductible in Poland. On the other hand, not all companies have the resources and expertise to interpret the relevant tax provision as a clear statement of the non-tax deductibility of bribes. In addition, foreign companies operating in Poland might misinterpret the language. The lead examiners therefore recommend that as a matter of priority, Poland take appropriate and feasible steps within its legal system to clarify that all bribes to foreign public officials in violation of article 229 of the Penal Code are not tax deductible.

b) Detection of bribe payments by tax authorities

122. Poland has conducted several initiatives to encourage the tax authorities to detect and report suspicions of foreign bribery in the course of a tax audit. In December 2008, the General Inspector of the Treasury Inspection and the Head of the Customs Service issued “Guidelines on More Effective Use of the Opportunities to Reveal Hidden Costs of Bribes during Fiscal and Tax Inspections – the Amounts Allocated to or Spent on Bribery of Public Officials and particularly of Foreign Public Officials in International Business Transactions”. These guidelines have also been the basis of a number of training activities and have resulted in the issuance of internal regulations, decisions and instructions by Treasury Inspection and the Customs Service. Training activities include a programme and training aids developed by the Centre for Occupational Education of the Ministry of Finance, which includes information on the OECD Bribery Awareness Handbook for Tax Examiners, and will be used to provide trainings at the central and regional level. In addition, training activities have been undertaken in the majority of local units, which have provided intensive trainings on detecting bribe payments to foreign public officials. However, despite these efforts, to date the tax authorities in Poland have not detected any suspicions of foreign bribery in the course of their tax audits.

123. Following the on-site visit, the lead examiners asked the Polish authorities to provide statistics on the number of tax returns in which a company and/or natural person requested a tax deduction for the value of gifts, entertainment or other advantage given to a foreign public official in order to conduct international business. In response, the Polish authorities stated in writing that it is not possible to provide this kind of information, because in tax return forms, income earning costs are indicated in aggregate amounts without a division into types.

Commentary

The lead examiners commend Poland for significant efforts to raise awareness in the tax administration on the detection of bribes in the course of tax inspections.

The lead examiners recommend that the Polish authorities re-examine the systems and processes in place for identifying bribe payments, to ensure that Poland has in place the proper tools, including technology and expertise, to track bribe payments for which tax deductions have been sought under categories of allowable expenses.

9. International Co-Operation

a) Mutual Legal Assistance

124. Poland’s framework for mutual legal assistance (MLA) has not changed since Phase 2. The Criminal Procedure Code governs MLA to foreign authorities in the absence of a treaty (CPC, Art. 568.1). The lack of dual criminality is a discretionary ground for denial (CPC Art. 588.3(3)). Mandatory grounds

for denial of an MLA request include “conflict with the legal order” of Poland and infringement on Polish sovereignty (CPC Art. 588.2). MLA may be provided for coercive and non-coercive measures, but court authorisation is required for coercive measures (Art. 585; Phase 2, para. 119). Polish authorities at the on-site visit explained that MLA may be provided for persons who availed themselves of the “impunity” provision. MLA may also be provided for proceedings against legal persons (Law of Liability of Collective Entities, Art. 41). The Polish Prime Minister has granted permission for the CBA to co-operate with 51 countries and 11 international organisations.

125. MLA requests to Poland may be sent either through the Ministry of Justice or directly to regional prosecution authorities. Requests sent to MOJ are first checked against formal legal requirements, and then forwarded to the relevant court or prosecutor to be executed, depending on the nature of the request (Phase 2, para. 117).

126. Since 2007, Poland has received 9 MLA requests in 5 foreign bribery cases from members of the Convention, and has effectively responded to all the requests. Two of the requests were completed within 4 months, 5 requests were completed within 6 months, and the 2 remaining requests were completed within one year. Poland has also co-operated in a foreign bribery matter by forming a joint investigative team with another Party to the Convention.

Commentary

The lead examiners commend the Polish authorities for their efficient and effective response to MLA requests concerning foreign bribery, and active co-operation in foreign investigations.

b) Extradition

i. Polish Citizens

127. Like MLA, the extradition regime in Poland has changed little since Phase 2, except for the introduction of the European Arrest Warrant (EAW) (CCP, Art. 607). Poland may grant extradition with or without an applicable treaty. Under the Constitution of Poland, Poland shall not extradite Polish citizens or those who have a right of asylum in Poland (CCP, Art. 604.1(1)) except pursuant to an international treaty ratified by Poland. An extradition request made pursuant to such an international treaty may be granted where: (1) the criminal act was committed outside of Poland, and (2) the act would have constituted an offence under Polish law “both at the time of its commitment and at the time of the making of the request” (Constitution of the Republic of Poland, Art. 55(2)). Poland also does not permit extradition in certain cases, such as where: (1) the statute of limitations has elapsed, (2) there is a lack of dual criminality, (3) *ne bis in idem* would apply, (4) extradition “would contravene Polish law”, (5) the death penalty may be imposed, (6) the freedom and rights of the extradited person may be violated, or (7) the offence is a political crime. Although Poland has not been requested to extradite in a foreign bribery matter, Poland has effectively granted extradition of a non-Polish citizen to another Party to the Convention in a domestic bribery matter.

128. The “impunity” provision (discussed in detail under B.1.a)) raises concerns about the compliance of Poland’s extradition regime to the Convention. Article 10 of the Convention requires Member countries to either: (1) provide for extradition of its nationals, or (2) prosecute nationals that are not extradited, where extradition was not granted solely on the ground that the person is a national. Since, the CCP does not allow extradition of Polish nationals, the Convention requires that those nationals who are the subject of extradition requests for foreign bribery be prosecuted in Poland, where the only reason why extradition was not granted was that the person was a Polish national. However, as explained in B.1.a) of this report, individuals who notify authorities of bribery are immune from prosecution under the “impunity” provision.

Polish citizens who avail themselves of the “impunity” provision would therefore be immune from prosecution, thus extinguishing the ability of the Polish authorities to prosecute them. At the same time, they could not be extradited on request by a Party to the Convention.

129. Poland contends that, under the Polish Constitution, the Convention would provide a basis for extradition of Polish citizens because ratified conventions have priority over domestic statutes (Constitution of Poland, Art. 91.2). However, the Constitution also provides for extradition of Polish nationals only where the act would have constituted an offence in Poland if it had been committed within the territory of Poland, “both at the time of its commitment *and* at the time of the making of the request” (Constitution of Poland, Art. 55(2)(2)) (emphasis added). The evaluation team is thus concerned that the dual criminality requirement would not be satisfied in a case where the perpetrator had availed him/ herself of the impunity provision, since pursuant to the Polish Constitution the criminal act would have been absolved by the time the extradition request is made.

130. The Polish authorities also state that the provision on dual criminality for the purpose of extradition in the Constitution does not relate to the imposition of a penalty on a specific person, but to incrimination of the specific behaviour. They add that this means that the constitutional principle cannot impede any extradition procedure relating to the Convention.

ii. Non-Polish Citizens

131. In addition, the same issue regarding the impact of the “impunity” provision applies to requests for extradition of non-Polish citizens, as Poland is prohibited from extraditing all persons, including citizens, permanent residents of Poland, and non-citizens who are not permanent residents, if the act for which extradition is requested “does not have the features of a prohibited act, or if the law stipulates that the act does not constitute an offence, or that a perpetrator of the act does not commit an offence or is not subject to penalty” (CCP, Art. 604.1(2)).

132. Furthermore, extradition may be refused in Poland for “permanent residents of Poland”, regardless of the application of the “impunity” provision or any other legal impediment such as the expiration of the statute of limitations in Poland (CCP, Art. 604.2(1)).

Commentary

In the absence of supporting jurisprudence, the lead examiners are concerned that the “impunity” provision might create a loophole in Poland’s extradition regime for foreign bribery in relation to both Polish nationals and non-nationals who avail themselves of the provision (See Commentary under B.1.a) of this report.)

In addition, Poland has discretion to not extradite “permanent residents of Poland” regardless if there are not other reasons in the law for refusing extradition. The lead examiners therefore recommend following-up Poland’s extradition regime to requests by Parties to the Convention for the extradition of Polish permanent residents for the bribery of foreign public officials.

10. Public Awareness and the Reporting of Foreign Bribery

133. In Poland’s Phase 2 evaluation, the Working Group issued a number of recommendations relating to awareness-raising and the reporting of foreign bribery, some of which were only partially implemented at the time of the Phase 2 Follow-up Report. Awareness among business associations and companies has been addressed in section B.7.c) of this report, and awareness within the auditing profession in section B.7.a) of this report. This section will therefore focus on the level of awareness among the legal profession, civil society and the public at large.

a) Public awareness of the Anti-Bribery Convention and the offence of foreign bribery

134. Since Poland's Phase 2 evaluation, the government has taken some steps to increase awareness in relevant fields, and – to a much lesser degree – among civil society (including academics, media and legal experts), who, despite themselves having a fair understanding of the Convention and foreign bribery, report that awareness among the general public is extremely low to “non-existent.” Panellists agreed that societal consciousness of corruption in general is fairly high, but that the topic of foreign bribery is too “specific” for the general population, and perhaps even for businesses. One panellist stated that even among specialised institutions dedicated to combating corruption, foreign bribery is still a “marginal” issue, although the publication of a report on foreign bribery in 2003 did create a short-lived spike in interest on the subject. In fact, the same panellist expressed amazement at the number of awareness-raising activities reported to have been conducted in Poland in the Phase 2 report.

135. Several of the civil society representatives conjectured that the reason for the low level of awareness of foreign bribery among Polish citizens could be that, given Poland's economic position as recently expanding into the world market, the problem of international corruption is not yet viewed as a high priority. Civil society panellists echoed sentiments expressed in previous panels with businesses and the auditing and accounting professions, which is that Polish business activities abroad have not yet reached levels warranting significant concern over foreign bribery. Although seeing an increase in international business activities, Poland is still not viewed by its own citizens and businesses as being a major exporter, on par with some of the “larger economies.” One civil society panellist opined that bribing a domestic public official would likely draw considerable attention as it involves matters of immediate national concern, but international bribery is still not considered relevant to Poland's national interest. Lead examiners note with some concern that across the board, Polish businesses and industries are not yet perceived as being important international players.

136. The level of interest in foreign bribery of the general populace is mirrored in the amount of coverage the subject receives in the Polish media. None of the three representatives of NGOs could recount any stories published on Polish companies being prosecuted for bribery, although one NGO representative was able to recall two cases of allegations of foreign bribery published three to four years ago. Panellists then disagreed on the reason for the absence of any such stories; a few believed the absence of coverage could be explained by the absence of cases, while others attributed it to a lack of public interest and a dearth of qualified investigative journalists. One member of civil society reasoned that Polish journalists are largely focussed on national matters, and even then are not prepared to be the “watchdogs” of Polish society.

Commentary

It is evident that Polish society remains at best, unconcerned about the issue of foreign bribery, and at worst, entirely misinformed as to its relevance to Poland's national economic interests. It appears that most panellists across the board still perceive Poland to be a relatively insular and domestically-driven economy, which is quickly becoming less the case. The lead examiners, therefore, recommend Poland to significantly increase its awareness-raising efforts, but with more emphasis on Poland's growing international presence.

b) Duty to report suspected acts of foreign bribery

137. Article 304.1 of the Polish Penal Code of Criminal Procedure creates a civic duty for Polish citizens to inform the state Prosecutor or police of the commission of an offence. As a “civic duty,” this obligation to report is not subject to criminal sanctions. Article 304.2 imposes a legal obligation on state and local government employees, “which in connection with their activities have been informed of an

offence prosecuted *ex officio*, . . . to immediately inform the state prosecutor or the Police.” Poland clarified that a public official’s failure to report may be a criminal offence under Article 231.1 for failing to perform his/her duty or failing to uphold the public interest. Although Poland’s Penal Code does not expressly impose an obligation to report suspected acts of corruption or foreign bribery, in order to facilitate reporting, the website of the National Police Headquarters contains a tab enabling direct reporting of a suspected act of corruption to the relevant regional division. Moreover, a dedicated email address was created for the reporting of suspected corruption in the foreign service. In the responses to the Phase 3 Questionnaire, Poland further clarified that the obligation to report an offence to law enforcement is not imposed on any public officer, but only on those authorised to act on the behalf of the institution or agency or who are responsible for its proper functioning.

138. Representatives of civil society at the on-site visit explained that in the aftermath of the Communist era, there is still reluctance in particular among older members of the population to report criminal offences. However, they were hopeful that as the newer generation rises, this pattern of thinking will see a marked change.

c) Whistleblower protection

139. Polish law does not contain any consolidated legislation protecting whistleblowers from retaliation; Articles 18 and 45.1 of Poland’s Labour Code prohibit unjustified termination and discrimination, including humiliating, hostile or degrading treatment. In the event that an employer’s actions do not qualify as discrimination, the “anti-mobbing provision” contained in Article 94.2 prohibits persistent and long-term harassment or intimidation of an employee that results in a decreased evaluation of his professional abilities or the humiliation or isolation of the employee. An employee suffering from health problems due to “mobbing” (or harassment) in the workplace, or who terminates his employment because of such harassment, has a claim for compensation. Other provisions that may relate (although not expressly) to protection of whistleblowers include the Personal Data Protection Act and Article 184 of the Code of Criminal Procedure (protecting the identity of witnesses), Article 218 of the Penal Code (penalising malicious or persistent violation of the rights of employees, and Article 24 of the Civil Code (creating a civil remedy for endangering the personal rights of another).²⁹

140. The provisions contained in Poland’s labour law place the onus on the employee to make out a case for unjustified termination, a scenario that effectively turns all claims of whistleblower retaliation into wrongful termination claims. Further, Poland’s piecemeal approach to whistleblower protection also hinders public understanding and awareness of the protective measures in place. When asked about whistleblower protections during the on-site, legal experts agreed that social consciousness of this issue remains quite low and while the private sector has taken some initiative in this area (through implementation of internal guidelines and controls), the government has taken no action to improve awareness or facilitate reporting. When asked about the efficacy of the anti-mobbing provisions, legal experts were doubtful such cases could actually succeed in court due to the lack of expertise and knowledge among judges on this issue, and evidentiary considerations.

141. Civil society panellists expressed similar doubts as to the efficacy of whistleblower protections in Poland as they stand. One panellist observed that in a series of interviews conducted with Polish judges, it

²⁹ Wojciechowska-Nowak, Anna, “Whistleblower Protection in Poland: Current Status and Recommendations for Improvements” (2012) [Translated internally at OECD from: Założenia do ustawy o ochronie osób sygnalizujących nieprawidłowości w środowisku zawodowym. Jak polski ustawodawca może czerpać z doświadczeń państw obcych? (Fundacja Batorego, program Przeciw Korupcji, 2012): <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Przeciw%20Korupcji/zalozenia-do-ustawy-o-ochronie-sygnalistow.pdf>

was “obvious” that the regulations contained in the Labour Code are not suited for the purposes of protecting whistleblowers. Panellists agreed that whistleblowing regulations are too dispersed in various acts of law to be easily understood. Moreover, only a percentage of the Polish workforce is ultimately covered by any of the laws pertaining to employment discrimination or harassment. Such legislation only protects employees with permanent contracts (for indefinite periods of time). However, an estimated 30% of the Polish workforce is employed under temporary or definite period contracts (covered by the Civil Code), which require only a 2 week period of notice for lawful termination.³⁰ In such a case, courts would be unable to investigate the reason for dismissal as Polish labour courts are only allowed to investigate whether the correct procedures were followed for terminating the employee.³¹ Finally, protections against unlawful termination do not cover job cuts or layoffs due to economic reasons. Panellists noted ominously that anti-mobbing provisions in particular do not cover instances in which the employee is fired; consequently, the “normal” reaction of employers to insider reports is to fire the whistleblower, or eliminate his post.

142. During the on-site, the Ministry of Labour and Social Policy stated that discussions on whistleblower protections, including the possibility of codifying such protections in one unified law, shall go beyond the current labour law concept of wrongful termination, and will also take into account topics such as anti-corruption, ethics, public interest, fair proceedings, and protections against violating the rights of employees. The Ministry also explained that the Labour Code is not the appropriate place for whistleblower provisions. In its follow-up submissions to the Phase 3 on-site, Polish authorities acknowledged that the issue of whistleblowers is “very complex and multi-thread,” within which the Labour Code provisions are only “one element.”

143. The lead examiners are troubled by the fact that the Labour Law provisions admittedly do not cover critical groups of public sector employees, members of the police force or army, or other persons “linked to their employer by relationship of subordination.” They feel that, in light of these revelations, the need for stronger, more cohesive regulations is self-evident. However, it may be heartening that the Ministry of Labour conceded during panel discussions that upon seeing the protections in place in other countries, Poland may indeed require more targeted whistleblower legislation. The Ministry of Labour indicated that such targeted legislation would likely have a broader scope than the Labour Code, providing a more comprehensive scheme of protection for all public sector employees. The Polish authorities noted during the on-site that this development is still at a very early stage and should not be expected to result in anything concrete in the immediate future.

Commentary

Polish whistleblower regulations, in their current state, are largely ineffective due to their disparate and vague application. Moreover, it is clear from discussions with civil society and legal experts that, due to for instance the numerous loopholes in the anti-mobbing and anti-discrimination provisions, employers are easily able to evade application of the law. The lead examiners therefore recommend that Poland prioritise law reform in this area and ensure that appropriate measures are in place to protect from retaliatory or disciplinary action private and public sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery.

³⁰ *Ibid.*

³¹ *Ibid.*

11. Public Advantages

a) Public procurement

144. Article 24 of Poland's Public Procurement Law and the Law on Collective Entities provides for automatic exclusion of any companies and individuals sentenced by a valid and final court judgment for the offence of bribery (including a foreign judgment) in the context of a public procurement contract. Although the automatic exclusion is certainly in line with the Working Group's recommendations relating to public advantages, whether the actual practice has been effective is not clear in this regard. Despite the existence of around 14 000 contracting agencies,³² to date, the Public Procurement Office (PPO)³³ has not documented a single debarment based on a conviction for foreign bribery. However, the Polish authorities explain that this could be due to procedures for documenting and reporting on procurement contracts by the numerous awarding entities in Poland, which do not require reporting on economic operators excluded from public procurement contracting.³⁴

145. Polish awarding entities verify whether a Polish economic operator has been convicted in a Polish court or in a foreign court by checking the National Criminal Register. If the economic operator is based abroad, it is required to submit a certificate of the relevant foreign judicial or administrative body to the effect that it has not been convicted of bribery. If the relevant authority does not issue such documents, the foreign economic operator must submit a sworn document attesting that a conviction has not been obtained in a foreign court. The lead examiners note that, regarding foreign convictions, this process is dependent on the expediency of foreign authorities to provide the awarding entities with the relevant documentation. During the on-site, lead examiners were concerned that Polish awarding entities do not check the debarment lists of international financial institutions (IFI). The Polish authorities explained that under the Polish and European public procurement law, IFI debarment lists cannot be used as grounds for exclusion as they do not constitute valid and final court judgements. The lead examiners do not believe that this precludes the Polish authorities from checking IFI debarment lists for the purpose of triggering red flags for enhanced due diligence.

146. It is also clear that Article 24 precludes the exercise of any independent discretion; in other words, it is an all or nothing provision. At the on-site, the PPO explained that the awarding entity is not entitled to take into consideration sources of information (such as media reports, information from competitors, or even ongoing court proceedings that have not resulted in a verdict) other than a court order. If a company has been convicted of a bribery offence, it is automatically excluded; however, in the absence of a final and valid conviction, even an ongoing investigation or an indictment will not trigger the possibility of exclusion.³⁵ Moreover, the awarding entity is not allowed to consider whether an applicant

³² The European Commission "Annual Public Procurement Implementation Review" for 2012 quotes Poland as having reported 13 765 contracting entities.

³³ The PPO is a central authority of the Polish government, and plays a policy-making and coordinating role for the whole of the public procurement system in Poland.

³⁴ Pursuant to article 98 of the Polish Public Procurement Law, Polish awarding entities are required to provide annual reports to the PPO on their public procurement contracts, and the content of these reports is determined largely by rules on such reporting by the PPO to the Public Procurement Office of the European Commission. The Polish authorities explain that reports to the EC do not require information about economic operators who were excluded from public procurement procedures. On the other hand, this kind of data is kept by the Polish awarding entities, and is available upon request pursuant to the Regulation of the Prime Minister of 26 October 2010 on the Report on Contract Award Procedure (Journal of Laws, No. 223, item 1458).

³⁵ Polish authorities cite EU Directive 2004/18/EC as a basis for disallowing information about foreign bribery allegations or knowledge of investigations to provide grounds for exclusion. Directive 2004/18/EC

has in place adequate internal ethics or corporate controls when awarding contracts if they are not related to the subject-matter of the public procurement contract.

147. The lead examiners also asked during the on-site what steps can be taken if foreign bribery is detected after a contract is awarded. The PPO representative responded that suspicions of bribery must be reported to the public prosecutor or the CBA. No concrete information, however, could be provided on whether this has ever occurred.

148. As far as awareness-raising activities, the PPO stated in the on-site visit that it conducts trainings and educational activities on public procurement law (including the provision for exclusion) targeted at contracting authorities. The PPO does not conduct training sessions with companies, as they are assumed to know the law and to have been trained internally.

b) ODA-funded procurement

149. In terms of ODA, Poland is a relatively new actor in the field, having acceded to the EU only in 2004. Since its accession, Poland committed to reach an ODA/GNI ratio of 0.33% by 2015 (although this target is widely recognised as unrealistic given Poland's failure to meet its 2010 projections of 0.17%). Actual levels of ODA, however, hovered around 0.08% and 0.085% of GNI for 2010 and 2011, respectively, which amounted to approximately 378 million EUR in 2010 and 417 million in 2011.³⁶ In light of Poland's stated objectives relating to ODA and the findings of DAC's recent Special Review encouraging Poland to establish a clear plan for increasing aid, ODA may become a subject of increased importance. The primary agency in charge of delivery of Polish aid is MOFA, although, within the framework of specialised bilateral assistance programmes, other Ministries, such as the Ministry of Defence and Ministry of the Interior, also deliver aid under the MOFA's general coordination.³⁷ MOFA is the policymaker for development cooperation and the coordinator of a host of independently financed development agencies.

150. It is clear from discussions with MOFA during the on-site that, although the Ministry may take limited steps to address foreign bribery, it lacks any systematic procedure for detection of irregularities in ODA-funded contracts. MOFA informed the lead examiners that it works with a multitude of local NGOs, usually operating under local laws, so the Ministry generally relies on the NGOs to conduct their own due diligence. Furthermore, unlike Article 24 of Poland's Public Procurement Law, there is no mandatory debarment provision for ODA contracts funded by MOFA, except in programmes where aid is delivered through public procurement (in which case exclusion would be applicable under the Public Procurement Law). MOFA explained that it can exercise a degree of control over the funds; if, for instance, conditions existed that directly contravene the Convention, the Ministry does have a procedure to recover the funds. However, as there is no clause allowing for debarment, should MOFA be the recipient of information regarding a company's involvement in, or conviction for, foreign bribery, the only measure it can take is to

states in full: "The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned" [emphasis added].

³⁶ OECD (2012), "Development aid: Net official development assistance (ODA)," Development: Key Tables from OECD, No. 1. See also DAC Special Review of Poland (2010).

³⁷ According to the EU-funded Initiative for Peacebuilding country case study of Poland (conducted in 2008), the cost of cooperation with Russia is classified as a separate pool of expenses as Russia is not listed as an ODA recipient on the DAC list. Therefore, cost of projects related to Russia are not qualified as ODA.

pass the information along to the relevant Polish law enforcement authority, unless the scenario involved a Polish tender, in which case the Public Procurement Law would apply to exclude the company in question. MOFA monitors media reports for allegations involving contracting companies. However, this does not result in the compilation of any blacklist or lead to any steps to exclude suspect companies. To date no case of foreign bribery involving a MOFA-funded ODA contract has been detected.

c) Official export credit support

151. Under Polish law, there is no mandatory requirement for denial of officially supported export credits upon a conviction for foreign bribery, although if the Polish export credit agency KUKÉ S.A. discovers that an applicant for export credits has been previously convicted for bribery, it has the discretion to withhold support for a transaction or deny access to official support. In Phase 2, KUKÉ S.A. explained that any sanctions to be imposed must be based on “legal evidence”; in other words, mere suspicion or even “sufficient evidence” without a final verdict would not form an adequate basis for sanctioning. If a conviction for bribery can be proven, then a range of administrative sanctions – including suspension, refusal to provide or termination of official support – would be available. As Poland does not yet have any foreign bribery convictions, however, there have been no instances where KUKÉ has denied or withdrawn official export credit support on such a basis.

152. When asked about measures since Phase 2 to permit its authorities to suspend from competition for public contracts or other public advantages (e.g., public procurement and ODA-funded contracts, export credits, etc.) companies found guilty of having bribed a foreign public official in the context of an international business transaction, the Ministry of Finance stated at the on-site, that in the context of intergovernmental credits provided as tied-aid for the financing of Polish exports, exporters are required to submit a statement of non-bribing and to disclose any commissions paid in connection with any related contracts. Exporters are also obliged to disclose whether they are on the debarment lists of any international organisations and if there are any proceedings pending against them. This declaration is filed with the application to KUKÉ, and also as an enclosure to the insurance agreement. KUKÉ representatives at the on-site confirmed that they also independently check whether an exporter has been banned or blacklisted by any international finance institutions. Related procedures exist with respect to the activities of the Ministry of Finance in providing export credits to other countries.

153. KUKÉ also has measures in place to detect and respond to irregularities that indicate bribery has taken, or is taking, place. If there are grounds to suspect that an exporter has been involved in bribery of a foreign public official in a business transaction, KUKÉ can then take steps, such as gathering additional information, towards establishing whether the suspicion was justified. If, in the preceding 5 years, the exporter, or a person acting on his/her behalf, has been convicted of a foreign bribery or related offence, or if administrative measures have been taken against the exporter by his/her national authorities, then KUKÉ may refuse to provide insurance protection or impose other administrative sanctions. According to the most recent updates to the 2006 Survey on Measures Taken to Combat Foreign Bribery in Officially Supported Export Credits (“2006 Survey on Export Credits”), when credible evidence comes to light before the decision to provide support has been made, KUKÉ always informs the law enforcement authorities, undertakes enhanced due diligence (including verifying management control systems of the company in question, confirming that internal corrective measures have been implemented and assessing the amount and propriety of agents’ commissions) and suspends approval of the application pending the outcome of the enhanced due diligence.

154. KUKÉ clarified that its procedure, unlike the Public Procurement Law, does not mandate exclusion in cases where an incident of bribery has been proven, but rather relies on the discretion of the agency based on several factors, such as whether the bribery was of the first instance, what (if any) remedial and preventive procedures were implemented afterwards and what happened to the people

involved. In the 2006 Survey on Export Credits, Polish authorities responded that law enforcement authorities are always notified of a proven instance of bribery, but refusal to indemnify claims for export credit insurance and recourse for claims already paid are discretionary measures that are sometimes applied. KUKI stated that although a situation requiring enhanced due diligence of a company has never arisen, it has exercised enhanced due diligence with respect to the amount of agency commissions.

Commentary

Although the presence of a company on the debarment list of an International Financial Institution (IFI) cannot under Polish law be a ground for debarment from public procurement contracting, the lead examiners believe that publicly available debarment lists of IFIs can still be a useful source of information for Polish public procurement agencies about companies that have been debarred for corruption. Therefore, the lead examiners recommend that Poland consider systematically checking the debarment lists of international financial institutions, as a safeguard for depending on information from foreign authorities about foreign bribery convictions, and for the purpose of triggering red flags for enhanced due diligence regarding possible foreign bribery. The lead examiners also recommend that Poland raise awareness about the foreign bribery offence among institutions involved in public procurement contracting, including ODA-funded procurement contracting.

Regarding official export credit supports, the lead examiners recommend that in compliance with the OECD Recommendation of Council on Bribery and Officially Supported Export Credits, Poland refuse to approve credit, cover or other support to applicants if due diligence concludes that bribery was involved in the transaction, and take appropriate action, if bribery is proven after credit, cover or other support has been approved. The lead examiners also recommend that Poland verify whether exporters and where appropriate applicants are listed on the publicly available debarment lists of international financial institutions, and where they are on such a list, undertake enhanced due diligence.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

155. The Working Group on Bribery commends the Polish authorities for their high level of transparency and cooperation throughout the Phase 3 process. One prosecution of the bribery of foreign public officials is ongoing in Poland. Since Poland's foreign bribery offence came into force in February 2001, it has not prosecuted any other foreign bribery case. Two investigations were terminated concerning allegations of foreign bribery by Polish SOEs to obtain major public procurement contracts in high risk and sensitive sectors. Another known allegation involving a major public procurement contract in a high risk and sensitive sector did not progress to an investigation.

156. Poland has not fully implemented any of the partially implemented or unimplemented Phase 2 recommendations that remained outstanding at the time of the Phase 2 written follow-up report in October 2009 (Recommendations 1c, 1d), 2d), 3a), 3e), 3f), 4a) 4b) and 5). These recommendations address areas including the following: awareness-raising, training and reporting by the accounting and auditing profession, whistleblower protections, proactive foreign bribery investigations, the "impunity" provision in the foreign bribery offence, legal requirements for the application of the liability of legal persons, level of sanctions including for legal persons, and the tax treatment of bribe payments. In addition, regarding Phase 2 Recommendation 4b) to consider raising or eliminating the cap on fines against legal persons, Poland has instead lowered the cap and the range of fines, with the result that the maximum fine for legal persons has been reduced from PLN 20 million (around EUR 5 million) to PLN 5 million (around EUR 1.2 million).

157. The Working Group notes that with efforts being taken by the Polish government to encourage the international competitiveness of Polish enterprises, and Poland's recent economic performance, the risk of foreign bribery by Polish entrepreneurs could increase in the medium to long term. Recommendation 4, below, is to develop a comprehensive investigation and prosecution strategy to address this increasing risk. Given the overriding importance of this recommendation to Poland's effective implementation of the Convention, the Working Group requests that Poland present the strategy in writing at the time of its one-year oral follow-up report. The Working Group also requests that the written strategy address Recommendation 1 on the "impunity" provision, Recommendation 2 on the liability of legal persons, and Recommendation 7 on the prevention and identification of bribe payments through tax measures. In addition, the Working Group requests Poland provide an oral report on implementation of recommendation 3c) on sanctions for legal persons.

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

1. Recommendations of the Working Group

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

1. Regarding the offence of bribing a foreign public official in Article 229.5 of the Polish Penal Code, the Working Group recommends that Poland urgently take appropriate measures feasible within the Polish legal system to ensure that the "impunity" provision cannot be applied to the bribery of foreign public officials (Convention, Articles 1 and 3; 2009 Recommendations III and V).
2. Regarding the liability of legal persons in the Act on Liability of Collective Entities for the bribery of a foreign public official, the Working Group recommends that Poland:
 - a) Take urgent steps to eliminate the requirement of a conviction of a natural person or a decision to discontinue proceedings against the natural person, in order to impose liability on a legal person (Convention, Articles 2 and 3); and
 - b) Take steps to ensure that police and prosecutors are adequately trained and made aware of the importance of effectively enforcing the liability of legal persons, and that such training address challenges in investigating and prosecuting legal persons caused by the requirement described in subparagraph (a) above (Convention, Article 3; 2009 Recommendation III).
3. Concerning sanctions for the bribery of a foreign public official, the Working Group recommends that Poland:
 - a) Continue to raise the awareness of the Polish law enforcement authorities of the importance of imposing effective, proportionate and dissuasive sanctions on natural persons (Convention, Article 3; 2009 Recommendation III);
 - b) Continue to raise awareness of the Polish law enforcement authorities of the importance of imposing confiscation upon conviction (Convention, Article 3; 2009 Recommendation III); and
 - c) Regarding legal persons, eliminate the cap on or increase the maximum penalty available under the law so that they are subject to effective, proportionate and dissuasive penalties, and as a matter of priority draw the attention of the relevant authorities to the availability of additional sanctions,

including debarment, upon conviction of a legal person under the Liability of Collective Entities Act (Convention, Articles 2 and 3; 2009 Recommendation III).

4. Concerning the investigation and prosecution of the bribery of foreign public officials, the Working Group recommends that Poland establish an investigation and prosecution strategy to address the increasing risk of foreign bribery by Polish companies that addresses issues including the following: (i) the need for adequate resources and expertise to investigate and prosecute highly complex cases, including in sensitive sectors, involving SOEs, and requiring forensic financial and accounting expertise; and (ii) a comprehensive plan on how to reduce the length of time for foreign bribery proceedings to a workable and reasonable period (2009 Recommendation V).

Recommendations for ensuring effective prevention and detection of foreign bribery

5. The Working Group recommends that Poland take the following steps to improve the prevention and detection of foreign bribery through its anti-money laundering system:
 - a) Examine whether “para-banking” poses a risk of laundering the proceeds from foreign bribery (Convention, Article 7; 2009 Recommendation V); and
 - b) Urgently take substantial steps to raise the awareness of and provide training for the FIU and all entities subject to suspicious transactions reporting requirements of the risk of laundering the proceeds of the bribery of foreign public officials, and provide them with guidance on what constitutes such proceeds, and how to effectively detect them (Convention, Article 7; 2009 Recommendation III).
6. The Working Group recommends that Poland take the following steps to enhance the prevention and detection of foreign bribery through accounting and auditing requirements, and internal controls, ethics and compliance measures:
 - a) Intensify efforts to encourage the accounting and auditing profession to raise awareness and provide training on the detection of foreign bribery in companies’ books and records (Convention, Article 8; 2009 Recommendation X);
 - b) Provide clarification and guidance to the accounting and auditing profession on the evidentiary standards that must be met to justify reporting suspicions of foreign bribery to the law enforcement authorities (Convention, Article 8; 2009 Recommendation X);
 - c) Find a way appropriate and feasible in its legal system to ensure that natural and legal persons are subject to effective, proportionate and dissuasive penalties for fraudulent accounting for the purpose of bribing foreign public officials or hiding such bribery (Convention, Article 8; 2009 Recommendation X); and
 - d) Urgently make significant efforts to raise the awareness of large companies, SOEs, and SMEs of the following: (i) the risks of foreign bribery in international business transactions; (ii) application of the foreign bribery offence and the Law on Liability of Collective Entities to bribes made through agents abroad; and (iii) the need to adopt effective internal controls, ethics and compliance measures for preventing foreign bribery (2009 Recommendation III).

7. Regarding the prevention and detection of foreign bribery through tax measures, the Working Group recommends that Poland:
 - a) As a matter of priority, take appropriate and feasible steps within its legal system to clarify that all bribes to foreign public officials in violation of Article 229.5 of the Polish Penal Code are not tax deductible (2009 Recommendations III and VIII; 2009 Recommendation on Tax Measures); and
 - b) Re-examine the processes in place for identifying bribe payments, to ensure that Poland has in place proper tools, including technology and expertise, to track bribe payments for which tax deductions have been sought under categories of allowable expenses (2009 Recommendations III and VIII; 2009 Recommendation on Tax Measures).
8. The Working Group recommends that Poland take the following steps to enhance public awareness and the reporting of foreign bribery:
 - a) Significantly increase public awareness-raising efforts, with an emphasis on the growing presence of Polish companies in international business (2009 Recommendation III); and
 - b) Prioritise the reform of the law on whistleblower protections to ensure that appropriate measures are in place to protect from retaliatory or disciplinary action private and public sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds (2009 Recommendation IX).
9. Regarding the prevention and detection of foreign bribery through agencies responsible for providing public advantages to Polish businesses, the Working Group recommends that Poland:
 - a) Raise awareness about the foreign bribery offence among institutions involved in public procurement contracting, including ODA-funded procurement contracting (2009 Recommendation III);
 - b) Consider systematically checking the publicly available debarment lists of international financial institutions in relation to: (i) the award of public procurement contracts, including ODA-funded procurement contracts; and (ii) the provision of official export credit support (Convention, Article 3; 2009 Recommendation XI); and
 - c) Refuse to approve official export credit cover or other support to applicants if due diligence concludes that bribery was involved in the transaction, and take appropriate action if bribery is proven after credit, cover or other support has been approved (Convention, Article 3; 2009 Recommendation XII; 2006 Recommendation on Export Credits).

2. Follow-up by the Working Group

10. The Working Group will follow-up the issues below as jurisprudence and practice develop on the implementation of the foreign bribery offence in Poland:
 - a) Application of the foreign bribery offence to: 1) the bribery of employees of state administrations performing exclusively “service type work”; 2) bribes made through intermediaries; and 3) bribes in the form of non-pecuniary benefits (Convention, Article 1; 2009 Recommendation (Annex I on Good Practice Guidance on Implementing Specific Articles of the Convention, Article C);
 - b) Application of territorial jurisdiction to natural persons;

- c) Regarding legal persons, application of the following: (i) the requirement in the Act on Liability of Collective Entities that the conduct of a natural person “did or could have” given an advantage to the legal person, (ii) nationality jurisdiction, and (iii) other sanctions, including debarment (Convention, Article 3; 2009 Recommendations III and XI);
- d) The recent separation of the role of the Office of the Prosecutor General (OPG) and the Minister of Justice in Poland, to ensure that it effectively safeguards investigative and prosecutorial decision-making in foreign bribery cases from considerations of factors prohibited in Article 5 of the Anti-bribery Convention (Convention, Article 5; 2009 Recommendation V); and
- e) The extradition of permanent residents of Poland for the bribery of foreign public officials (Convention, Article 10; 2009 Recommendation XIII).

ANNEX 1: TABLE OF PHASE 2 RECOMMENDATIONS

	RECOMMENDATIONS	WRITTEN FOLLOW-UP
<i>Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials</i>		
1.	With respect to awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Poland:	
	a) provide training to police, prosecutors and the judiciary on the Convention and on Poland's foreign bribery legislation (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);	Satisfactorily implemented
	b) take additional measures, including further training, to raise the level of awareness of the Convention and the foreign bribery offence within the public administration, particularly those institutions that interact with Polish companies active in foreign markets, including foreign diplomatic representations, and trade promotion, official export credit support and Official Development Assistance (ODA) institutions (Revised Recommendation, Paragraph I);	Satisfactorily implemented
	c) take necessary action to improve awareness of the Convention and of foreign bribery legislation among business associations and companies, including small and medium size enterprises, and among Non-Government Organisations and companies involved in the execution of ODA contracts funded by Poland (Revised Recommendation, Paragraph I);	Partially implemented
	d) encourage the accounting and auditing professions to develop further initiatives to (i) provide training and raise awareness concerning the foreign bribery offence and the relevant accounting and auditing requirements under Polish law; and (ii) publicise within both professions the obligation to report suspicions of foreign bribery to the appropriate bodies (Revised Recommendation, Paragraphs I and V); and,	Partially implemented
	e) take further measures to raise awareness about the Law on Liability of Collective Entities to ensure that possible contraventions of the law by legal persons are actively investigated and prosecuted and, to that extent, consider (1) measures to assist police and prosecutors with the investigation and prosecution of legal persons pursuant to the Law, and (2) the provision of further training for police and prosecutors about the operation of the Law (Revised Recommendation, Paragraphs I).	Satisfactorily implemented
2.	With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Poland:	
	a) adopt measures to ensure that Polish public officials who could play a role in the detection and prevention of the foreign bribery offence are aware of their duty to report foreign bribery to law enforcement authorities in Poland, and the procedures and channels for such reporting (Revised Recommendation, Paragraph I);	Satisfactorily implemented
	b) with respect to personnel in charge of ODA and those in other institutions that have privileged contacts with Polish enterprises active abroad, provide training on how to detect foreign bribery and on specific measures to be	Satisfactorily implemented

	taken if credible suspicions of foreign bribery should arise, including reporting channels and arrangements for co-operation and co-ordination between the relevant government ministries (Revised Recommendation, Paragraph D);	
	c) provide training for tax officials as a matter of priority in order to maximise the possibility of detection of the bribery of foreign public officials, including information about the non-tax deductibility of bribes to foreign public officials under the Convention and the obligation of tax officials to report suspicions of such bribes to law enforcement authorities (Revised Recommendation, Paragraphs I, II; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);	Satisfactorily implemented
	d) consider introducing stronger whistleblower protection measures for public and private sector employees who report suspicious facts that may indicate foreign bribery, in order to encourage them to report such facts without fear of reprisals (Convention, Article 5; Revised Recommendation, Paragraphs I and V.C (iv));	Partially implemented
	e) consider strengthening the measures for deterring foreign bribery in respect of international business transactions benefiting from official export credit support, including through the assessment of applications for officially supported export credits and the scrutiny of agents' commissions (Revised Recommendation, Paragraph II (v));	Satisfactorily implemented
	f) encourage the General Inspector of Financial Information to consider taking appropriate and practicable steps to improve the flow of information and feedback to obligated institutions on the use of suspicious transaction reports by the authorities, with the view to further strengthening the anti-money laundering reporting system (Revised Recommendation, Paragraph D); and,	Satisfactorily implemented
	g) consider requiring auditors to report indications of a possible illegal act of foreign bribery to law enforcement authorities (Revised Recommendation, Paragraphs I and V.B (iv)).	Satisfactorily implemented
3.	With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Poland:	
	a) take necessary measures to ensure that all credible foreign bribery allegations are proactively and conscientiously investigated, and remind police and prosecutors of the importance of actively looking into the range of possible sources of detection of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);	Partially implemented
	b) ensure that greater use is made of specialised financial investigators within anti-corruption units of the police and State Prosecution Authority for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);	Satisfactorily implemented
	c) in relation to the dual nature of the Office of the Prosecutor General (i.e., the Office is held by the Minister of Justice) consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers (in particular for the foreign bribery offence) are not to be influenced by considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I);	Satisfactorily implemented
	d) consider, within Poland's constitutional principles, measures that may be taken in order to ensure that the immunity from prosecution available to certain designated office holders does not impede the effective investigation,	Satisfactorily implemented

	prosecution and adjudication of foreign bribery cases and related offences and, in this respect, consider clearly limiting the immunity applicable to them, to acts done in performance of the office holder's duties (<i>i.e.</i> , functional immunity) (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);	
	e) review the "impunity" provision within article 229.6 of the Penal Code and either exclude its application to the offence of foreign bribery, or significantly limit its scope by imposing further conditions for its application, or in some other appropriate way ensure that the law does not contravene the Convention and report to the Working Group on progress in 12 months (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II); and,	Partially implemented
	f) amend the Law on Liability of Collective Entities to eliminate the requirement that a natural person be finally and validly convicted as a prerequisite to proceeding against a collective entity (Convention, Articles 2, 3.2).	Not implemented
4.	With respect to sanctions for foreign bribery, the Working Group recommends that Poland:	
	a) take measures to draw to the attention of investigating, prosecutorial and judicial authorities, the importance of applying sanctions that are sufficiently effective, proportionate and dissuasive for foreign bribery offences, in particular emphasising the importance of economic sanctions, including fines and the forfeiture of proceeds of bribery, and offer training in tracking down the proceeds of bribery and assessing the value of such proceeds (Convention, Article 3.1; Revised Recommendation, Paragraph I); and,	Partially implemented
	b) consider whether the cap on fines for legal persons under the Law on Liability of Collective Entities (<i>i.e.</i> , 10% of the "revenue" generated in the tax year when the offence was committed) is an obstacle to imposing effective, proportionate and dissuasive sanctions, and if so, amend the Law accordingly (Convention, Article 3.2).	Partially implemented
5.	With respect to the non-tax deductibility of bribes, the Working Group recommends that Poland amend its legislation to clearly confirm that bribes are not tax-deductible and in that regard, consider an express prohibition on the tax deductibility of bribes (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).	Partially implemented

Follow-up by the Working Group

159. The Working Group will follow up on the issues below, as practice develops, in order to assess:

- a) the application of the foreign bribery offence in the Penal Code, including its coverage of bribes made to third parties and to all aspects of the term "foreign public official";
- b) the application, in article 3 of the Law on Liability of Collective Entities, of the requirement that the conduct of the natural person did or could have given the collective entity an advantage, to ascertain how this provision is applied in practice to foreign bribery cases;
- c) the level of sanctions for the foreign bribery offence and related offences (including false accounting offences) imposed against natural and legal persons (including the application of

confiscation measures, additional sanctions and the use of suspended imprisonment terms by courts) and to ascertain whether the sanctions handed down by the courts are effective, proportionate and dissuasive;

- d) Poland's application of territorial and nationality jurisdiction, in particular, in cases of proceedings against legal persons or concerning offences committed in whole or in part abroad;
- e) whether the Central Anti-Corruption Bureau (CBA) established in 2006 has developed a role and capacity for combating foreign bribery in international business transactions and, if so, the effectiveness of any arrangements established to co-ordinate its work with the police and the State Prosecution Authority in investigating foreign bribery cases; and,
- f) whether the exception for "service type work" in the Penal Code definitions of "public official" and "a person performing public functions" does not, contrary to Article 1 of the Convention, result in an exception to the foreign bribery offence for acts or omissions of a foreign public official "in relation to the performance of official duties" (Convention, Articles 1, 5; Commentary 9).

ANNEX 2: KEY LEGISLATIVE PROVISIONS

PENAL CODE

Article 115 – Selected definitions

§ 4. The material or personal benefit constitutes the benefit for the person himself or for another entity (relevant to issue of “third party beneficiary”);

§ 3. Similar offences are offences of the same type; the offences committed with the use of violence or with the threat of its use, or the offences committed with an intent to secure financial or material benefits shall be regarded as similar offences (definition of a “public official”);

§ 19. A person performing public functions is a public official, a member of the local government authority, a person employed in an organisational unit which has access to public funds, unless this person performs exclusively service type work, as well as another person whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding for the Republic of Poland. (definition of “similar offences”).

Article 18 – Instigation, Complicity and Aiding

§ 1. Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person, or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration.

§ 2. Whoever, willing that another person should commit a prohibited act, induces the person to do so, shall be liable for instigating.

§ 3. Whoever, with an intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for aiding and abetting.

Forfeiture

Article 44

§ 1. The court shall impose the forfeiture of items directly derived from an offence.

§ 2. The court may decide on the forfeiture, where law so provides for, of the items which served or were designed for committing the offence.

§ 3. The forfeiture described in § 2 shall not be applied if its imposition would not be commensurate with the severity of the offence committed, the court may impose a compensatory damages to the State Treasury instead.

§ 4. In the event that imposing the forfeiture of items specified in §§ 1 or 2 is not possible, the court may impose the obligation to pay a pecuniary equivalent of items directly derived from an offence or items which served or were designed for committing the offence.

§ 5. The forfeiture of items referred to in § 1 or 2 shall not be imposed if they are subject to return to the injured person or other legitimate entity.

§ 6. In the event that the conviction has pertained to an offence of violating a prohibition of production, possession or dealing in or transporting specific items, the court may decide or, if the law so provides, shall decide on the forfeiture thereof.

§ 7. If the items referred to in § 2 or 6 are not the property of the perpetrator, the forfeiture may be decided by the court only in the cases provided for in the law; in the case of co-ownership, the decision shall cover only the forfeiture of the share owned by the perpetrator, or the obligation to pay a pecuniary equivalent of its value.

§ 8. Property which is the subject of forfeiture shall be transferred to the ownership of the State Treasury at the time the sentence becomes final and valid.

Article 45

§ 1. If a perpetrator received any benefit from an offence, even indirectly, which shall not be subject to forfeiture of items referred to in art. 44 § 1 or 6, a court shall impose forfeiture of such benefit or pecuniary equivalent of its value. Forfeiture shall not be applied to the benefit as a whole or its part if the benefit or its pecuniary equivalent is subject to return to the injured person or another entity.

§ 2. In the case of sentencing for the offence from which the perpetrator received, even indirectly any benefit of considerable value, the property that the perpetrator received or took possession of or to which the perpetrator received any legal title, during or after the commission of the offence, even before any final judgement, is deemed to be the benefit derived from the offence unless the perpetrator or any other interested person proves otherwise.

§ 3. When the circumstances of the case indicate that there is high probability that the perpetrator referred to in § 2- transferred, practically or under any other legal title, property derived from the offence to a natural person or legal person or other entity not having legal personality, items being in autonomous possession of that person or entity as well as their property rights are deemed to belong to the perpetrator unless any interested person or organizational unit proves that they were legally received.

§ 4. The provisions of § 2 and 3 shall be also applied while execution of the seizure pursuant to the provision of Article 292 § 2 of the Code of Criminal Procedure, while securing the benefits threatened with forfeiture and enforcing this measure. A person or an entity to which the allegation provided for in § 3 refers may bring an action against the State Treasury concerning the reversal of this allegation; the enforcement proceedings shall be suspended until the case is legally concluded.

§ 5. In the case of co-ownership, the forfeiture of the perpetrator's share in co-property or the forfeiture of share's in co-property equivalent shall be exacted.

§ 6. The material benefit or its equivalence subject to forfeiture shall be passed to the State Treasury from the moment the judgement becomes valid and final, and in the case referred to in § 4, sentence 2, from the moment the judgement dismissing the claim against the State Treasury becomes valid and final.

Article 52

In the event of sentencing for an offence which brought material benefits to a natural or legal person or an organisational unit not possessing the status of a legal person, and committed by a perpetrator who acted on its behalf or in its interest, the court shall obligate the entity which acquired the material benefit, to return it in whole or in part to the benefit of the State Treasury; this shall not affect the material benefit subject to return to another entity.

Liability for offences committed abroad

Article 110

§ 1. The Polish penal law shall be applied to aliens who have committed abroad an offence against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit not having legal personality and to aliens who have committed abroad a terrorist offence.

§ 2. The Polish penal law shall be applied to aliens in the case of the commission abroad an offence other than listed in § 1, if, under the Polish penal law, such an offence is subject to a penalty exceeding 2 years of deprivation of liberty, and the perpetrator remains within the territory of the Republic of Poland and no decision on his extradition has been taken.

Article 112

Notwithstanding the provisions in force in the place of the commission of the offence the Polish penal law shall be applied to a Polish citizen or an alien in case of the commission of:

- 1) an offence against the internal or external security of the Republic of Poland;
- 2) an offence against Polish offices or public officials;
- 3) an offence against essential economic interests of Poland;
- 4) an offence of false deposition made before a Polish office;
- 5) an offence from which any material benefit has been obtained, even indirectly, within the territory of the Republic of Poland.

Article 113

Notwithstanding the provisions binding in the place of committing an offence, the Polish Penal law shall be applied to a Polish national and an alien, whose surrender has not been decided if such an alien has committed an offence abroad and the Republic of Poland is obliged to prosecute such crime under an international treaty or if an offence committed by such an alien is specified in the Rome Statute of the International Criminal Court, drawn up in Rome on 17 July 1998 (Journal of Laws of 2003, No. 78, pos. 708).

Article 229 – Supply-side bribery (including bribery of foreign public officials)

§ 1. Whoever gives a material or personal benefit or promises to provide it to a person performing public functions in connection with his official capacity ('in connection with performance of this function') shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

§ 2. In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 3. If the perpetrator of the act specified in § 1 strives to induce a person performing public functions to violate the law or provides such a person, or promises to provide, with a material or personal benefit for violation of the law, shall be subject to the penalty of deprivation of liberty for a term of between one year and 10 years.

§ 4. Whoever gives a material benefit of considerable value or promises to provide it to a person performing public functions in connection with his official capacity, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.

§ 5. Accordingly, subject to the penalties specified in § 1-4 shall be also anyone who gives a material or personal benefit or promises to provide it to a person performing public functions in another country or an international organisation in connection with these functions.

§ 6. The perpetrator of the act specified in § 1-5 shall not be liable to punishment if the material or personal benefit or a promise thereof were accepted by the person performing public functions and the perpetrator had reported this fact to the law-enforcement agency, revealing all essential circumstances of the offence before this authority was notified of the offence.

CODE OF CRIMINAL PROCEDURE

Chapter 65. Requests by foreign states for the extradition or transportation of prosecuted or sentenced persons staying abroad, and for the delivery of material objects

Article 604. § 1. Extradition is inadmissible if:

- 1) the person to whom such a motion refers, is a Polish national or has been granted the right of asylum in the Republic of Poland,
- 2) the act does not have the features of a prohibited act, or if the law stipulates that the act does not constitute an offence, or that a perpetrator of the act does not commit an offence or is not subject to penalty,
- 3) the period of limitation has elapsed,
- 4) the criminal proceedings have been validly concluded concerning the same act committed by the same person,
- 5) the extradition would contravene Polish law,
- 6) there are grounds for fearing that in the state moving for extradition, a death sentence may be issued for the extradited person or later executed,
- 7) there is a justified concern that freedom and rights of the extradited person may be violated in the state requesting extradition,
- 8) applies to a person prosecuted for commitment of an offence without the use of violence due to political reasons

§ 2. In particular, extradition may be refused, if:

- 1) the person to whom such a motion refers has permanent residence in Poland,
- 2) the criminal offence was committed on the territory of the Republic of Poland, or on board of a Polish vessel or aircraft,
- 3) criminal proceedings are pending concerning the same act committed by the same person,
- 4) the offence is subject to prosecution on a private charge,
- 5) pursuant to the law of the State which has moved for extradition, the offence committed is subject to the penalty of deprivation of liberty for a term not exceeding one year, or to a lesser penalty or such a penalty has been actually imposed,
- 6) an offence further to which extradition is requested is a military or fiscal offence, or a political offence other than specified in § 1 subsection 8,
- 7) the State which has moved for extradition, does not guarantee reciprocity in this matter.

§ 3. In the event indicated in § 1 subsection (4) and § 2 subsection (3), the resolution of the motion for extradition may be adjourned, until the criminal proceedings pending against the same person in the Republic of Poland are concluded, or until he has served the sentence imposed or has been granted remission of the penalty.

ACT ON LIABILITY OF COLLECTIVE ENTITIES FOR ACTS PROHIBITED UNDER PENALTY

Article 3 – Advantage to legal person

The collective entity shall be liable for a prohibited act consisting in conduct of a natural person who:

- 1) acts in the name or on behalf of the collective entity under the authority or duty to represent it, to make decisions in its name, or to exercise internal control, or whenever such person abuses the authority or neglects the duty;
- 2) is allowed to act as the result of abuse of the authority or neglecting of the duty by the person referred to in point 1 above;
- 3) acts in the name or on behalf of the collective entity on consent or at the knowledge of the person referred to in point 1;
 - 3a) being an entrepreneur, who directly cooperates with the collective entity in the realisation of an objective legally admissible,
- 4) *[repealed]*

– if such conduct did or could have given the collective entity an advantage, even of non-financial nature.

Article 4 – Conviction of natural person

The collective entity shall be held liable, if perpetration of a prohibited act listed in article 16, by the person referred to in Art. 3, has been acknowledged in a valid and final convicting judgement, judgement on conditional discontinuation of penal proceedings or proceedings with regard to a fiscal offence, decision to leave such person a voluntary submission to liability, or a decision to discontinue the proceedings for circumstances excluding prosecution of the perpetrator.

Article 5 – Absence of due supervision

The collective entity shall be held liable if the offence has been committed in the effect of:

- 1) at least absence of due diligence in electing the natural person referred to in Art. 3.2 or 3.3, or of at least the absence of due supervision over this person, by an authority or a representative of the collective entity;
- 2) organization of operation of a collective entity which did not ensure avoiding committing a prohibited act by the person referred to in Article 3.1 or 3.3a, where this could have been ensured by keeping due diligence required in given circumstances, by the agency or representative of the collective entity.

Article 7 – Fines for legal persons

1. A collective entity shall be sentenced to a fine between 1000 and 5.000 000 PLN but no more than up to 3% of the revenue generated in the tax year when the offence which is a ground for the collective entity's liability was committed.

Article 8 – Forfeiture

1. The collective entity is further decreed the forfeiture of:

- 1) the objects coming, even indirectly, from the prohibited act, or objects used or designated for use as the tools of perpetrating the prohibited act;
- 2) the financial gains originating, even indirectly, from the prohibited act;
- 3) the amount equivalent to the objects or financial benefit coming, even indirectly, from the prohibited act.

2. The forfeiture specified in paragraph 1 above shall not be decreed, if the object, financial benefit, or amount equivalent thereto are due for restitution to another entitled entity.

Article 9 – Debarment, exclusion and other sanctions

1. The collective entity can be penalised with:

- 1) the ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants;
- 2) the ban on using grants, subsidies, or other forms of financial support originating from public funds;
- 3) the ban on using the aid provided by the international organisations the Republic of Poland holds membership in;
- 4) the ban on applying for public procurement contracts;
- 5) [*repealed*];
- 6) public pronouncement of the ruling.
 1. The bans listed in paragraph 1.1-5 are imposed for any period between 1 and 5 years, and are adjudicated in years.
 2. [*abrogated*].

2. The bans listed in paragraph 1.1-5 are imposed for any period between 1 and 5 years, and are adjudicated in years.

3. The ban referred to in paragraph 1.5 shall not be imposed, if it could lead to bankruptcy or liquidation of the collective entity, or layoffs discussed in Art. 1 of the Act of 13th March 2003 on special principles of terminating employment for reasons relating to the employer (Journal of Laws of 2003 No. 90, it. 884 with further amendments).

Article 10 – Social consequences

When adjudicating the fine, imposing the bans or pronouncing the ruling in public the court shall consider in particular weight of irregularities in electing or supervising mentioned in art. 5, the size of the advantages obtained or possible to obtain by the collective entity, its financial situation and social consequences of the penalty and an influence of punishment on further functioning of the collective entity.

PUBLIC PROCUREMENT LAW

Article 17 1. Persons performing actions in connection with the conduct of award procedures shall be subject to exclusion, if:

- 1) they are competing for a contract;
- 2) they are relatives by marriage, blood or affinity in direct line or relatives by blood or affinity in indirect line up to the second degree, or relatives by adoption or guardianship or tutelage with the economic operator, his legal deputy or members of managing or supervisory bodies of economic operators competing for a contract;
- 3) during the three years prior to the date of the start of the contract award procedure they remained in a relationship of employment or service with the economic operator or were members of managing or supervisory bodies of economic operators competing for a contract;
- 4) remain in such legal or actual relationship with the economic operator, which may raise justified doubts as to their impartiality;
- 5) have been legally sentenced for an offence committed in connection with contract award procedures, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profit,

2. Persons performing actions in connection with a contract award procedure shall provide a written statement, under the pain of penal liability for making false statements, about the absence or existence of the circumstances referred to in paragraph 1.

3. Actions in connection with the contract award procedure undertaken by a person subject to exclusion after they became aware of the circumstances referred to in paragraph 1 shall be repeated, except for the opening of tenders and other factual actions having no influence on the outcome of the procedure.

Article 24

1. Excluded from contract award procedures shall be:

- 1) (...)
- 2) economic operators against whom the winding up procedure has been started or whose bankruptcy has been declared, except for economic operators who, upon bankruptcy declaration, entered into a composition approved by a valid court decision, unless such a composition provides for payment to the creditors by a liquidation of the assets of the bankrupt entity;
- 3) economic operators who are in arrears with payment of taxes, charges or social insurance or health insurance premiums, with the exception of cases where they have been legally exempted, their outstanding payments have been deferred or divided into installments or the execution of a decision of a competent authority has been stopped in its entirety;
- 4) natural persons, who have been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against the environment, for bribery, for an offence against economic turnover or for any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence or treasury offence;
- 5) registered partnership whose partner has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against the environment, for bribery, for an offence against economic turnover or for any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence or treasury offence;
- 6) professional partnership whose partner or member of the management board has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against the environment, for bribery, for an offence against economic turnover or for any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence or treasury offence;
- 7) limited partnership and limited joint-stock partnership whose general partner has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against the environment, for bribery, for an offence against economic turnover or for any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence or treasury offence;
- 8) legal persons whose active member of the managing body has been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, offence against the environment, for bribery, for an offence against economic turnover or for any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in organized crime group or in a union aimed at committing an offence or treasury offence;
- 9) collective entities, with respect to whom a court has issued a decision prohibiting them from competing for contracts under the provisions concerning the liability of collective entities for tort under the liability to penalty;

(...).

ANNEX 3: LIST OF PARTICIPANTS AT THE ON-SITE VISIT

Government Ministries and Bodies

Ministry of Justice
Ministry of Finance
Ministry of Foreign Affairs
National Police Headquarters
Office of the Central Anti-Corruption Bureau

Office of the Prosecutor General
Regional Prosecutors Office in Gorzow Wlkp
Appellate Prosecutor's Office in Szczecin

Ministry of Economy
Ministry of Defence
Ministry of Treasury
Ministry of Labour and Social Policy
Polish Agency of Information and Foreign
Investment
Public Procurement Office
Export Credit Insurance Corporation
Tax Office in Warsaw
Audit Office in Poznan
Fiscal Audit Office in Kielce
General Inspector for Financial Information (FIU)

Private Sector

3 representatives of the financial sector
Representatives of 6 business and trade associations

Representatives of 11 MNEs (including 5 SOEs)
8 representatives of the accounting and auditing
profession

Civil Society, International Organisations and the Media

4 representatives of the legal profession
1 representative of the media
1 academic
3 representatives of NGOs

ANNEX 4: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AML	Anti-money laundering
ARD	Asset Recovery Division
CBA	Central Anti-Corruption Bureau
CFT	Combating the financing of terrorism
CSR	Corporate social responsibility
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
FIU	General Inspector for Financial Information
KUKE	Export Credit Insurance Corporation
MOFA	Ministry of Foreign Affairs
MOJ	Ministry of Justice
MLA	Mutual legal assistance
MNE	Multi-national enterprise
NCSA	National Council of Statutory Auditors
NGO	Non-governmental organisation
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
OPG	Office of the Prosecutor General
PAIZ	Polish Agency for Information and Foreign Investment
PLN	Polish zloty
PPO	Public Procurement Office
SEZ	Special economic zone
SME	Small or medium sized enterprise
SOE	State-owned enterprise
STR	Suspicious transaction report
UNCAC	United Nations Convention against Corruption