DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

DENMARK: PHASE 2

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 15 June 2006.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Phase 2 Report on Denmark by the Working Group on Bribery evaluates Denmark's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. No cases of foreign bribery have been tried in Denmark so far. However, the Working Group finds that Denmark has engaged in significant legislative efforts to implement the Convention, including increasing the limitation period for prosecuting legal persons to the same level as the one applicable for prosecuting natural persons. Additional efforts are nevertheless necessary in some areas. Since Phase 1, Denmark has not introduced sufficiently effective, proportionate and dissuasive sanctions for the foreign bribery offence. Additional measures should also be undertaken to further raise awareness of foreign bribery in both the public and the private sectors.

The Report finds that the maximum sanction for foreign bribery is lower than for comparable offences in the Danish Criminal Code. This low level of sanctions also does not meet the necessary threshold for allowing Danish law enforcement authorities to use special investigative techniques – such as interception of communications and undercover operation – in counteracting crimes of foreign bribery. As a result of Denmark's dual criminality rules, such techniques are also not available for the purpose of providing mutual legal assistance in foreign bribery cases.

The Report also highlights problems within the reporting chain that could prevent civil servants in key public agencies and ministries – in particular at the Ministry of Foreign Affairs – from effectively channelling suspicions of foreign bribery which they might unveil or be alerted to in the course of their work. The overall framework for detection and prevention is further hampered by the absence of any measures to provide for whistleblower protection to employees of the private sector.

In addition, the Report highlights a number of positive aspects in Denmark's fight against foreign bribery. The Report welcomes Denmark's extension to five years of the limitation period for prosecuting legal persons (previously two years), as well as the introduction of a new act on the prevention of money laundering that provides for enhanced reporting and diligence requirements for reporting entities. The Report also notes Denmark's wide scope of action with regard to corruption prevention in the context of development assistance, as well as efforts undertaken with a view to extend ratification of the Convention to Greenland and the Faroe Islands.

The Report, which reflects findings of experts from the Slovak Republic and Sweden, was adopted by the OECD Working Group along with recommendations, which appear in the last section of the report. The Report is based on the laws, regulations and other materials supplied by Denmark, and information obtained by the evaluation team during its on-site visit to Copenhagen. During the five-day on-site visit in January-February 2006, the evaluation team met with representatives of Danish government agencies, the private sector, civil society and the media. Within one year of the Working Group's approval of the Phase 2 Report, Denmark will report orally to the Working Group on the steps that it will have taken or plans to take to implement the Working Group's recommendations. A further report in writing to the Working Group within two years will give rise to a publicly-available evaluation by the Working Group of Denmark's implementation of the recommendations.

A. INTRODUCTION

1. The On-Site Visit

1. From 29 January to 3 February 2006, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Copenhagen, Denmark as part of the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation). The purpose of the visit was to examine Denmark's structures for enforcing the laws and rules implementing these OECD instruments, and to assess their application in practice.

2. The Danish authorities have been co-operative during the entire examination process. Prior to the visit, Denmark responded to the Phase 2 Questionnaire and a supplemental questionnaire. Denmark also provided relevant legislation and documentation. The examination team[1] analysed these materials and conducted independent research to obtain additional points of view. During the visit, Denmark provided the examination team with sufficient access to government representatives.[2] Following the visit, the Danish authorities continued to provide additional information.

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

2. General Observations

a) Economic System

4. At the beginning of 2004, the Kingdom of Denmark had a population of approximately 5.4 million.[3] The Scandinavian country shares a border with Germany, and its closest neighbour by sea is Sweden. In addition to Denmark itself, the Kingdom also includes the Faroe Islands and Greenland.[4]

5. Denmark's economy ranks among the smallest in the OECD (23rd among the 30 OECD countries for size of GDP), but its citizens are considered to be among the wealthiest in the world (4th among Member States in per capita GDP).[5]

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1 The examining team was composed of lead examiners from Slovakia: Ms. Alexandra Kapišovská, Foreign Relations and Human Rights Division, Ministry of Justice, Ms. Silvia Tomkova, Expert for accounting and tax legislation, Ministry of Finance, and Mr. Vladimir Turan, Prosecutor, General Prosecutor's Office, Office of the Special Prosecutor; lead examiners from Sweden: Ms. Birgitta Nygren, Ambassador, International Trade Policy Department, Ministry for Foreign Affairs, Ms. Marie Lind Thomsen, Public Prosecutor, International Public Prosecution Office in Stockholm, Swedish Prosecution Authority, and Mr. Per Nichols, Senior Public Prosecutor, National Anti-Corruption Unit, Swedish Prosecution Authority; and members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs at the OECD Secretariat: Mr. Silvio Bonfigli, Principal Administrator – Coordinator Phase 2 Examination of Denmark, and Mr. Sébastien Lanthier, Administrator. The meetings during the on-site visit were conducted in English.

2 See the list of participants in Annex 1.

3 Danmarks Statistics (2005), http://www.dst.dk; Official Denmark website developed by the Danish State (2005), http://www.denmark.dk

4 The Faroe Islands and Greenland have a population of 46 962 and 56 375, and a Gross Domestic Product (GDP) of USD 1 billion and USD 1.1 billion, respectively. Both economies are highly dependent on fishing exports and substantial support from the Danish Government.

6. Denmark has consistently maintained an international trade surplus since 1987.[6] Danish external trade is concentrated on a few dominant trading partners located in Western Europe, Scandinavia, and North America. The ten largest export markets accounted for 71% of total Danish exports in 2004.[7] The most significant increase in exports to emerging economies since 1998 were observed in exports to Poland, Russia, China, India, and Middle Eastern countries.[8]

7. With respect to foreign direct investment (FDI), Danish companies have invested heavily abroad, mainly in Western Europe, Scandinavia, and the United States. As of 2003, Denmark's cumulative FDI outward position mounted up to USD 89.1 billion, ranking 14th among OECD countries.[9] As of 2001, outward investments by sector were 80.7% in services, 17.7% in manufacturing, and 1.6% in the primary sector. Close to 80% of outward FDI were positioned in Western Europe and North America, 9% in Eastern Europe, and 7% in Asia.[10]

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5 2003 figures. Source: OECD (September 2005), *Main Economic Indicators*, OECD, Paris, pp.258-261

6 *Id.*

7 In 2003, Denmark exported USD 65.0 billion in goods and USD 32.3 billion in services (at current prices and exchange rates), ranking 19th and 15th respectively out of 30 OECD countries. The major export destinations (as a percentage of total exports) were: (1) Germany (18.7%), (2) Sweden (12.6%), (3) United Kingdom (8.5%), (4) United States (6.2%), (5) Norway (5.7%), (6) France (5.1%), (7) Netherlands (4.7%). (Sources: OECD (September 2005), *Main Economic Indicators*, OECD, Paris, pp.258-261 ; OECD (2005), *OECD Factbook 2005*, OECD, Paris ; Danmarks Statistics, http://www.dst.dk)

8 In 2003, Denmark's most important export destinations among emerging economies were Poland (DKK 6.8 bn), Russia (DKK 5.7 bn), and China (DKK 5.0 bn). Exports to Eastern Europe, to Central and South America, and to Africa accounted for 7%, 1.3% and 1.1% of total exports, respectively. (Sources: Danmarks Statistik, Statistical Yearbook 2005: General Economic Statistics, Table 382 ; Danmarks Statistik, Statistical Yearbook 2000: General Economic Statistics, Table 360) [DKK units per 1 USD = 5.988 (year 2004); DKK units per 1 EUR = 7.46124 (October 2005)]

9 As of 2001, the top destinations for Danish *outward FDI position* were: (1) Belgium-Luxembourg (DKK 112.8 bn), (2) United States (DKK 97.5 bn), (3) Switzerland (DKK 43.3 bn), (4) United Kingdom (DKK 40.0 bn), (5) Sweden (DKK 31.7 bn), (6) Netherlands (DKK 31.3 bn), (7) Norway (DKK 30.8 bn), (8) France (DKK 25.1 bn).

As of 2001, the top sectors for Danish *outward FDI position* were (DKK): (1) food products (DKK 50.9 bn), (2) financial activities (DKK 41.1 bn), (3) telecommunications (DKK 34.0 bn), (4) trade and repairs (DKK 33.6 bn), (5) real estate & business activities (DKK 33.5 bn), (6) petroleum, chemical, rubber and plastic product (DKK 23.8 bn).

The top destinations for Danish *FDI outflows*, on a 1998-2002 average, were: (1) Belgium-Luxembourg (DKK 24.8 bn), (2) United States (DKK 10.1 bn), (3) Netherlands (DKK 5.3 bn), (4) Germany (DKK 5.3 bn), (5) Switzerland (DKK 5.3 bn), (6) Sweden (DKK 4.9 bn), (7) France (DKK 4.6 bn), (8) United Kingdom (DKK 4.5 bn).

As of 2002, *inward FDI position* in Denmark amounted to USD 97 bn (13th among OECD countries). Top source countries of inward FDI stocks, as of 2001, were: (1) United States (DKK 163.8 bn), (2) Sweden (DKK 76.4 bn), (3) Belgium-Luxembourg (DKK 70.3 bn), (4) United Kingdom (DKK 41.8 bn), (5) Netherlands (DKK 41.0 bn), (6) Norway (DKK 29.5 bn).

Source: OECD (2004), *International Direct Investment Yearbook 1991-2002 – 2003 Edition*, OECD, Paris, p.106-118

10 *Id.* Major geographical destinations for outward FDI stocks in emerging markets include Argentina (DKK 10.5 billion in 2002), countries of the Near and Middle East (DKK 9.3 billion in 2002) and the Baltic countries (DKK 7.7 billion in 2002).

8. Over the years, Denmark has consistently figured among the top donors in the OECD Development Assistance Committee (DAC). Levels of official development assistance (ODA) amount to 0.85% of Denmark's gross national income (GNI).[11] As ODA involves a transfer of resources to countries often perceived as being prone to corruption, this report will also examine the mechanisms in place within Denmark's system for providing ODA to prevent foreign bribery and to apply sanctions for acts of bribery of foreign public officials.

b) Political and Legal Systems

9. Denmark is a constitutional monarchy. The legislative branch consists of a 179-seat unicameral *Folketing* (Parliament) whose members are elected on the basis of proportional representation for four-year terms. The composition of the government is determined by the distribution of seats in the *Folketing*. The *Folketing* has exclusive jurisdiction to enact criminal laws in Denmark, except for criminal law applying to Greenland and the Faroe Islands, which have their own parliamentary institutions responsible for enacting criminal legislation.

10. Danish criminal procedure is based on the accusatorial principle. The book of the Administration of Justice Act (AJA) dealing with criminal procedure sets out a number of rules aimed at facilitating a fair trial. Basic principles are the presumption of innocence, the right for the defendant to remain silent and equality of arms between prosecution and defence.

11. Two very important principles assist in analysing the Danish legislative system. Firstly, Danish criminal legislation is not characterised by lengthy explanations and the presence of details and definitions. Secondly, the *travaux préparatoires* (preparatory works) regarding any given bill are generally used to provide the details not contained in the legislation, and are considered by the courts to carry a high degree of legal weight.[12] Courts, however, are not bound to follow them.

c) Implementation of the Convention and the Revised Recommendation

12. Denmark implemented the Convention by amending Section 122 of the Danish Criminal Code in 2000.[13] After the Phase 1 review in 2001,[14] Denmark amended its criminal code on the basis of a recommendation of the Working Group concerning the statute of limitations for legal persons. The amendment, passed in 2003, resulted in an increase of the statute of limitations for legal persons, which is now identical to the statute of limitations for natural persons (5 years).[15] At the time of the on-site visit, two other important bills were at the finalisation stage, and soon to be presented to the *Folketing*; one related to the fight against money laundering, and the other will significantly reform the Danish judicial system.[16]

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11 OECD (2006), Development Co-operation Report 2005, Volume 7, No.1, OECD, Paris, p.80

12 Preparatory works can only be amended or repealed by the Parliament.

13 See Annex 2 for excerpts of relevant statutory provisions.

14 OECD Working Group on Bribery (2001), *Phase 1 Review of Implementation of the Convention and 1997 Revised Recommendation – Denmark*, OECD, Paris.

15 Please refer to the section C.2.d of the report for a description of the issue and the new provision.

16 Please refer to the section C of the report for a description the main changes that are expected to ensue from the enactment of these two bills.

d) Territorial application of the OECD Convention in Greenland and the Faroe Islands

13. Upon ratification of the Convention, Denmark made a territorial reservation to the effect that until further notice, the Convention shall not apply to Greenland and the Faroe Islands. To date, the Convention has not been brought into force in these territories. During the on-site visit, the Danish authorities indicated that they would like to lift the territorial reservation and bring the Convention into force in Greenland and the Faroe Islands.

14. The Commission on Greenland's Judicial System *(Den Grønlandske Retsvæsenskommission)* has performed a thorough review and assessment of the entire judicial system of Greenland. Its final report has been published in 2004.[17] The Danish Government is planning to present a bill for Parliament (*Folketinget)* during the Parliamentary session 2006-07 to extend the application of the Convention to Greenland.

15. Similarly, the Danish Government recently requested the Faroese Home Rule Government to bring the Convention into force in the Faroe Islands. At the time of writing, however, the authorities of the Faroe Islands had not responded to the Danish Government's request.

Commentary:

With respect to Greenland and the Faroe Islands, the lead examiners recommend that Denmark, within the rules governing their relationship (i) extend the OECD Convention to Greenland at the earliest possible date; and (ii) assist the authorities of the Faroe Islands in adopting the necessary legislation in order to extend ratification of the OECD Convention to the islands at the earliest possible date.

e) Corruption in general

16. Along with its Nordic neighbours, Denmark enjoys a reputation for having little corruption. This reputation was reflected in the view of many of the officials interviewed at the on-site visit who indicated that bribery was not a significant problem in Denmark. The country ranked fourth in the Corruption Perceptions Index (CPI) 2005 prepared by Transparency International, and it has never ranked lower than fourth since the inception of the Index in 1995.[18]

17. The lead examiners have some concerns that Denmark's policy on implementing the Convention and Revised Recommendation would be largely based on the above-mentioned reputation rather than on a realistic assessment of the opportunities and pressures on companies and individuals to engage in corrupt practices when conducting business abroad. This concern was also echoed by various panellists during their meetings with the lead examiners.

f) Cases Involving the Bribery of Foreign Public Officials

18. There have been no formal investigations or prosecutions of foreign bribery in Denmark. In 2005, foreign bribery allegations involving a Danish company were not investigated by SØK because the allegations were in fact directed at a foreign subsidiary of the said Danish company (according to

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17 The Commission has proposed that the provisions on active and passive bribery of the Greenlandic Penal Code *"be amended to comprise bribery of foreign public officials"*. It is also proposed to extend the provision on money laundering to comprise *"the proceeds from active or passive bribery"*. See, Report no. 1442/2004 on Greenland's Judicial System, p. 70.

18 Denmark also ranked first in the CPI for three years in a row (1997-1999).

guidelines published by the Director of Public Prosecution[19], parent companies cannot be held liable for the actions of their subsidiaries). Finally, foreign bribery allegations in the press had surfaced just days before the on-site visit, and thus the lead examiners did not deem it appropriate to discuss them with the Danish officials.

g) Response to the Report of the Independent Inquiry Committee into the UN Oil-For-Food Programme

19. The Independent Inquiry Committee (IIC) was established in April 2004 through the appointment by the UN Secretary-General of an independent, high-level inquiry to investigate and report on the administration and management of the UN Oil-for-food Programme. On 27 October 2005, the IIC published its fifth and final substantive report ("IIC Report"). The IIC Report focused on the transactions between the former Iraqi government and companies and individuals to whom it chose to sell oil and from whom it bought humanitarian goods.

20. The IIC Report documented a complicated and vast network of alleged illicit surcharges paid to the Iraqi government in connection with oil contracts. It also documented the payment of alleged kickbacks in the form of after-sales-service fees and inland transportation fees in relation to contracts for the sale of humanitarian goods to the Iraqi government. Following the publication of the IIC Report, the UN Secretary-General issued a statement calling on national authorities to take steps to prevent the recurrence of the companies' alleged activities documented in the Report, and take action, where appropriate, against companies falling within their jurisdiction. The IIC Report only describes the alleged activities, and does not presuppose how national laws would apply to them. Companies from many countries, including Denmark, are referred to in the IIC Report, although it is not alleged that all the companies mentioned have been involved or implicated in corrupt transactions.[20]

21. At the time of the on-site visit, there was an on-going investigation on the activities of one of the Danish companies involved in the United Nations Iraqi Oil-for-Food Programme (OfFP). The investigation was initiated after the company issued a press release stating that it had fired an employee in relation to its involvement in the irregularities of the OfFP. A total of three employees of the firm were subsequently charged under Section 110c(2) of the Danish Criminal Code,[21] an offence commonly referred to as "breach of United Nations sanctions".[22]

22. During the on-site visit, the lead examiners had the opportunity to discuss at liberty some legal issues arising from the OfFP allegations under investigations. It is the view of the lead examiners that the Danish prosecutors are giving the OfFP allegations serious consideration.

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19 The guidelines are found in Notice No. 5/1999 of 6 October 1999.

20 See '*Response to Report of Independent Inquiry Committee into United Nations Oil-for-food Programme',* OECD [DAF/INV/BR/WD (2005) 25], 5 December 2005, p. 4.

21 Section 110(c) subsection 2 of the Danish Criminal Code states:

"Any person who, intentionally or through negligence, contravenes any provisions or prohibitions that may have been provided by law for the fulfilment of the state's obligations as a member of the United Nations shall be liable to a fine or to imprisonment for any term not exceeding four months or, in aggravating circumstances, to imprisonment for any term not exceeding four years".

22 After the on-site visit, Denmark indicated that several other Danish companies had been charged under section 110c(2) of the Danish Criminal Code. At the time of writing, the investigations were still pending.

3. Outline of the Report

23. This report is structured as follows. Part B examines prevention, detection and awareness of foreign bribery in Denmark. Part C looks at the investigation, prosecution and sanctioning of foreign bribery and related offences. Part D sets out the recommendations of the Working Group and issues for follow-up.

B. PREVENTION, DETECTION, AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

24. During the on-site visit, a number of participants from different backgrounds indicated that events like the signature of the OECD Convention and the United Nations Convention against Corruption (UNCAC)[23] have undoubtedly contributed to enhance the awareness of bribery issues in Denmark. More recently, the wide press coverage on the Danish companies allegedly involved in the irregularities of the United Nations Iraqi Oil-for-Food Programme had also a decisive impact on the rise of the general awareness of transnational bribery in the Danish society.[24]

25. Awareness raising of the offence of bribery of foreign public officials and training initiatives for all relevant domestic civil servants are crucial tools in reaching the goals of the Convention and the Revised Recommendation. The Danish authorities share this view, as exemplified by the various initiatives undertaken since the ratification of the Convention.[25]

a) Government Initiatives to Raise Awareness

26. The Danish authorities have not adopted a national anti-corruption strategy. Bribery issues are nevertheless addressed through various governmental initiatives, often made in partnership with the private sector. There have also been some awareness-raising initiatives targeting Danish civil servants.[26]

27. At the time of the on-site visit, major public bodies – such as the Office of the National Commissioner of Police, the Copenhagen Police, the National Audit Office of Denmark (NAOD), the Ministry of Economic and Business Affairs, the Danish Competition Authority (DCA), the Danish Commerce and Companies Agency (DCCA), the Securities Council, the Financial Supervisory Authority, and the National Agency for Enterprise and Construction (NAEC) – had not taken any measures targeting their own staff to raise awareness about the offence of foreign bribery, the Convention and the Revised Recommendation.

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23 At the time of the on-site visit, Denmark had signed but not ratified the UNCAC. The Danish authorities did not give any time schedule for ratification.

24 A few other events, notably the allegations of misuse of public funds by a mayor and passive bribery allegations involving Danish officials responsible for issuing residency permits also contributed to raise the general awareness of bribery issues among the Danish citizens.

25 A survey by the Confederation of Danish Industries (Dansk Industri – DI) conducted among 250 Danish companies manufacturing or exporting in the Baltic States showed that corruption was considered to be one of the major obstacles to conducting business activities in the area (survey conclusion cited in Dansk Industi (2001), *Avoid Corruption – A Guide for Companies*, p.6).

26 Awareness-raising initiatives targeting civil servants involved in export credits, development assistance, diplomatic missions and trade promotion, and the tax administration are respectively dealt with in sections B.3, B.4, B.5 and B.6 of the report, together with the initiatives undertaken by these same civil servants and related agencies targeting the private sector.

28. Furthermore, a Danish representative of Transparency International indicated that the university curriculum of Danish business school students failed to offer courses on foreign bribery. The same problem concerns the Judiciary, where none of the courses for judges and new recruits deals with the Convention.

(i) The Ministry of Justice Booklet on Corruption

29. At the time of the on-site visit, the Ministry of Justice (MOJ) was working on a booklet aimed to raise the general awareness on corruption. The booklet is expected to be published before the end of 2006 and will be made publicly available. The booklet will include all relevant criminal law provisions, as well as examples to help the reader understand the line between what is legal and what is not. Issues relating to the bribery of foreign public officials will be also addressed.

(ii) The Public Prosecutor for Serious Economic Crimes and Confederation of Danish Industries Partnership to Help Companies avoid Corruption

30. The Public Prosecutor for Serious Economic Crime (SØK) cooperates closely with the Confederation of Danish Industries (DI)[27]. Staff members from SØK have assisted DI in producing a manual on how to avoid corruption and they teach at the training programmes for the members of DI. One of these training programmes offered to companies pertains to corruption and foreign bribery. Between 60 and 100 companies were said to attend each year. Attendance was also said to be on the rise in recent years.

31. In 2002, a corruption prevention manual was developed by DI in cooperation with SØK. The 70-page document guides the reader through the relevant Danish legislation and provides guidance to companies on various possible corruption prevention strategies. An enhanced and updated version of the manual was due for publication in March 2006, but has been postponed until August 2006.

(iii) Small and Medium Size Enterprise Business Anti-Corruption Portal Project

32. A private Danish consulting firm obtained in 2005 a mandate from the Danish Ministry of Foreign Affairs (MFA) to develop a project to provide practical guidance to SMEs operating in developing countries. The rationale for this project is that SMEs typically have fewer resources than large enterprises and are in need of greater support when it comes to corruption prevention, detection and risk management.[28]

(iv) The Corporate Social Responsibility Compass

33. The Danish Ministry of Economic and Business Affairs, the Confederation of Danish Industries (DI) and the Danish Human Rights Institute developed a program, launched in June 2005, called the CSR (Corporate Social Responsibility) Compass. This internet-based tool[29] aims at assisting Danish enterprises in drafting a CSR declaration for any customer or business partner who requires them to act in a socially

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27 Please refer to section B.1.b.i. for a description of DI and its main activities.

28 The project, 60% of which is financed by Danida and 40% through in-kind contribution by private companies, will take the form of an internet based anti-corruption portal. The portal will include *inter alia* information on the anti-corruption legal framework and on business integrity management systems, country corruption profiles, and an information network. A first version of the portal was expected to be operational in the summer of 2006.

29 The CSR Compass website was available in Danish only at the time of the on-site visit: http://www.csrkompasset.dk/.

responsible manner (*e.g.* with regard to working conditions, human rights or principles of sustainable development).

34. Representatives from the CSR Compass initiative indicated that internet traffic data and preliminary feedback showed that a very large number of Danish companies that were in the process of composing or enhancing their codes of conduct were using the CSR Compass as a benchmark.

35. One of the available declarations through the CSR Compass is on corruption. The four-paragraph declaration begins by stating that the company ensures that "none of the company's employees give or receive unjustified advantages from Danish or foreign officials or employees in private companies". Although the declaration does not match the language of the Convention or of Section 122 of the Danish Criminal Code, it includes a reference to the relevant sections the Danish Criminal Code, including Section 122. Moreover, various information and web links related to the Convention and relevant sections of the Danish Criminal Code are posted on the CSR Compass website.

b) Private Sector Initiatives to Raise Awareness

(i) Business Organisations

The Confederation of Danish Industries

36. The Confederation of Danish Industries (DI) is the major industrial organisation of employers in Denmark (approximately 7,000 members). DI has introduced a corruption awareness service to its members in partnership with SØK which includes a manual and a training programme, and has participated in setting up the CSR Compass (described above).

37. DI provides assistance to its members for drafting codes of conduct and setting up effective compliance strategies. However, DI does not provide advice to companies confronted with specific instances of corruption or solicitation, nor does DI provide periodic assistance to companies on how to interpret the law.

Danish Federation of Small and Medium Enterprises

38. The Danish Federation of Small and Medium Enterprises (DFSME) has approximately 20 000 members operating in all sectors which all have in common that the company's manager and owner is one and same person. A significant share of the services provided by DFSME to its members is legal and non-legal counselling, export education, and sector studies.

39. DFSME counsels and assists SMEs on issues of corporate social responsibility (CSR), which is perceived as becoming an essential aspect of many small or medium enterprises' competitiveness.

40. DFSME stated that its members were often reluctant to operate in developing countries because of corruption issues. DFSME is also often asked to assist its members that encounter corruption abroad in the context of a Danida public-private partnership programme.

(ii) Major Enterprises

41. In a June 2005 report[30], the Danish Institute for Human Rights found that, based on a sample of 164 major Danish companies, only 43 companies had codes of conducts targeting their own organisation and/or their supply chains. Moreover, only 13 of these codes of conducts addressed corruption issues.[31]

42. The study also found that few Danish companies mention implementation procedures directly in their codes, and that when compared to the figures of a 2001 OECD study of 246 codes of corporate conduct,[32] Danish companies generally include fewer provisions on implementation in their codes than their foreign peers.[33]

43. Of the four major Danish companies that participated in the on-site visit, two had developed codes specifically dedicated to anti-corruption. One of these two companies also had an implementation strategy targeting its staff and was in the process of developing an implementation strategy targeting business partners. A third company indicated that although it did not yet have a comprehensive anti-corruption strategy in place (it was in the process of developing a code of conduct), it asked all its managers to sign a business integrity pact upon hiring.[34]

44. All business representatives met during the on-site visit stated that a zero tolerance policy towards small facilitation payments was impracticable. They also stated that corruption was part of doing business in some geographical areas and business sectors, and that in these areas and sectors business was simply not able to operate without some form of illicit payments being made.

45. A large Danish company (which had no anti-corruption policy in place) also estimated that corruption issues could be dealt with at the local level on a case-by-case basis. It also considered that the defence of facilitation payments (as described in the preparatory works of the Danish implementing legislation) would apply in some cases to payments made to a foreign public official in order for him to breach his duty in the context of a business transaction.[35]

46. Most of the companies represented during the on-site visit had not set up schemes to provide internal communication channels and protection for internal whistleblowers.

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30 Abildgaard, R. (2005), *Corporate Codes of Conduct in Denmark – An Examination of their CSR Content*, Danish Institute of Human Rights, Copenhagen, June 2005

31 *Idem*, p.16

32 OECD (2001), *Codes of Corporate Conduct: Expanded Review of their Contents*, Working Papers on International Investment, No. 6, Paris, OECD, May 2001

33 Abildgaard, R. (2005), *Corporate Codes of Conduct in Denmark – An Examination of their CSR Content*, Danish Institute of Human Rights, Copenhagen, June 2005, p.37

34 In particular, the company used the pact for terminating the contracts of the managers who were found responsible for misconducts in the context of the UN Oil-for-Food Programme. It was through its own internal company controls that, in May 2004, the company found evidence documenting that in 2001 and 2002 employees had made unauthorised payments to the Iraqi authorities.

35 For a discussion of the small facilitation payment defence as provided by the Danish legislation, please refer to section C.2.a.i of the report.

(iii) Small and Medium-Sized Enterprises

47. Danish small and medium enterprises (SMEs) make up more than half of the total turnover of Danish enterprises and almost 40% of Danish exports.[36] A 2003 survey showed that over 30% of Danish SMEs had exporting activities, ranking third among European SMEs behind only Luxembourg and Liechtenstein.[37]

48. Small Danish enterprises met during the visit stated that Danish SMEs operating in developing countries were frequently confronted with corruption issues, but lacked the resources to tackle them in an efficient and legal manner. They indicated that SMEs needed greater support from Danish embassies for guidance and reporting, and for ensuring the enforcement of contract agreements with their local private and public partners.

49. One small enterprise also pointed out that it had difficulty in differentiating between what was a bribe and a facilitation payment when conducting business abroad. It stated that SMEs lacked concrete guidance on this issue. Confusion for this small enterprise arose from the fact that although some forms of facilitation payments are tolerated by the Danish legislation[38], MFA programmes have a zero tolerance policy[39] and no form of bribery or facilitation payments are tax deductible in Denmark[40].

Commentary

The lead examiners recommend that Denmark take measures to further raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it, and undertake effective public awareness activities for the purpose of educating Danish business and law school students on the offence.

The lead examiners also recommend that Denmark raise awareness about the foreign bribery offence and applicable sanctions, provide enhanced and comprehensive guidance to Danish businesses on how to avoid making corrupt payments abroad, and support the development and adoption of compliance programs for both SMEs and large enterprises doing business abroad.

(iv) Civil Society and Trade Unions

Non Governmental Organisations

50. The Danish chapter of Transparency International (TI), founded in 1995, is among the oldest TI chapters. In addition to the awareness level of business school students mentioned above, another specific concern raised by the TI representative at the on-site visit related to the Oil-for-Food Programme allegations and the way these allegations were expected to be prosecuted (see above section A.2.g. of the report).

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36 Ministry of Foreign Affairs of Denmark, October 2005, http://www.um.dk/en/menu/TradeAndInvestment/Services/SmallAndMediumSized/

37 The Observatory of European SMEs (2003), *Report 2003/4: The Internationalisation of SMEs*, European Commission, p.16

38 Please refer to section C.2.a.i. of the report.

39 Please refer to section B.5 of the report.

40 Please refer to section B.6 of the report.

Trade Unions

51. Danish trade unions[41] have not undertaken any awareness raising activities focused on corruption. Concerning the protection of whistleblowers, trade unions indicated that private sector employees had a duty of loyalty to their employers and could be legally dismissed for "blowing the whistle". International standards in the field of whistleblower protection were not perceived as having yet had an impact on Danish laws and regulations and the internal policies of Danish companies.

2. Reporting, Whistleblowing and Witness Protection

52. During the on-site visit, a SØK representative indicated that – apart from the Oil-for-Food Programme allegations and the rapidly dismissed press allegations of bribery by a foreign-based subsidiary of a Danish company (see section A.2.f) – his office had not been reported any suspicions, allegations or evidence of foreign bribery since the entry into force of the Convention. The SØK representative held the view that the absence of foreign bribery cases might be due to the lack of incentives in reporting suspicions of offences of bribery of foreign public officials.

a) Danish Public Servants' Duty to Report Crimes

53. In Denmark, there is no general legal obligation for public servants to report suspected crimes which they become aware of, and Danish public servants cannot in normal circumstances be criminally sanctioned when they refrain from reporting crimes or suspicions of crimes to their superiors or the law enforcement authorities. Denmark indicates that it is a "natural part" of a public official's duties to report cases of suspected corruption or fraud to his superior. It should also be noted that, according to general principles of administrative law, public officials are permitted to report suspicions of crimes that they might come across in the course of their duties to the law enforcement authorities.

54. Section 27(1) of the Public Administration Act lays down a secrecy obligation for all public servants. Information is notably considered confidential whenever it is otherwise necessary to keep the information secret to protect material public or private interests, including in particular Danish foreign policy and Danish external economic interests and the public and private financial interests.

55. Under Section 152(1) of the Danish Criminal Code, the sanction associated with a breach of this secrecy obligation is a fine or imprisonment for up to six months. Section 152e of the Danish Criminal Code further states that the secrecy obligation of public servants does not apply where the public servant is under an obligation to pass on the information, or acts in order to lawfully safeguard obvious public interests or the interest of himself or others.

56. Information sharing among Danish administrative authorities – including the Police and the Tax Administration – is regulated by Section 28 of the Public Administration Act. Section 28(3) of the Public Administration Act indicates that "*confidential information may be passed on to another administration authority only when the information must be assumed to be of essential importance to the performance of that other authority's activities or for a decision to be made by that other authority*."

57. No general guidelines have been issued by the public administration on reporting suspicions of crimes by public servants.[42] Where applicable, ministries and public agencies are responsible for

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41 80% of Danish employees are affiliated to a trade union in Denmark.

42 At the time of the on-site visit, a Code of Conduct for Danish public employees was being prepared by the Ministry of Finance (the State Employer's Authority) in cooperation with other ministries, the public employer's organisations as well as the public employees' organisations. Denmark indicates that during the

developing their own policies, rules and guidelines for conducting internal investigations in their area of competence, and for determining the best procedure for handling criminal allegations and reporting suspicions.[43] With the exception of the Police and the Public Prosecutor, no public agency met during the on-site visit had explicit rules for reporting criminal offences to the law enforcement authorities.

Commentary

The lead examiners recommend that Denmark issue clear guidelines for its public servants on how to handle suspicions of foreign bribery offences that they may come across in the course of their duties.

As a general commentary with regard to detection and reporting, the lead examiners recommend Denmark to maintain statistics as to the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and related offences.

b) Whistleblowing and Whistleblower Protection

(i) Danish public servants

58. As part of the terms of engagement in the Danish public administration, an official can not be legally dismissed for reporting in good faith suspicions of any crimes, regardless of whether reporting has first been made internally or directly to the law enforcement authorities.

59. No statistical information is available on the reporting by public officials or public agencies of suspicions of crimes to the law enforcement authorities.

(ii) Private sector employees

60. The Danish Labour Code does not offer any protection against dismissal for employees reporting suspicions of bribery.[44] Danish employees have a wide-ranging duty of loyalty towards their employer and can be legally dismissed for reporting in good faith suspicions of crimes committed by their corporate entity or by colleagues and superiors. This situation was decried by all members of civil society met during the on-site visit, who referred to "a long and regrettable tradition of punishing whistleblowers in Denmark". The examination team was not provided with any statistics on the reporting of corporate crimes by employees or dismissed employees.

c) Witness Protection

61. At central level, a specialised unit of the Danish National Police provides support to Police districts. The unit, however, does not have powers to develop witness protection programmes unless

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final drafting phase of the Code, it will consider whether to include more specific guidelines on how to handle suspicions of corruption or any other criminal offences public employees may come across when exercising their functions. The Code of Conduct is foreseen to be published during summer 2006.

43 Issues relating to the detection and reporting of suspicions of foreign bribery by staff working in export credits, development assistance, foreign diplomatic representations and trade promotion, and tax administration, are addressed in sections B.3, B.4, B.5 and B.6 of the report, respectively.

44 Denmark indicates that the general agreements and Salaried Employee Act contain provisions which require that a dismissal must be justified. In cases of unjust dismissal the employer must pay compensation to the employee. There is a presumption that these rules might apply if an employee reports reasonably founded suspicion of bribery. However, there is no case law on the issue.

expressly requested by police districts. The police can take only physical measures for the protection of witnesses outside court hearings. In extremely serious cases, the law also enables the National Police Commissioner to change of identity to a witness. EUROPOL best practices are usually applied by the Danish Police when dealing with the protection of witnesses. Denmark does not envisage the adoption of witness protection programmes in the short term.

Commentary

The lead examiners recommend that the Danish authorities introduce measures to ensure effective protection of whistleblowers in order to protect private sector employees from dismissal and encourage individuals to report suspected cases of foreign bribery without fear of retaliation.

d) Investigative Journalism

62. During the on-site visit, representatives of the Danish media indicated that, although investigative journalists have traditionally not been on the lookout for foreign bribery allegations involving Danish companies, the allegations linked to the Oil-for-Food Programme have altered the media's attitude in this respect. Danish journalists now monitor foreign media sources for indications of bribery allegations involving Danish companies on a more regular basis.

3. Officially Supported Export Credits

a) Awareness-Raising Efforts

63. *Eksportkreditfonden* (EKF) is an independent export credit agency under the Danish State. EKF is only active in medium and long term support, as the private sector handles all short term contracts. EKF was active in the field of awareness raising and prevention targeting its exporters and banks in May 2001, following the implementation by Denmark of the Convention and the OECD Action Statement on Bribery and Officially Supported Export Credits ("the OECD Action Statement"). A one-page internal guideline for EKF staff was also introduced in 2001. Information is available on EKF's internet home page about how bribery issues are dealt with in connection to export guarantees, including the relevant declarations and the consequences for the cover under the guarantee if the rules are violated.[45]

Anti-Corruption Provisions in Contracts[46]

64. The guarantee holder (*i.e.* the exporter or the financial institution) has to sign a declaration that neither he, nor any persons acting on their behalf, has engaged in or will engage in bribery in connection with the guaranteed transaction. They also declare that they forfeit the right to compensation, and agree to repay what may already have been received – including losses, expenses, and legal costs – if they have engaged in bribery. The guarantee will not enter into force until the signed declaration is returned. The declarations also explicitly include responsibility for bribery committed by agents and other persons acting on behalf of the guarantee holder.

65. The OECD Action Statement asks export credit agencies to "inform applicants requesting support about the legal consequences of bribery in international business transactions… including its national laws

45 www.ekf.dk

46 The anti-corruption provisions in EKF contracts are here addressed from the point of view of awareness raising, and prevention/deterrence. The role of these anti-corruption provisions as administrative sanctions for acts of foreign bribery is addressed more specifically in section C.6.d.i of the report.

prohibiting such bribery". The anti-corruption declarations in EKF contracts do not contain a reference to the offence under the Danish Criminal Code, but EKF has undertaken awareness raising activities through other means, such as information about foreign bribery on its website. Background information is also provided in an annex to the declarations.

b) Detection and Reporting of Foreign Bribery

66. Agents' commissions are eligible for official support, and EKF would only consider on a case by case basis if the agent commission can be accepted.[47] Accordingly, EKF only takes investigative measures on a case by case basis. Thus, bribery risks are not systematically assessed.

67. There is no obligation for EKF staff to report suspicions of bribery to investigative authorities. EKF has not provided its staff with any specific training related to foreign bribery issues, nor guidance or instructions for detection and reporting of suspicions or instances of foreign bribery. EKF representatives indicated that they were waiting for eventual enhancement of the OECD Action Statement before taking any measures in the area of detection and reporting. At the time of the on-site visit, EKF employees were said to have never came across suspicions or evidence of bribes paid to foreign public officials.

Commentary

The lead examiners recommend that the Danish Authorities continue to make efforts to raise awareness about the offence of bribery of foreign public officials among Danish businesses applying for officially supported export credits.

The lead examiners recommend that the Danish authorities take steps to improve the capacity of relevant EKF employees to detect and report illicit payments of foreign bribery.

4. Official Development Assistance

68. The Ministry for Foreign Affairs (MFA) – under which the Danish Minister for Development Cooperation operates – has overall responsibility for overseeing all Danish development co-operation. Danida is the brand-name for the Danish International Development Assistance activities of the MFA. The MFA has the overall responsibility to manage and implement official development assistance (ODA) programmes. The management of ODA programmes abroad is conducted through Danish embassies. In 2004, total Danish ODA as percentage of gross national income (GNI) was 0.85% (2nd among OECD Development Assistance Committee [DAC] countries), and the bilateral share of Danish ODA was 59%.[48]

69. The Danish International Investment Funds have been established by the Danish Government in order to fulfil developmental objectives. The Danish International Investment Funds ("the Funds") is the umbrella term for the Industrialisation Fund for Developing Countries (IFU; established 1967) and the Investment Fund for Central and Eastern Europe (IØ; established 1989). IFU and IØ are independent, self-

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47 See *Responses to the OECD/ECG's 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits*, situation as of 30 September 2005. [TD/ECG(2005)4/REV]

48 Top recipient countries (2003-04 average) are Tanzania, Viet Nam, Mozambique, Uganda, Ghana, Bangladesh, Zambia, Nepal, Nicaragua, and Egypt. Danida distributes bilateral development assistance so that Africa receives approximately 60%, Asia approximately 30% and Latin America approximately 10%. The major purposes of bilateral ODA are social infrastructure and services, economic infrastructure and services, production sectors and emergency assistance (Sources: OECD (2006), Development Co-operation Report 2005, Volume 7, No.1, OECD, Paris, p.80 ; OECD (2003), DAC Peer Review: Denmark, OECD, Paris, p.67 ; Danida Annual Report 2002, http://www.um.dk/).

governing entities, limited in their liability to the extent of their net worth only. The Danish Minister of Foreign Affairs appoints their Supervisory Board and Managing Director. The Funds' net disbursement in terms of equity and equity related capital is incorporated as part of Denmark's ODA.

a) Awareness-Raising Efforts

70. The MFA has been the most active government bodies in awareness raising and prevention, setting up initiatives targeting their own staff, their private sector partners, and partner countries. The MFA has adopted a five years "Action Plan to Fight Corruption" (2003-2008) within the framework of Danida. The Action Plan aims for a holistic approach, addressing issues of prevention, detection, and sanctioning. The Convention is mentioned in the introduction to the 36-page document.[49]

71. Bribes and facilitation payments are both prohibited under the MFA policy of "zero tolerance", a key aspect of the Action Plan. However, the focus of the MFA Action Plan to Fight Corruption and related instruments[50] is to avoid mismanagement of Danish development funds by MFA staff, cooperation partners and partner governments, and to ensure that Danish development aid has a significant impact in partner countries.[51] The impact that this has on the potential for detection and reporting of the foreign bribery offence by officials working in development assistance is addressed in section B.4.b. of the report.

72. The Danida Anti-Corruption Code, a central element to the implementation of the MFA Action Plan, was adopted in September 2004. The code provides – along with the accompanying Guide to the Code – guidance on the desired standards of conduct within the framework of the Action Plan. Since their adoption by Danida, these instruments have been formally applied by headquarters staff, Danish and local staff at the embassies, and experts and advisors on Danida contracts.[52]

73. Principle Five of the Danida Anti-Corruption Code[53] aims to cover both active and passive bribery and both domestic and foreign bribery and corruption. Principle Five of the Danida Anti-Corruption Code (i) does not explicitly cover "promises" and "offers", (ii) it does not explicitly prohibit bribery payments made to foreign public officials,[54] and (iii) it does not explicitly prohibit bribery payments made to third parties beneficiaries.[55] However, the Danida Anti-Corruption Code and the related e-learning course[56] do provide some additional guidance with regard to bribery and facilitation payments,

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49 Danish Ministry of Foreign Affairs (2003), *Danida Action Plan to Fight Corruption 2003-2008,* revised version of December 2003.

50 These instruments are the Anti-Corruption Code of Conduct and the accompanying Guide to the Code, the Anti-Corruption e-learning course, the Anti-Corruption Hotline (see section 4.b.), and the inclusion of an Anti-Corruption clause in all Danida contracts. The Anti-Corruption clause in contracts and its implications are discussed in section C.6.d.iii.

51 Danish Ministry of Foreign Affairs (2004), *Annual Anti-corruption Report 2004 – Implementation of the Danida Anti Corruption Action Plan 2003 – 2008*, Danish Ministry of Foreign Affairs, Copenhagen.

52 Danish Ministry of Foreign Affairs (2004), *Annual Anti-corruption Report 2004 – Implementation of the Danida Anti Corruption Action Plan 2003 – 2008*, Danish Ministry of Foreign Affairs, Copenhagen.

53 Principle Five of the Danida Anti-Corruption Code states: "We will not give, solicit or receive directly or indirectly any gift or other favour that may influence the exercise of our function, performance of duty or judgement. This does not include conventional hospitality or minor gifts."

54 Bribery of persons working in international public service or functions is also not addressed.

55 The Danish authorities consider that the bribery of foreign public official as envisaged by the Convention and the Danish Criminal Code is implicitly covered in Principle Five of the Danida Anti-Corruption Code.

56 Danida, in the context of the implementation of the Ministry of Foreign Affairs Action Plan to Fight Corruption, has set up an anti-corruption e-learning course. All staff working with Danish development

notably prohibiting "payments to secure or expedite the performance of a routine, legal or necessary action" by employees and partners working with ODA.

74. The Danida Anti-Corruption Code and the Guide also call for dissemination of the code, and seek to impact the behaviour of partners (NGOs, businesses, and institutional partners alike). Danida seeks the acknowledgement of the Code by partners and ensures that a code of ethical conduct compatible with its own code forms part of all Danida contracts with individual consultants, consulting companies and companies contracted to implement projects.[57]

75. Through its Action Plan, the MFA seeks to help combat corruption in the countries receiving Danish development aid. This includes advocating for the implementation of effective anti-corruption strategies in partner countries, but also to "give visible political support to investigation, prosecution and sanctions undertaken by partner countries' own authorities in corruption cases" and to "urge partner countries to participate fully in international anti-corruption work, adhere to international regulations and to ratify relevant international conventions".[58]

b) Detection of Foreign Bribery and the Duty to Report

(i) Reporting policy and procedure

76. Principle Six of the Danida Anti-Corruption Code states that "in accordance with the principle of 'zero tolerance', [Danida staff] are obliged to report suspicion or evidence of corruption committed by colleagues or others." The Guide further states that the "first instance of reporting evidence and suspicion of corruption is your superior." Whether this includes an obligation to report all types of suspicions and evidence of bribery of foreign public official and facilitation payments committed by employees or partners is not made explicit.[59]

77. The MFA has also issued two separate ministerial instructions, in March[60] and November 2004, in order to set out the procedure for reporting "irregularities".[61] According to these instructions, all "irregularities" detected by MFA staff working in development assistance have to be reported to the hierarchical superior. The Danish authorities claim that this includes a duty to report suspicions or evidence of bribery of foreign public official detected in the context of the administration of development funds. Corruption is mentioned but not defined. In both of the instructions issued by the MFA, it is also not entirely clear (1) whether reporting suspicions of foreign bribery is in fact covered by this duty to report

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assistance and all staff working at embassies dealing with Danish development assistance is obliged to take this course. The course materials are extensive, comprising of six modules and address various forms of corruption within the Danish aid delivery system and corruption within the use of development aid provided by Denmark. Short cases studies are also part of the course materials, including cases involving bribes and facilitation payments to foreign public officials. At the time of the on-site visit, approximately 800 staff members had completed the course.

57 Danish Ministry of Foreign Affairs (2004), *Annual Anti-corruption Report 2004 – Implementation of the Danida Anti Corruption Action Plan 2003 – 2008*, Danish Ministry of Foreign Affairs, Copenhagen.

58 Danish Ministry of Foreign Affairs (2003), *Danida Action Plan to Fight Corruption 2003-2008,* Revised version December 2003, p.29-30

59 After the on-site visit, the Danish authorities indicated that an explicit obligation would be included in a future revision of the Guide in order to address this issue.

60 Note that the March 2004 instructions were due to expire on 31 December 2005.

61 The instructions were issued in accordance with Section 10(1) of the National Audit Act and sections 06.3 and 06.11.19 of the Finance Act.

irregularities and (2) which of the two instructions would apply if indeed the reporting of suspicions of foreign bribery is covered.[62] Also, while both instructions underscore that the duty to report is not conditional of a concrete loss or risk of loss of Danish funds, it is also stated that the duty to report does not cover cases which are not considered to be "material". It is not clear, with regard to suspected offences of bribery of foreign public officials committed by staff or partners, how this required level of materiality is evaluated in practice where there is no concrete risk of loss of Danish funds.[63]

78. According to these MFA instructions and information obtained during the on-site visit, the procedure for reporting irregularities would follow the chain described hereafter. Subsequent to a report made by an employee to his hierarchical superior at the local level, or following a report to the MFA by a recipient of Danish development funds,[64] an initial internal investigation is conducted at the local level by the relevant embassy/department. The latter would then report serious cases of irregularities and suspected irregularities directly to the National Audit Office of Denmark (NAOD).[65] Where criminal offences are suspected, the NAOD would not itself report to the law enforcement authorities,[66] as "it is the responsibility of the administrative authorities to refer cases of suspected criminal offences to the police for further investigation."[67] However, this aspect of the reporting procedure (reporting to the Danish and/or foreign law enforcement authorities by the MFA) is not directly addressed in the instructions issued by the MFA on reporting irregularities.

79. During the on-site visit, MFA representatives indicated that a series of actions would take place in parallel to the above-mentioned procedure in the event that an "irregularity" detected by staff would include suspicions or evidence of an offence of bribery of foreign public official. The relevant embassy/department would first have to consult its legal expert in the foreign country in question to ensure that the suspicions are grounded and that the suspected behaviour is indeed a criminal offence in the country concerned. An MFA representative indicated that the relevant embassy/department could then, as appropriate, report the matter to the local, foreign law enforcement authorities.

80. The MFA does not seem to appropriately take into consideration the fact that Denmark has the power to exert nationality jurisdiction over offences of bribery of foreign public officials committed wholly abroad.[68] Moreover, nowhere is it made explicit in MFA policy and guidance documents whether

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62 After the on-site visit, the Danish authorities indicated that the MFA had initiated a revision of the two instructions to merge them into one. They have also indicated that the reporting of bribery of foreign public officials would be explicitly mentioned in the new instrument, in order to address the concerns of the Working Group.

63 Denmark indicates that the MFA's evaluation of materiality is based on a case-by-case scrutiny of the specific local conditions in which an irregularity has taken place. Detailed specifications for the evaluation – including guidelines for quantifications – are not part of the instructions.

64 In accordance with the terms agreed upon recipients of development assistance are obliged to report to the MFA if probable cause arises to suspect or establish irregularities in connection with the administration of the development assistance funds. (MFA Instructions of 24 March 2004, file no. 104.DAN.6-6.c)

65 A draft of the letter which is to be sent to the NAOD is first submitted to the person responsible for the embassy's/department's budget. The latter then decides whether the matter has to be presented to the management of the MFA before being presented being sent to the NAOD. If this is the case, MFA management could then also decide to inform the minister. (MFA Instructions of 24 March 2004, file no. 104.DAN.6-6.c)

66 See also Section 16 of the Auditor General's Act and section B.7.b. of the report.

67 Responses to the Phase 2 Questionnaire, section 2.1

68 Please refer to section C.2.b. of the report for more information on the Danish jurisdiction over offences of bribery of foreign public official.

MFA staff, agencies and partners have a duty to report suspicions of bribery of foreign public officials to SØK or other Danish law enforcement authorities.

(ii) Secrecy obligation

81. Danida officials and partners are reminded of their secrecy obligation through the Guide's section on Principle Seven[69] of the Danida Code, stating that secrecy "applies especially to information regarding (sensitive) private, personal or economic facts (like business secrets) and if such disclosure can harm Danish public interests including the security of the state, relations to foreign powers or international organisations and the economic interests of the state including business and procurement transactions by the Danish Government". [The words in parenthesis were already included in the original text.]

82. There is a potential concern that without clearer guidance provided to staff with regard to reporting suspicions of offences of foreign bribery; this secrecy obligation could be misleading for employees looking for guidance on reporting some of the most sensitive cases of foreign bribery.

83. With regards to applicable disciplinary sanctions for both a failure to report and a breach of the secrecy obligation, the Guide to the Danida Anti-Corruption Code of Conduct stipulates that "breaches to the Code may have implications for your career or ultimately your employment with Danida".

(iii) Anti-Corruption Hotline

84. The MFA established in 2005 the Danida anti-corruption hotline for reporting the misuse of Danish development funds. The "hotline" guarantees confidentiality and anonymity to whistleblowers who request it. The policy for handling the information collected through the hotline does not differ from the handling of other irregularities as described in the paragraphs above.

85. At the time of the on-site-visit, the use of the hotline was still very limited.[70] Thus, despite its potential, the impact of the hotline on the detection and reporting of offences of foreign bribery was difficult to assess by the examination team. The Danish authorities were not planning either to extend the use of the hotline beyond allegations of misuse of Danida funds or to establish a closer co-operation between hotline administrators and SØK.

Commentary

The lead examiners recommend that the Danish Authorities (i) explicitly prohibit the bribery of foreign public officials in all their anti-corruption instruments related to the administration of development funds, and (ii) explicitly include suspicions of bribery of a foreign public official within the compass of the types of information to be reported by staff and partners working in relation with the Danish system for providing ODA.

The lead examiners also recommend that the Danish authorities take steps to ensure an effective system for reporting to the Danish and/or local law enforcement authorities suspicions of bribery of foreign public officials detected in the context of the administration of development funds.

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69 Principle Seven of the Danida Code: "We will strive to achieve maximum openness and transparency towards our external constituencies. However, confidentiality will be applied when necessary to safeguard the rights of our partners, staff and others."

70 Denmark was also among the few bilateral donors to have such a hotline in place.

c) Awareness Raising and Detection by the Danish International Investment Funds

86. The Funds have issued Guidelines on IFU and IØ Staff Ethics.[71] These have been valid and binding for staff members since 31 January 2002. The Guidelines on Staff Ethics formalise the ethical standards and policies applicable for all IFU and IØ employees whether employed in Denmark or outside Denmark, including in relation to corruption issues. No reference is made to either Section 122 of the Danish Criminal Code or the Convention. However, both active and passive bribery are addressed, the possibility of criminal consequences is mentioned and instructions are given for prevention and internal reporting. The Funds do not apply the "zero tolerance" principle in force at the MFA and Danida.

87. Since 2000/2001, an anti-corruption clause is included in all project contracts. The clause was revised in 2004 to describe more clearly the various applicable sanctions.[72] The funds also co-operate closely with Transparency International in developing and maintaining high standards in fighting corruption.

88. The Funds have a Corporate Social Responsibility (CSR) Policy, approved on 24 November 2005. It covers the environmental, occupational health and safety (OHS) and human rights policies. The CSR Policy includes a commitment by the Funds to follow relevant internationally established rules and requirements as well as to induce and to the extent possible oblige their project companies to comply with these rules and requirements. The OECD Convention is explicitly mentioned, as well as the UN Convention against Corruption. The Funds' decisions concerning investments, in addition to normal business principles and risk assessment, give enhanced attention to CSR issues, including anti-bribery. CSR assessments are conducted both at the pre-investment and post-investment stages.

89. At the time of the on-site visit, a new procedure had also just been set up allowing for the consultation of a local expert on the potential local project pitfalls at the pre-investment stage, including with regard to corruption.

90. The Funds are under no obligation to report externally suspicions or confirmed instances of foreign bribery. A representative of the Funds further indicated that four cases of corruption had been detected in the history of the funds,[73] and that these had been handled "very carefully".[74] The Funds employees are also not considered public servants and as such do not enjoy any whistleblower protection (see section B.2.b of the report)[75].

Commentary

The lead examiners recommend that Denmark encourage the Funds to continue to use their corruption-prevention tools to further raise awareness about the offence of bribery of foreign public officials and the corresponding sanctions under the Danish Criminal Code.

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71 http://www.ifu.dk/StaffEthics/staff_ethics.htm

72 Please refer to section C.6.d of the report for information on available administrative sanctions for offences of bribery of foreign public officials.

73 The representative of the Funds did not indicate whether or not bribery of foreign public officials was involved in any of these cases.

74 After the on-site visit, the Danish authorities indicated that one of these cases had also been referred to the Danish law enforcement authorities as the alleged offences had taken place in Denmark. No additional information on the case was provided.

75 The Funds do not, through their CSR policy, address issues of internal or external whistleblowing for employees, project partners or project companies.

The lead examiners also recommend the Danish authorities to ensure that the Funds, their investment partners and the management of the individual project companies continue to be actively engaged in corruption prevention and duly comply with the Convention and the Revised Recommendation.

5. Foreign Diplomatic Representations

a) Awareness-Raising Efforts and Assistance to Companies Abroad

91. Denmark states that at the MFA, "the resources related to the work of fighting corruption are streamlined into the system and are not identifiable as such. Every employee of the MFA is thus expected to act in accordance with the overall policy of zero tolerance and to contribute to the implementation of this policy." The overwhelming majority of the work done at the MFA to fight corruption is done in the context of development assistance. The Danish authorities argue that due to job rotation and high level of cooperation among MFA staff and agencies, initiatives undertaken in the context of development assistance are having an impact on the awareness levels within all sections of the MFA.

92. Only one awareness raising initiative by the MFA targeted diplomatic personnel as such. It was an announcement made on 19 July 2005 that barely touched upon the issue of active bribery: "*We will not give, solicit or receive gifts or other favours that may influence the exercise of our function, performance of duty or judgement. Staff members will still be allowed to accept ordinary hospitality and small gifts*." The whole document is in fact about passive corruption.

93. The Trade Council of Denmark (TCD), the official export and investment promotion agency in Denmark, is organised within the MFA.[76] The TCD has one office in Copenhagen, and 90 missions abroad in 64 countries, where around 80% of its staff is found.[77] Of these, over half are locally employed, typically inhabitants of the country concerned. The locally employed staff and posted staff members of the TCD are responsible for assisting companies in the context of business consultancy services provided by the TCD. TCD staff does not provide specific legal assistance, but is able to refer Danish companies to local lawyers. It is also able to assist Danish companies facing bribery solicitations from foreign officials, for instance by contacting the local authorities on behalf of the company.[78] Denmark further stated that the issue of bribery solicitation is regularly debated at local level between MFA staff and Danish companies.[79]

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76 The TCD provides both individual consultancy to enterprises and general business service directed both at enterprises and the public at large. The TCD assists enterprises in attracting investments to Denmark and Danish enterprises in exporting and investing abroad through consultancy (both in Denmark and in foreign missions) on political, economic and commercial issues.

77 Danish Ministry of Foreign Affairs (2005), *Danish Trade Council Annual Report 2003-2004*, p.4

78 Denmark indicates that the TCD does not give specific legal advice, and that TCD staff would refer companies to a lawyer in questions of legal matters. Denmark also indicates that TCD staff provides business consultancy on alternative strategies to corruption.

79 According to Section 7(1) of the Danish Public Administration Act, an administration authority shall to the extent required give guidance and assistance to any person who enquires of them in matters within their purview.

94. At the time of the on-site visit, the TCD had not published any specific guidelines for staff on how to deal with corruption issues,[80] nor had it taken steps to raise awareness among Danish companies about Section 122 of the Danish Criminal Code, the Convention and the Revised Recommendation.[81]

95. At the time of the on-site visit, the TCD was working on a set of anti-corruption guidelines and a toolbox for assistance to Danish companies on anti-corruption which was expected to be finalised in the later half of 2006.

b) Detection of Foreign Bribery and the Duty to Report

96. No TCD guidelines exist for reporting suspicions of foreign bribery. During the on-site visit, TCD representatives indicated that suspicion or detection would first be reported to the superior at the local mission who would then, as appropriate, report to the MFA headquarters in Copenhagen. This policy is the same throughout the MFA, except for irregularities detected in the context of development assistance (see section B.4.b of the report). The MFA and the TCD do not generally report to the Danish law enforcement authorities suspicions of offences committed abroad over which Denmark might have jurisdiction.

97. Allegations linked to the Oil-for-Food Programme (OfFP), for example, were not spontaneously reported to the law enforcement authorities. The NAEC[82] and the MFA received information on alleged irregularities in the OfFP on at least two occasions. This includes a letter sent in April 2001 by a United Kingdom Mission to a Danish Mission expressing concerns that three specific contracts of a Danish company contained potential evidence of irregularities.[83] The IIC Report indicates that the Danish Mission at the time simply forwarded the UK's inquiry directly to the Danish company in question. In response, the company's export area manager (the same who is revealed in the IIC Report to have signed "side-letter agreements" with Iraqi public bodies[84]) denied any wrongdoing.[85] MFA and NAEC management were apparently not alerted at the time. SØK was neither alerted nor consulted. After the OfFP was terminated in 2003 and after the IIC completed its inquiry which had been initiated in April 2004, SØK was also not spontaneously provided with any information from the NAEC, the MFA or the Danish Mission in question.

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80 Denmark indicates that the TCD has a general statement in its quality manual indicating that the TCD's firm guideline with regard to ethics and corruption is to always recommend Danish companies to obey local and Danish laws and regulations.

81 The Danish authorities consider that as an export and investment promotion agency, it is not the responsibility of TCD to raise awareness among Danish companies regarding Section 122 of the Danish Criminal Code.

82 The NAEC was acting as an information and contact point for Danish enterprises in the context of the UN Oil-for-Food Programme. The NAEC is the competent authority responsible for the administration of EU-regulations for restrictive measures (financial sanctions and EU-regulation implementing United Nations Security Council Resolutions concerning financial restrictions). The NAEC is also the agency responsible for export controls regarding export of dual use goods and technology.

83 Independent Inquiry Committee (27 October 2005), *Report on the Manipulation of the Oil-for-Food Programme*, United Nations, New York, p.340-341

84 The IIC has extensively documented the presence of side letter agreements signed by the company's export area manager. It has also retraced a money flow leaving the Danish company in question to then reach an Iraqi controlled bank account after first having passed through an intermediary local agent in Jordan responsible for providing the company's "after sales services". (Independent Inquiry Committee (27 October 2005), *Report on the Manipulation of the Oil-for-Food Programme*, United Nations, New York, p.341)

85 Independent Inquiry Committee (27 October 2005), *Report on the Manipulation of the Oil-for-Food Programme*, United Nations, New York, p.340-341

98. When interviewed on the matter during the on-site visit, both the NAEC and the MFA indicated that they simply had served as "a postal service" between the companies and the United Nations and that their mandate did not include investigation, reporting suspicions or assessing the weight of allegations.

99. In another episode linked to the OfFP, of which the examining team became aware of only after the on-site visit, a Danish company that detected through internal company controls in May 2004 that non-authorised payments had been made to the Iraqi authorities during the OfFP immediately reported the matter to the MFA (in June 2004).[86] No steps were then taken by the MFA in order to consult or alert the Danish law enforcement authorities on the matter.

100. The above-mentioned episodes, along with the absence of clear guidelines for reporting suspicions of foreign bribery, raise doubts as to whether the NAEC and the MFA have the ability and adequate procedure in place to ensure an efficient handling of information obtained from external sources which may have a possible link to potentially serious offences committed abroad and over which Denmark may have jurisdiction.

Commentary

The lead examiners recommend that Denmark encourage the TCD to finalize its anti-corruption policy and guidelines and ensure that these instruments deal adequately with issues of prevention, detection and reporting of the foreign bribery offence.

The lead examiners also recommend Denmark to advise overseas representations, including diplomatic and trade promotion personnel, on the steps that should be taken – including encouraging reporting the matter to the competent law enforcement authorities – when there are credible allegations that a Danish company or individual has bribed or taken steps to bribe a foreign public official.[87]

6. Tax Authorities

a) Non-Deductibility of Bribes

101. Denmark has in place since 1998 a legislative provision expressly prohibiting the tax deductibility of bribe payments to foreign public officials, which was introduced by Act No.1097 of 29 December 1997. Section 8D of the Danish Tax Assessment Act (DTAA) reads:

> *In the statement of the taxable income no deduction shall be granted for the cost of bribes of the type referred to in Section 144 of the Danish Criminal Code to an individual who has been employed, appointed or elected to carry out services or duties in legislative, administrative and judiciary agencies, be it for Denmark, the Faroe Islands or Greenland or a foreign state, including local authorities or political branches, or for an international organisation which has been constituted by states, governments or other international organisations.*

102. Denmark clarifies that the reference to Section 144 of the Danish Criminal Code (passive bribery) instead of Section 122 of the Danish Criminal Code (active bribery), is aimed at indicating that no deductibility exists for payments made to a Danish or foreign public official if according to the standards under Section 144 of the Danish Criminal Code the recipient would be punishable for accepting the

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86 This information is taken from official company press releases issued on the 18th August 2005 and the 20th September 2005.

87 The lead examiners note that this is an issue for many Parties.

payment.[88] As no form of bribe or facilitation payment to a Danish public official is tolerated, the standard used for the non-deductibility of bribes paid abroad is more stringent than the standard used for the application of the foreign bribery offence as provided by Section 122 of the Danish Criminal Code.[89]

103. Section E.B.3.15 of the Tax Assessment Guidelines for Danish tax officials provides guidance on which fees and payments remain tax deductible in spite of Section 8D DTAA:

> Section 8 D of the Danish Tax Assessment Act does not include gifts, etc., made to employees who are not public officials working for Danish or foreign authorities. Thus, the provision does not abolish the right to deduct, according to applicable practice, bribes paid to employees of commercial enterprises in states where that kind of payment is customary.

104. Bribes paid to employees of the private sector – where "customary" – remain tax deductible. The standard used for the non-deductibility of bribes paid in the private sector appears to be less stringent than the standard used for the application of the private sector bribery offence as provided by Section 299(2) of the Danish Criminal Code, which prohibits private sector bribery altogether without any reference to "custom".[90]

b) Awareness, Training and Detection

105. During the on-site visit, the examination team was informed that an "awareness action plan" was to be put in place in 2007, aiming to inform all Danish individuals, businesses and tax auditors of what was non-deductible under Danish tax law. This "awareness action plan" was to cover 120 topics, including bribery.

106. Some guidance on the non-deductibility of bribes is provided to tax officials through the Tax Assessment Guidelines, but tax officials have not been provided with any specific training related to foreign bribery issues. In particular, no additional training or guidance is available to determine which public officials – in practice – are included in the definition of Section 8D DTAA.

107. Representatives of the Danish tax administration indicated that bribes and facilitation payments to employees of state-owned enterprises and state-controlled enterprises are in all cases non-deductible. Where uncertainty arises as to whether the person in question is to be considered a foreign public official (*e.g.* a political party member in a one-party state), tax administration officials indicated that they have to refer to the laws of the foreign country. This can entail procedural delays of various lengths as assistance would generally have to be sought from the authorities of the foreign country in question.

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88 Section E.B.3.15 of the Tax Assessment Guidelines states that "*the judgment as to whether deductibility exists in respect of gifts and other payments to a public officials is thus linked with the Danish standard [of criminal behaviour], even in those cases where the gift, etc., is made in another state*." Section 144 of the Danish Criminal Code reads: "*Any person who, while exercising a Danish, foreign or international public office or function, unlawfully receives, demands or accepts the promise of a gift or other privilege shall be liable to imprisonment for any term not exceeding six years, or in mitigating circumstances, to a fine.*"

89 Section 122 of the Danish Criminal Code does not prohibit all forms of facilitation payments made to foreign public officials. Please refer to section C.2.a.i. of the report for a discussion of the issue of the small facilitation payments defence; and to the *travaux préparatoires* to Act No. 228 of 4 April 2000 amending Section 122 of the Danish Criminal Code.

90 After the on-site visit, the Danish authorities indicated that the Tax Assessment Guidelines would be amended so that it clearly appears that no deductibility exists for payments to bribery in the private sector, if the payment is a criminal offence pursuant to the Criminal Code.

108. Tax officials have a period of 3 years and 4 months (starting from the end of the corresponding fiscal year) to provide the investigated person with a notification that it is being investigated. From the time of notification, the tax authorities then have a four months period to complete the investigation.

109. The onus of proof for an expense's deductibility rests on the businessman, and the costs looking to be deducted must be specified in accordance with their nature.[91] Where in connection with a tax audit suspicions arise that a bribe has been paid, the tax administration would conduct an investigation that could inquire into numerous aspects of the transaction.[92] What in practice constitutes the evidentiary threshold that initially triggers this investigation procedure is not entirely clear.

110. During the on-site visit, tax officials stated that it was very difficult for them to discover both bribes and facilitation payments made to foreign public officials in the course of their work. As to the question of how to determine in practice the difference between private and public sector bribery, representatives of the Danish tax administration recognised that this could create problems, as the deductibility of "customary" bribes paid in the private sector (see above section B.6.a.) provided a way through which bribes paid in the public sector could be concealed.

111. In Denmark, financial institutions are obliged to provide information to the tax authorities in accordance with the provisions in Part II of the Tax Control Act (TCA)[93]. Under Section 80 TCA, the tax administration can request specific information directly from financial institutions in all cases where the request concerns an identified person or account. In the rare cases where banks do not comply with the tax administration's request for information, the latter could refer the matter to the Board of Assessment (an independent public body) which has the power under Section 80 TCA to compel banks to provide information to the tax authorities. In cases where the request does not concern an identified person or account, the tax authorities always have to first obtain permission from the Board of Assessment before gaining access to bank records and information. Banks also have an obligation to systematically provide the tax authorities with information on who has opened and closed a bank account within their institution.

c) Sharing of Information and Duty to Report Foreign Bribery

112. Tax officials indicated that, although they do not have a binding obligation to report, in practice the tax administration would refer matters to SØK in all cases where tax officials detect suspicions of a criminal offence. The level of proof required for such reporting remains unclear (the Tax Control Act and the general principles of administrative law simply forbid tax officials from investigating criminal matters themselves). Once a case has been formally transferred to SØK for investigation, the latter can have access to all data obtained in the course of the tax audit.

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91 Executive Order No. 707 of 4 July 2005, Part 5

92 This could include: the correlation (documentation substantiating that there is correlation between the payment of the bribe and specific transactions), the quality of the delivery/service, the form of the payment (documentation showing the disbursement/ invoice/contractual basis), evaluation of the identity details on the invoice (telephone, fax, or e-mail), specification of the valuable consideration (from the party accepting the payment) and an investigation thereof, investigation of written private agreements, investigation of the payment (cash flow analysis); whether for example it is normal business routine to split a given payment into several smaller portions, investigation of the distinguishing form of the payment (bank transfer/cheque/cash) and whether the choice of payment form may indicate a desire to evade detection by tax authorities. [Information provided by Denmark in the responses to the Phase 2 Questionnaire, section 17.1]

93 A translation of Part II of the Tax Control Act was not provided by the Danish authorities. This section of the report relies on information collected in the responses to the Phase 2 Questionnaire and through on-site visit discussions.

113. Tax officials are subject to sanctions for a breach of professional secrecy – a fine or a maximum of six months imprisonment in regular cases – as provided under Sections 152-152a and 152c-152f of the Danish Criminal Code. Accordingly, Section 17 DTAA compels tax officials to "… *observe absolute secrecy vis-à-vis unauthorized parties* …" and reminds them of the applicable penalties in case of breach.

114. Tax authorities do not keep a central register concerning tax offences. Such register exists only at the level of local tax authorities and local police. There are also no available statistics on the reporting by tax officials of suspicions of crimes to the law enforcement authorities.

115. Cooperation between the tax administration and the police is governed by the general rules on cooperation between public agencies.[94] These rules also cover the disclosure by tax officials of information requested in the course of criminal proceedings.

Commentary

The lead examiners are satisfied with the explicit prohibition of deductibility of bribes paid to foreign public officials, but they are concerned that in practice some issues in awareness and detection might arise from the fact that the tax guidelines are at variance with the law. The lead examiners recommend that Denmark provide enhanced guidance and training to tax officials on the application of the rules prohibiting tax deductibility, including the detection of bribe payments disguised as legitimate allowable expenses.[95]

The lead examiners recommend that Denmark establish clearer guidelines to the effect that tax inspectors are required to report cases of suspected foreign bribery to the investigative authorities. They also recommend that the Danish authorities enhance the availability of detailed statistics on tax offences and reporting by tax officials to law enforcement agencies.[96]

7. Accountants and Auditors

a) Accounting and Auditing of the Private Sector

116. The Danish Commerce and Companies Agency (DCCA), an agency under the Ministry of Economic and Business Affairs, is the authority responsible for the regulation of the audit profession. It issues executive orders based on the Act on State Authorized and Registered Public Accountants. The Institute of State Authorized Public Accountants in Denmark (FSR) is a private organization established by the profession. Ninety-four percent of licensed state authorized public accountants are members of FSR. The FSR issues the Danish accounting and auditing standards.

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94 Subsection 28(3) of the Public Administration Act states that "… *confidential information may be passed on to another administration authority only when the information must be assumed to be of essential importance to the performance of that other authority's activities or for a decision to be made by that other authority*."

95 After the on-site visit, the Danish authorities indicated that the tax administration would consider the possibility of making the OECD Bribery Awareness Handbook for Tax Examiners obligatory guidance and source of inspiration for the Danish tax authorities.

96 After the on-site visit, the Danish authorities indicated that the tax administration would consider the possibility of establishing guidelines for reporting information on bribes to the police, and that the possibility of maintaining detailed statistical information on tax fraud and reporting would be re-evaluated.

117. The Danish Bookkeeping Act, which applies to the vast majority of enterprises established in Denmark[97], requires companies to follow accepted bookkeeping principles (which as a general rule include the Danish Accounting Standards issued by the FSR), to keep good track of records, and to ensure that accurate and well-kept books are easily accessible. It also stipulates that accounting records and books must be kept for five years from the end of the corresponding accounting period. Acts contrary to the accounting requirements enclosed in the Bookkeeping Act are punishable with a fine unless a more severe sentence can be given in accordance with other legislation.[98]

118. Since 1 January 2006, the Copenhagen Stock Exchange (CSE) requires listed companies to include in their annual report a statement concerning the CSE Recommendations for corporate governance ("comply or explain" rule). The CSE Recommendations deal with various aspects of corporate governance; it notably asks supervisory boards: (1) to consider publishing details of a non-financial nature such as information about the company's ethical and social responsibilities in the company's annual reports; (2) to make a specific and critical assessment of the auditor's independence and competence; (3) to review and assess the internal control systems within the company and the quality of the management's oversight of such systems, and (4) to consider establishing an audit committee.

119. The DCCA is responsible for receiving and publishing annual reports. It also selects and checks through random sampling annual reports and the accompanying auditor's reports to ascertain any obvious violations of accounting regulations. Violations are punishable with a fine.

120. The Danish Securities Council[99] is the agency responsible for enforcing compliance of listed companies with accounting regulations in their annual and interim reports. The Securities Council has the authority to review financial statements from listed or traded undertakings and to monitor and enforce financial reporting, accounting and auditing of listed companies.

(i) Awareness and Training

121. Regarding the accounting and auditing professions, no specific awareness raising or training activity concerning the foreign bribery offence or its detection has been organised by either government agencies or the FSR. FSR had offered to its members various courses on fraud and money laundering in the five years which preceded the Phase 2 examination of Denmark, but none of these courses had dealt with domestic or foreign bribery.

(ii) Accounting and Auditing Standards

122. Listed companies have to follow the Danish Accounting Standards issued by FSR. Danish Accounting Standards are closely modelled on the International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS). Danish Accounting Standards can be used on a voluntary basis by non-listed companies, and the FSR also issues accounting standards for SMEs.

(iii) External auditing

Companies required to submit annual reports

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97 Except enterprises which are non-commercial, not liable to taxation or duty or not required to give financial information to qualify for grants from EU or from the public sector of Denmark.

98 See section C.5 for additional information on false accounting offences.

99 The Danish Securities Council is an independent public agency consisting of both independent members and members who represent commercial interests in the securities area.

123. The Danish Annual Accounts Act (DAA) requires public (39 023) and private (116 887) limited companies, companies, association or cooperative with limited liability (1 337), limited partnership, partnerships with personal liability or partners (113), commercial foundations (1 233) and European Economic Interest Grouping to submit audited annual reports to the DCCA.[100] These represent approximately half of all active companies registered in Denmark. The DAA also contains the rules in the Fourth and Seventh Council directives of the European Communities (on annual accounts and consolidated accounts). Listed companies must follow the International Financial Reporting Standards (IFRS) in preparing their annual consolidated accounts, and audits have to be conducted with due consideration of the care, precision and speed required by the task and in accordance with good auditor practice.

The auditor's independence

124. Statutory auditors are appointed by company shareholders. Companies have the possibility of appointing only one external auditor, but at least one of the external auditors is required to be a state authorized public accountant. The Act on State-Authorised and Registered Public Accountants provides for the auditor's independence. The Act obliges audit firms to prepare guidelines to secure that their auditors are independent before they take on new assignments. The review of such guidelines takes place as part of the quality-test of the auditing firm (see below).

125. The March 2005 version of the FSR Code of Ethics for Professional Accountants, partially implementing the IFAC (International Federation of Accountants) Code of Ethics, also deals with the issue of the auditor's independence. The full IFAC Code of Ethics is expected to be implemented in a revised FSR Code of Ethics in 2006 or 2007.

Quality controls of auditing firms and oversight of the auditing profession

126. The Auditor's Public Oversight Body was created in 2003 to establish detailed procedures for the statutory quality assurance review of state authorized and registered public accountants. The results of all quality assurance reviews of auditing firms have to be communicated to the Auditor's Public Oversight Body[101]. The latter then decides the steps which should be taken in cases where it is found that the auditing firm under review (performed by another auditing firm or the oversight body itself) has violated legal rules or has neglected its duty.

127. The Auditor's Public Oversight Body also has the authority to ensure compliance with independence requirements, to establish whether sufficient quality control systems are developed and implemented, and to decide on any possible sanctions. Possible sanctions include issuing a warning, requiring a new quality review, or filing a disciplinary action (*e.g.* revoking the auditor's licence) or criminal action. Among the 435 auditing firms controlled in 2004, 8% were sanctioned.

(iv) Duty to Report Foreign Bribery

128. The Revised Recommendation states that "Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies" (Section V.B.iii). In Denmark, this requirement to report within the company structure is mainly provided for by the standards on auditing, which are issued and

100 The numbers in the parenthesis represent the total number of companies required to submit audited annual reports, broke down by company type. A total of 158 593 companies are required to submit to external auditing. Figures provided by Denmark.

101 The Auditor's Public Oversight Body is an independent public agency comprising of nine members, only four of which are from the profession.

enforced by the FSR and follow the International Standards on Auditing (ISA) developed by the International Federation of Accountants (IFAC). ISA 240 (the consideration of fraud in an audit of financial statements) states that where "the auditor has obtained evidence that fraud exists or may exist, it is important that the matter be brought to the attention of the appropriate level of management as soon as practicable". [102] It also states that reporting should take place even where the evidence concerns actions by employees at "a low level in the entity's organization", and that in certain cases the evidence should be reported to those charged with governance (corporate monitoring bodies).

129. The Revised Recommendation also states that "Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities" (Section V.B.iv). In Denmark, since 2003 there is an obligation for auditors to report outside of the company structure in certain specific circumstances. Section 10(5) of the Act on State-Authorised and Registered Public Accountants (ASARPA) states that if a company auditor realises that one or more members of the company management commits or has committed economic crimes in connection with the carrying out of their work, and if the auditor has a presumption that the crime involves significant amounts or is otherwise of a serious nature, the auditor must immediately notify each member of the management hereof. If the management has not at the latest 14 days hereafter made documentation available to the auditor that the necessary steps to stop ongoing criminal activity have been taken and made reparations to damages caused by crimes already committed, the auditor must immediately notify SØK of the presumed economic offences.[103] Failure to comply with these reporting requirements is punishable with a fine and with revoking the auditor's licence.

130. After the on-site visit, Denmark further indicated that according to Section 10(6) ASARPA – read in conjunction with the applicable Danish standard on auditing (AS 240 paragraph 93) – auditors are also required to report any indication of economic crimes committed by any company employees or agents to management. In case of inaction by management, the auditor has to report the alleged economic crime to SØK.[104]

131. At the time of the on-site visit, Section 10(5) ASARPA had not led to any report to SØK by an external auditor and no sanctions for failure to report inside or outside the company structure had ever been imposed, even though these reporting requirements were in force since 2003.[105] Statistics on the enforcement of the standards on auditing by the FSR were not provided.

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102 Similarly, ISA 250 provides for reporting by the auditor of non-compliance by the company with laws and regulations detected in the course of its audit and which may materially affect the financial statements.

103 This does not apply in cases which are dealt with under rules for the prevention of money laundering and the financing of terrorism. On this matter please refer to section B.8 of the report.

104 Denmark has referred to a commentator who has contended that the definition of economic crime includes bribery offences (Professor Lars Bo Langsted, *Revionsionsansvar*, p. 170).

105 In addition, Executive Order no. 90 of 22 February 1996 on Statements, etc. by State Authorised and Public Accountants requires auditors to provide information (in the auditor's report) on whether in the course of their work they have obtained reason to assume that "members of the management may become liable in damages or incur criminal liability for acts or omissions affecting the undertaking, affiliated undertakings, partners, creditors or employees." Failure to report is punishable with a fine. The Executive Order lists a series of specific violations of Danish legislation which should "always" be reported in the auditor's statement, but these do not include Section 122 of the Danish Criminal Code. The DCCA has issued in 2004 a new Executive Order which repeals the above mentioned 1996 Executive Order. However, Denmark has not provided the 2004 Executive Order to the examining team. The latter was thus not able to assess the regulatory framework currently in force in this regard or to describe how it relates to Section 10(5) ASARPA.

132. Finally, no guidance is provided to auditors with regard to (i) the scope of their legal obligation to report, or (ii) the acceptable "necessary steps" to be taken by management upon notification. One representative of the auditing profession considered that upon detection of an offence punishable under Section 122 of the Danish Criminal Code, the only thing which should prevent the auditor from reporting the matter to SØK after notifying management would be a report made to the police by the management itself. All auditors met at the on-site visit also held the view that in cases where the alleged offence concerned the highest-level managers, the company auditor would generally always seek private legal advice before undertaking any reporting action.

Commentaries

The lead examiners note that Denmark has largely met the requirements of the Revised Recommendation with regard to the external auditor's legal obligation to report indications of possible acts of bribery. Nevertheless, the lead examiners recommend that Denmark provide clearer guidance to auditors with regard to the scope of their legal obligation to report suspicions of foreign bribery. This should include guidance on how the rules as provided by the Danish standards on auditing relate to the provisions under the ASARPA with regard to the reporting obligations of auditors.

b) Accounting and auditing of the Public Sector

133. The National Audit Office of Denmark (NAOD), an independent institution under the authority of the Parliament, is the supreme audit institution of Denmark.[106] While conducting an audit and "depending on the nature of the entity and the nature of its operations NAOD's assessment of the risk of fraud may include review of the measures taken by management to prevent bribery and corruption."

134. Denmark indicates that when "discovered by NAOD in its audits or by the administrative authorities it is the responsibility of the administrative authorities to refer cases of suspected criminal offences to the police for further investigation", as the NAOD has "normally no role in investigating such cases". Indications of a possible illegal act of bribery detected by the NAOD could in first instance be reported back to the authority concerned and eventually to the relevant minister and in last instance to the Parliament's Public Accounts Committee (*cf.* Section 16 of the Auditor General's Act). In practice, indications of a possible illegal act of domestic or foreign bribery detected by the NAOD would never be reported directly to the law enforcement authorities.

135. As noted above in section B.4.b. of the report, the NAOD would also constitute the end of the reporting chain where criminal offences that involve public funds were detected and reported by public servants (*e.g.* through the administration of ODA contract).

Commentaries

The lead examiners recommend that Denmark consider requiring the NAOD to report to relevant law enforcement agencies all possible instances of bribery of foreign public officials detected in the course of its audits and reviews.

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106 In addition to the state accounts and the 425 institutions which they encompass, NAOD audits and/or reviews a number of companies, enterprises and foundations that receive state funding or are owned by the state. Private sector entities are also audited by a private audit firm, and in these cases NAOD either acts as a second auditor or review the audited accounts and the audit report.

8. Money Laundering Reporting

a) Suspicious Transaction Reporting

136. A new Act on Measures to Prevent Money Laundering and Terrorist Financing ("the 2006 Act") entered into force on 1 March 2006.[107] The new law further amends the Act on Measures to Prevent Money Laundering enforced in 1993 and in 2002 ("the 1993 Act" and "the 2002 Act").[108] The 2006 Act fulfils parts of Denmark's obligations under the Third EU Money Laundering Directive[109]. It also enacts provisions with a view to complying with the obligations under the 1999 UN Convention for the Suppression of the Financing of Terrorism and the UN Security Council Resolution 1373 of 28 September 2001 on the fight against terrorism and financing of terrorism.

137. In certain areas, the 2006 Act makes enhanced requirements for the regulated reporting entities' knowledge of their customers. In particular, this applies to knowledge about reporting entities' beneficial owners with controlling interests and increased awareness of so-called politically exposed persons (PEPs).[110] The reporting obligation is extended so that the regulated reporting entities will not only be required to notify SØK if they suspect that a transaction is associated with a violation of the Danish Criminal Code. In future, notification must also be effected if the regulated undertakings and persons suspect that a transaction is associated with a violation of special legislation punishable by imprisonment of more than one year. The reporting obligation is limited to violations punishable by imprisonment of more than one year. Finally, regular feedback between SØK and reporting entities will be institutionalised (Section 35 of the 2006 Act).[111]

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107 The 2006 Act was adopted after the on-site visit to Copenhagen.

108 The Danish Act on Measures to Prevent Money Laundering ("the 1993 Act") came into force on 1st July 1993. The 1993 Act, which implemented the First EU Money Laundering Directive, covered the range of basic measures which are required in the financial sector, including customer identification, record keeping and mandatory suspicious transaction reporting. The 1993 Act also regulated the reporting obligations of banks, insurance companies, investment firms, securities brokers, lawyers, tax consultant, auditors, bureau de change and all branches of foreign credit and financial institutions. Royal Decrees of 1996 and 1997 extended the application of the 1993 Act to Greenland and the Faroe Islands respectively. In the two islands, local banks are members of the Danish Bank Association.

109 The Directive also applies to casinos and is implemented for casinos in the "*lov om spillekasinoer*" (act on casinos), cf. Consolidated Act no. 861 of 10 October 1994, as amended by Act no. 443 of 31 May 2000 and Act no. 366 of 24 May 2005. Part of the regulation for lawyers follows from the Administration of Justice Act. The Directive incorporates large parts of the revised recommendations for the fight against money laundering and financing of terrorism which the Financial Action Task Force on Money Laundering (FATF) adopted in June 2003. The Directive repeals the two previous money laundering directives, which are implemented in the current Money Laundering Act.

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

111 Section 35(1) of the 2006 Act on feedback states as follows:

"*The Public Prosecutor for Serious Economic Crime may, if investigative considerations do not contradict this, inform the notifying person about the status of the matter, including whether a charge has been made, and may inform about deletion from the money laundering register at the Public Prosecutor for Serious Economic Crime, and about a final decision, on conviction possibly in the form of a judgment or a transcript of a judgment.*"

138. Section 4(1) of the 2006 Act amends Section 2 of the 1993 Act and the 2002 Act and provides a new definition of money laundering which now better reflects the money laundering offence under Section 290 of the Danish Criminal Code.[112] Section 4(2) of the 2006 Act also extends the reporting obligations to self-laundering.[113]

139. Statistics on Suspicious Transaction Reports (STRs) under the 1993 Act and the 2002 Act show that between 2002 and 2004, 984 STRs have been filed by reporting entities to the Money Laundering Secretariat (the Danish FIU). In particular, 637 STRs were filed by Banks, 301 by Foreign Exchange Bureaus, 59 by Money Remittance Operators, 15 by Lawyers, 4 by Casinos, 4 by Mortgages Credit Institutes and 7 by "others" undertakings. The Danish FIU also registers reports that have led to or formed part of judicial and administrative decisions. Figures consolidated from 1994 onwards show that 122 reports have led to 102 convictions, 3 criminal fines, 3 administrative fines, and 14 other administrative decisions. So far, there have been no convictions for failure to report a suspicion of money laundering or financing of terrorism.

b) Sanctions for Failure to Report

140. Pursuant to Section 37(1) of the 2006 Act a criminal sanction ("fine") is triggered by the intentional or grossly negligent failure of a reporting entity to:

a) notify the authorities if after the investigation it is still suspected that a transaction involves money laundering or the financing of terrorists,

b) establish the identity of certain investors,

c) keep transactional records for at least five years,

d) have internal policies,

e) have procedures and educational material in order to prevent money laundering and financing of terrorism,

f) keep the duty of confidentiality

141. Section 37(1) of the 2006 Act applies unless more severe punishment is incurred under the provisions of the Danish Criminal Code (*e.g.* Section 290 of the Danish Criminal Code). Imprisonment of up to six months can be imposed for particularly gross or extensive violations of the regulations regarding the reporting obligation, identification, or storage of identity and transaction information (Section 37(2) of

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112 Section 4(1) of the 2006 Act defines money laundering as follows:

"*4.- (1) For the purposes of this Act "money laundering" shall mean,*

unlawfully to accept or acquire for oneself or others a share in profits, which are obtained by a punishable violation of the law,

unlawfully to conceal, keep, transport, assist in disposal or in a similar manner subsequently serve to ensure, for the benefit of another person, the profits of a punishable violation of the law, or attempting or participating in such actions.

(2) The provision in subsection (1) shall also cover actions carried out by the person who committed the punishable violation of the law from which the profits originate."

113 The concept of money laundering under section 290 of the Danish Criminal Code, does not cover the acts of money laundering being carried out by the person who has committed the predicate offence (self-laundering) whereas this is covered by the EU Directive's money laundering concept, in that there is the same need for reports to combat crime, irrespective of whether it is the original perpetrator carrying out the money laundering act.

the 2006 Act). Legal persons may incur criminal liability for violations of the 2006 Act (Section 37(6) of the 2006 Act).

142. The 2006 Act vests SØK, the Danish Financial Supervisory Authority (supervision over banks and other financial institutions) and the DCCA (supervision over entities that commercially carry out activities involving currency exchange, transfer of money and providers of services for undertakings) with the enforcement of the reporting system.

143. On-site inspections are conducted by the Danish Financial Supervisory Authority (FSA) in small banks every four years, and every year in large banks.[114] If the bank under inspection does not comply with its obligations under the money laundering legislation, the FSA has the authority to report to SØK for investigation. During the on-site visit, the FSA indicated that the last few years have seen a sharp increase of non-compliance by banks with the anti-money laundering legislation (from no instance of non-compliance in 2002 to 25 instances of non-compliance in 2005; for a total of 39 during the period). Denmark indicated that the increased number of measures taken against credit institutions was due to the increased focus on the fight against money laundering and terrorist financing. In December 2004, the FSA wrote a letter to the Danish Bankers Association asking the association to urge its members to pay more attention to their obligations under the money laundering legislation. The measures taken against credit institutions have included criticism for the lack of identification of customers and the lack of written internal rules on adequate control and communication procedures. These measures were followed by an order to come into compliance with the law. The FSA has taken similar measures against a total of 16 investment companies from 2002 to 2005. There have been no measures taken for lack of suspicious transaction reports. Referrals of cases of non-compliance to SØK remain very rare, as this was stated as having occurred only once (in 1998).

c) Typologies and Guidelines

144. Section 25(1) of the 2006 Act requires reporting entities to produce adequate written guidelines regarding the procedures and controls that must be followed in order to secure the entity's compliance with the Act. The Act, however, does not specify which procedures and controls are necessary to secure compliance nor does it define what amounts to a "suspicious transaction" with any precision. It is therefore the responsibility of each entity to elucidate on these concepts and assess which procedures and controls should be implemented. These procedure and controls are evaluated by the FSA and the DCCA as part of their regular enforcement activities. The FSA uses the guidelines issued by the Danish Bankers Association (see below) as a standard for evaluating the internal guidelines for reporting set up by individual banks.

145. The Danish Bankers Association has used guidelines since 1993. In August 2003, (after the enactment of the 2002 Act), the Danish Bankers Association issued a set of guidelines regarding the procedures and controls that may be followed by banks and financial institutions.[115] Under these guidelines, a "suspicious act" is defined as often being "an act which lacks a legitimate purpose, or is unusual in relation to the customer's known business activities or personal activities, or is generally unusual in relation to normal, everyday transactions".

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114 In relation to its size, Denmark has a large number of banks. There are 176 banks operating 2,014 branches, as well as 18 foreign banks and four Faroese banks operating in Denmark. (source: Economist Intelligence Unit (2005), *Country Profile 2005 – Denmark*, p.41)

115 Danish Bankers Association (2003), *Guidelines on Measures Against Money Laundering and Financing of Terrorism*, August 2003, p. 12. The August 2003 edition is a revised version incorporating the terror financing aspect which was included in the Danish Act on Money Laundering in 2002.

146. The guidelines issued by the Danish Bankers Association do not include typologies as such, but provide some indications as to which aspects of a transaction bank employees should concentrate on when assessing its "suspicious" nature. Overall, it is left "up to the individual employee's watchfulness to be aware of actions that may indicate money laundering"[116].

147. In Denmark, it is neither requirement nor practice to use a fixed quantitative threshold for triggering STRs. It is the nature of the transaction which is evaluated according to qualitative criteria of legitimacy and normality.

148. The guidelines issued by the Danish Bankers Association are not systematically used by all banks, which often have their own guidelines. In particular, smaller banks have tended to develop their own standards and guidelines. Several associations including the Danish Insurance Association, the Bar and Law Society, the Institute of State-Authorized Public Accountants and the Danish Association of Chartered Estate Agents have issued guidelines for their members.

Commentary

The lead examiners recommend that the Danish authorities ensure that the new dispositions of the 2006 Act on money laundering are systematically and effectively implemented by reporting entities. They also recommend follow-up on the application of the new law, including with respect to the application of sanctions for failure to report under Section 37(1) of the 2006 Act.

The lead examiners recommend that the Danish authorities consider issuing more specific standards for suspicious transaction reporting (in the form of typologies, guidelines and training material) in order to assist reporting entities in effectively playing their role in the fight against money laundering and foreign bribery.

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

1. Investigation and Prosecution of Foreign Bribery

a) Law Enforcement Authorities

Police

149. The Police in Denmark, Greenland, and the Faroe Islands are part of the Ministry of Justice. The Administration of Justice Act (AJA) lays down the provisions on the organisation of Danish police. The Minister of Justice is the supreme police authority and exercises his powers through the National Commissioner of Police, the Commissioner of the Copenhagen Police and the chief constables.[117]

150. Denmark is divided into 54 police districts.[118] The police district of Copenhagen is headed by the Commissioner of the Copenhagen Police, the other police districts each by a chief constable.[119] The

116 *Id*.

117 Section 109 (1) of the Administration of Justice Act

118 The Police in Denmark, Greenland, and the Faroe Islands are part of the Ministry of Justice. In year 2004, the Danish Police Service employed 13 404 persons. Of these, 10 413 were uniformed police officers.

119 The Commissioner of the Copenhagen Police and the chief constables are also head of the local prosecution services within their districts.

National Commissioner of Police (NCP) supervises the general police work planning by the Commissioner of the Copenhagen Police and the chief constables and may give general directions and establish guidelines for the performance of official duties.[120]

151. At the time of the on-site visit, a reform of the Police forces was under parliamentary scrutiny. The reform was presented by one Danish Member of Parliament interviewed by the examining team as a "new way of fighting crimes in Denmark". It envisages, among other things, an overall re-organisations of police units at district level (from the actual 54 units to 12 district police units) with a strengthening of the role of the chief constables in fixing priorities and resources and the possibility of employing experts to assist investigators and prosecutors in complex cases.[121]

Awareness, Training and Resources

152. The Danish National Police College is a department within the office of the National Commissioner. The training of new recruits takes three years. Special courses are offered to police officers and prosecutors for their further training and specialization in specific duties (*i.e.* accountancy, economic and computer crime). The courses are targeted to police officers and prosecutors who deal with the investigation and prosecutions of economic crime, including domestic and foreign bribery. SØK is responsible for holding the courses on economic crime jointly with the Police College.

Commentary

The lead examiners recommend that Denmark undertake measures to ensure that the Danish National Police College provide intensified training of police officers and prosecutors on investigating foreign bribery, including the practical aspects of bribery investigations. Such training should also aim at raising the awareness about the adverse effects of corruption.

b) Prosecutors and the Judiciary

(i) The Judiciary

153. The Danish Courts comprise 82 County Courts, the Maritime and Commercial Court of Copenhagen, two High Courts and the Supreme Court.[122] County Court decisions may be appealed to the High Court. High Court decisions in first instance cases may be appealed to the Supreme Court which is the highest Court of the Kingdom of Denmark.[123]

154. The Danish court system is made up of professional judges and lay judges. At County level, a professional judge presides together with two lay judges. The High Courts consist of three professional judges together with three lay judges. In the most serious criminal cases three judges sit with a jury of 12

120 Section 742(2) of the AJA provides that the police shall launch an investigation upon the laying of an information (by a victim, a competitor or another) or on its own initiative, where it may reasonably be presumed that a criminal offence liable to public prosecution has been committed. The police may decide to terminate the investigation in cases where no preliminary charge has been made during the investigation. However, pursuant to Section 22 of the Public Administration Act, the police must explicitly state the reasons for terminating the investigation.

121 The reform should be effective as of 1st January 2007.

122 Furthermore, the Special Court of Indictment and Revision (*Den særlige Klageret*) deals with cases concerning disciplinary sanctions against judges and re-opening of criminal cases after a final decision.

123 There are 337 judges in Denmark, 210 first instance judges, 108 high court judges, and 19 Supreme Court judges. See on the Danish Court Administration, Official Website, http://www.domstol.dk/

lay persons. The Supreme Court has only professional judges.[124] The constitutionality of an act of Parliament can be challenged before ordinary courts and in the last instance before the Supreme Court. There are no special courts or departments of the courts for cases of corruption.

Awareness, Training and Resources

155. The courts are administrated by the Court Administration, an independent body under the responsibility of the Ministry of Justice.[125] The Court Administration also provides formal training activities for judges and new recruits. An initial three-year training course is mandatory for all new recruits whereas further education is on a voluntary basis. A list of training courses is published every year by the Court Administration. Seminars have been organized on EU and Human Rights Laws. However, none of the activities provided by the Court Administration has dealt with either domestic or foreign bribery so far.

Commentary

The lead examiners recommend that the Court Administration organises training programmes on foreign bribery for Danish judges, including new recruits.

(ii) The Prosecution Service

156. Danish Criminal procedure is based on the accusatorial principle. It is the duty of the public prosecutors, in cooperation with the police, to prosecute offences according to the rules of the Administration of Justice Act (AJA).

157. Part 10 of the AJA lays down detailed rules on the prosecuting authority. No special rules exist for the investigation and prosecution of bribery of foreign public officials. The Danish prosecution service is structured hierarchically and consists of the Director of Public Prosecutions, the Regional Public Prosecutors and the Chief Constables (in Copenhagen the Commissioner of the Copenhagen Police).

158. The Director of Public Prosecutions, who is appointed by the Minister of Justice, is the superior of the other public prosecutors and supervises their work. He is in charge of the conduct of trials before the Supreme Court. Six Regional Prosecutors are in charge of the conduct of trials before the High Courts. They have also hierarchical supervision of trials by the 54 Chief Constables who are in charge of the conduct of trials before the district courts and the Maritime and Commercial Court.[126]

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124 Judges are appointed for life by the Queen upon recommendation by the Minister of Justice as advised by the Judicial Appointment Council.

125 Established in 1999, the Court Administration is headed by a Board of Governors which is responsible for the administration of the judiciary. The Danish Government has no powers to instruct the Board of Governors, to interfere with any decision of the Court Administration or to supervise its activities. The Board of Governors appoints a Director to head the Court Administration charged with the day-to-day administration of the judiciary. This includes administration of appropriations, general personnel administration in particular in respect of court clerks, technology support and accommodation administration. The Court Administration further assists the Board of Governors in preparing budgets, which are to form part of the Ministry of Justice Finance Bill, source of the annual appropriations to the judiciary. The judiciary in the Faroe Islands and Greenland is also administered by the Court Administration.

126 In Denmark there are 500 prosecutors. 20 of them are attached to the Office of the Prosecutor General and 15-20 to each regional office. The remaining prosecutors work in the police districts. The Chief of Police of the Faroe Islands and the Chief Constable of Greenland are under the direct authority of the Director of Public Prosecution. They have the same level of authority as the regional public prosecutors.

159. Denmark has neither a special unit for the investigation and prosecution of corruption nor any special anti-corruption programmes. However, in addition to the basic structure the prosecution service includes two specialised units: SØK and the Special International Crimes handling war crimes and crimes against humanity.

160. The SØK investigates and prosecutes serious cases of domestic and foreign bribery. SØK, which was established in 1973, is responsible – nationwide – for investigating and prosecuting the most complex and serious cases of economic crime, such fraud (including investment fraud), embezzlement, breach of trust, tax offences, corruption, extortion, usury and insider trading.

161. When deciding to take on a case, SØK considers the following factors: *i)* the complexity of the case; *ii)* whether there is a link to organised crime and *iii)* whether special business methods were involved or whether the case is in any other way serious. SØK is staffed with 23 prosecutors, 53 investigators and support staff. Auditors can be employed on a case-by-case basis to assist prosecutors and investigators.

Awareness, Training and Resources

162. The priority of the resources within the prosecution and police is determined by multi annual budget agreements between the political parties.[127] Hereby general guidelines for the priorities on the fight against crime are laid down.[128] From the Minister of Justice the established priorities are communicated via the Director of Public Prosecution to the Regional Public Prosecutors and the police districts. However, the Danish Minister of Justice has not specifically designated the bribery of foreign public officials as a priority.[129]

163. The prosecution service in Denmark appears to have adequate material and human resources. Conflicts of competence between SØK and police would be resolved on an informal basis and with a "flexible approach". It should be noted, however, that none of such conflicts has been reported since the establishment of SØK in 1973.

164. Although there is no express provision which regulates the division of tasks between SØK and police districts, coordination and exchange of information appears satisfactory as confirmed by a prosecutor at the on-site visit. The same prosecutor also indicated that the most of the allegations reported to SØK came from the public sector (*e.g.* Danish ministries, tax and customs) with a few cases reported by private companies and the media.

c) The Conduct of Investigations

(i) <u>The Commencement of Proceedings. Mandatory Prosecution</u>

165. Part 10 of the AJA lays down detailed rules on the prosecuting authority. Pursuant to Section 96(2) of the AJA, the public prosecutors shall proceed with any one case at the speed permitted by the nature of the case, and shall thus ensure that guilty persons are held responsible, but also that prosecution of innocent persons does not occur (principle of objectivity). During the on-site visit, the Danish authority clarified that contrary to what it was stated in the Phase 1 Report, Section 96(2) of the AJA would establish

127 A share of the budget of the Ministry of Justice is allocated to prosecutors and police forces. In 2006, this portion was of DKK 7.2 billion (approximately EUR 1 billion).

128 The guidelines are usually implemented in the form of result contracts directed towards the individual parts of the police and the prosecution

129 According to a SØK representative interviewed during the on-site visit, "permanent priority" is given to serious criminal offenses such as sexual crimes and child pornography.

the principle of mandatory prosecution within the Danish judicial system (with some specific exceptions contained in Section 722 of the AJA).

(ii) Co-ordination among Bodies and Agencies

166. The SØK cooperates closely with other authorities, particularly the Financial Supervisory Authority *(Finanstilsynet)*, the customs and tax authorities and the Competition Authority. Regular meetings with these authorities are held to discuss the general cooperation and, if necessary, also specific problems between the parties in relation to, for example, a concrete investigation.

d) Investigative Techniques and Bank Secrecy

167. The principle of bank secrecy is established in Section 53a of the Act on Commercial Banks and Savings Banks, etc. (consolidated Act no. 658 of 12 August 1999 as amended by Act no. 393 of 30 May 2000)[130] which states as follows:

> *Members of the board of directors, members of local boards of directors or similar organs, members of the board of representatives in a commercial bank or credit co-operation, auditors and inspectors and their deputies, members of the board of management and other employees may not unlawfully divulge or use confidential information obtained during the discharge of their duties.*

168. It is not 'unlawful' for a bank or bank employee to divulge confidential information if so authorised by a court in the course of a criminal investigation according to the AJA.[131]

169. The AJA also provides a wide range of investigative techniques for criminal offences.[132] These may include the invasion of the secrecy of communication (*e.g.* telephone interception, recording of private communications, letter opening and letter stopping), undercover operations, search and seizure. In particular, undercover operations and invasion of the secrecy of communications can only be carried out if the investigation concerns an offence which under the law can be punished with imprisonment for six years or more.[133] Since the maximum penalty for a foreign bribery offence under Section 122 of the Danish Criminal Code is imprisonment up to three years, it appears that such special investigative means would not be available in foreign bribery investigations.

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130 OECD Working Group on Bribery (2001), *Phase 1 Review of Implementation of the Convention and 1997 Revised Recommendation – Denmark*, OECD, p.22 (Hereafter "Phase 1 Report")

131 The Administration of Justice Act, Chapter 74, Sections 801-807d

132 The Administration of Justice Act, Sections 750-807d

133 The Administration of Justice Act, Section 754a (undercover operations) and Section 781(1) (invasion of the secrecy of communication)

Commentary

The lead examiners note that the use of important investigative means such as interception of communications and undercover operations would not be available in foreign bribery investigations. Thus, they recommend that Denmark make such special investigative means available for investigating the more serious cases of foreign bribery.

e) Mutual Legal Assistance and Extradition

(i) Mutual Legal Assistance[134]

170. Since 2000, Denmark has neither received nor made any requests for mutual legal assistance regarding the bribery of a foreign public official.

171. Denmark has acceded to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and the pertaining Protocols, but the convention has not been transposed into Danish law. The only requirement for MLA is that the request could be carried out in corresponding national Danish criminal proceedings.[135] Dual criminality would be deemed to be met to the extent that the requesting country "properly implemented (the Convention) into criminal law".

172. The Ministry of Justice is Denmark's central authority for the receipt and transmission of international requests for mutual legal assistance in criminal matters. Letters of request are executed in Denmark by the local police authorities (Chief Constables and the Commissioner of the Copenhagen Police), the regional Public Prosecutors and SØK.[136]

173. On 5 December 2001, the Danish Ministry of Justice issued a set of general guidelines for the treatment of mutual legal assistance in criminal matters. The guidelines aim at a streamlining of co-operation in the area of mutual legal assistance in criminal matters. The guidelines concern "all criminal cases including cases of bribery of foreign officials". They have been sent to "the Director of Public Prosecutions, the District Public Prosecutors and all police districts".[137]

174. Danish dependent territories of Greenland and the Faroe Islands are able to provide legal assistance. Requests for mutual legal assistance must be directed to Danish Ministry of Justice, who will then forward the request to the respective territory.

(ii) Extradition[138]

175. Denmark has neither received nor made requests for extradition in relation to the offence of bribery of a foreign public official. Denmark co-operates in the field of extradition on the basis of a treaty

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134 See Annex 4 for a complete list of MLA treaties to which Denmark is a Party.

135 Denmark would not be able to provide MLA if, for instance, the statute of limitations for the corresponding offence in Denmark had expired. The provisions of the Administration of Justice Act on coercive investigative measures are applied by analogy to requests for MLA.

136 Declaration on good practice in mutual legal assistance in criminal matters (Joint Action of 29 June 1998), p. 1

137 Responses to the Phase 2 supplementary questionnaire, section 18.

138 See Annex 4 for a complete list of extradition treaties to which Denmark is a Party.

or reciprocity. It is party to many bilateral and multilateral treaties on extradition, including agreements with neighbouring countries (the Nordic Extradition Act).

176. There are no formal time-limits concerning requests from countries outside the EU and the Northern countries. However, the Danish authorities indicate that requests for extradition will be dealt with "as speedily as possible". If the person is held in custody pending the decision on whether extradition is granted or not, the Danish law on extradition provides time limits for receiving the extradition documents (30 days from the arrest)[139]. The person must be surrendered to the requesting country within 30 days from the final decision on extradition.

177. Denmark has ratified the EU Council framework decision on the European arrest warrant and the surrender procedures between the Member States which facilitates extradition between the member states, including extradition for the crime of bribery of a foreign official. The decision came into force on 1 January 2004.[140]

178. A draft amendment to the Act on Extradition of Offenders was adopted in 2002. The amendment provides for the extradition of Danish nationals for prosecution abroad when the predicate criminal act carries a possible sentence of more than four years' imprisonment under Danish law or the Danish national resided in the country seeking extradition for at least two years prior to the offence for which the extradition is sought and that this offence is punishable under Danish law by a period of imprisonment of at least one year. Aliens can be extradited for prosecution or execution of a judgment in a state outside the European Union if the act is punishable under Danish law by a period of imprisonment of at least one year[141].

2. The Offence of Foreign Bribery

a) Elements of the Offence

179. Active bribery of persons exercising a public office or function is an offence under Section 122 of the Danish Criminal Code as amended by Act No. 228 of 4 April 2000. The offence applies irrespective of whether the office or function is Danish, foreign or international. In addition, the previous requirement that the public official commit a breach of duties has been replaced with the term "unlawfully" (*uberettiget*).[142] Section 122 of the Danish Criminal Code reads as follows:

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139 Under special circumstances, the time limit of 30 days for surrender of the person in custody can be extended by the court.

140 Danish nationals and foreign citizen must in general be extradited with a view to prosecution in another EU Member State pursuant to a European Arrest Warrant if the offence in question may entail prison for at least 1 year in the requesting State and a similar act committed in Denmark is also punishable under Danish law (the requirement of double criminality). However, the requirement of double criminality does not apply in respect of extradition for certain specified acts - including terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illegal trafficking in arms and drugs, and bribery – if the act in question in punishable by prison for at least 3 years in the requesting State.

141 If there is an agreement on extradition with the state involved, extradition of non-Danish nationals is possible for offences that carry a maximum penalty of less than 1 year of imprisonment according to Danish law. Extradition to enforce a sentence is normally only allowed if the sentence is for at least 4 months.

142 Concerning Section 122 of the Danish Criminal Code, the travaux préparatoires provide the following general comment on this aspect of the amendment:

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

180. Section 122 of the Danish Criminal Code comprises a "gift or other privilege". This term includes both pecuniary and non-pecuniary advantages, such as the promise of personal return services. In Phase 1, the Danish authorities indicated that the term "privilege" was an inaccurate translation of the Danish "*fordel*", which was best translated as "advantage".[143]

Application of Term "Unlawfully"

181. Section 122 of the Danish Criminal Code applies to any person who "unlawfully grants, promises or offers" a gift, etc. Denmark indicated that the terms "undue" or "unjustified" are in fact better suited than the term "unlawfully" for the purpose of translating the Danish term "*uberettiget*" which is used in the law. That term would provide an exclusion from the offence in the following cases: (1) The usual gifts in connection with anniversaries, etc; (2) A grant of a gift as a reward for an act already carried out without any advance promise, except where the gift is an implicit bribe for possible future acts; and (3) Small facilitation payments.[144]

182. The notion of "usual gift in connection with anniversaries" relates to the requirement that the granting of a gift or other advantage must be provided "unduly" in order to constitute an act of active bribery according to the circumstances.[145] No case law has been established regarding the interpretation of the term "unduly" or its application in relation to "usual gifts in connection with anniversaries". Similarly, there are neither guidelines nor guidance for Danish public officials dealing with this topic.

183. Denmark explains that the requirement that a gift be granted "unduly" in order to constitute bribery is assumed to entail that privileges of minor nature which do not involve any risk of affecting the

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"*… it [was] proposed to amend the description of the action of active bribery, deleting the requirement that the gift or the privilege must have been granted, promised or offered to make the public official commit a breach of duty. Instead, an express reservation is inserted to the effect that the bribery is only an offence if it is an "unlawful" grant (promise or offer) of a gift or other privilege. Compared with the present delimitation of the offence of bribery in section 122, the amendment will involve a minor extension of the criminal scope*."

143 Phase 1 Report, p 3

144 Phase 1 Report, p.4

145 Reference is made to the following excerpt from the travaux préparatoires of Section 122 of the Danish Criminal Code as amended by Act No. 228 of 4 April 2000:

"*Thus, under the proposed provision it is sufficient that the gift or privilege was (unduly) granted, promised or offered to induce the public official to do or fail to do anything in relation to his official duties. There is no additional requirement that the action or omission sought to be induced in the public official will involve anything by which he would be guilty of a breach of duty or that the briber has any such intent. The grant of a gift as a reward for an act already carried out without any prior promise thereof will fall outside the scope of the application of section 122 as hitherto. The same applies to gifts in connection with anniversaries, resignation and the like. Such gifts are not unlawful, nor are they granted to induce the recipient to do or fail to do anything in relation to his official duties.*"

recipient's future performance of his official duties can be excluded from the criminal scope of Section 122 of the Danish Criminal Code.[146]

184. With respect to the exception for small facilitation payments, the *travaux préparatoires* state that the assessment of whether a particular offer, etc. would involve a small facilitation payment "must take into account the situation in the country in which the public official exercises his office and the purpose of such grant."[147] It is further stated therein that the case might be covered where the purpose of the gift was to induce the foreign public official to act in breach of his/her duties. In the Phase 1 review, the Working Group recommended that this issue would be monitored in Phase 2.[148]

185. The Danish authorities elaborated at the on-site visit that the provision of the *travaux préparatoires* concerning gratuities granted to make the foreign public official act in breach of his duties intends to cover "very marginal situations" which would fall outside the remit of the Convention.[149] They added that, in all cases where an international business transaction was involved, small facilitation payments for acts in breach of the foreign public official's duties would be punished pursuant to Section 122 of the Danish Criminal Code. The same provision applies to small facilitations payments made to a Danish domestic official which are always illegal.

186. Despite these assurances, the lead examiners remain concerned that the provision in the *travaux préparatoires* on small facilitations payments for acts in breach of the foreign public official's duties represents a potential loophole. In particular, the reference to "gratuities … to make the foreign public official act in breach of his duties" is unclear and could lead to confusion or misunderstanding.[150] Furthermore, the lead examiners note the lack of any guidance provided by the Danish government to Danish companies on how to deal with such occurrences when doing business abroad.

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146 The granting of such minor gifts in connection with anniversaries which occur in recognition of the recipient's work in general and not in order to induce him to a specific act or omission in the future is thus usually not considered "unduly" in the meaning of Section 122 of the Criminal Code.

147 The travaux préparatoires provide for an exception in the following circumstances:

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

148 Phase 1 Report, p. 25

149 The *travaux préparatoires* illustrate the situation where a sum of money is given to a prison officer to get access to visiting a family member incarcerated in the prison in question: "… *if [the payment] occurs in Denmark, it will be criminal bribery. If, on the other hand, it occurs in a country where it is necessary to pay money "under the table" to visit inmates and possibly bring along food, blankets, medicine or the like to the inmate, the Ministry of Justice would not normally consider it 'unlawful' to pay the amount demanded. Under such circumstances, the Ministry of Justice finds that this would apply even if the prison regulations of the country in question make it a breach of duty for the prison officer to permit visits, and where, therefore, the payment can be said to have as its purpose to induce him to commit a breach of duty."*

150 For an example of such misunderstanding within Danish businesses, please refer to section B.1.b.ii. of the report.

187. The lead examiners are of the view that the Danish authorities should further clarify the impact of the provisions concerning small facilitation payments in order to make it clear that small facilitation payments to induce the foreign public official to act in breach of his/her duties are always illegal pursuant to Section 122 of the Danish Criminal Code. In this respect, Denmark could use upcoming publications by the Ministry of Justice (the MOJ booklet on corruption) and the Trade Council of Denmark (TCD Guidelines) to clarify the impact of the above-mentioned provision[151].

Commentary:

The lead examiners recommend that the Danish authorities ensure that the provision of small facilitation payments is not an impediment to the effective enforcement and prevention of the foreign bribery offence. In particular, they recommend that the Danish authorities clarify that small facilitation payments given to induce the foreign public official to act in breach of his duties in the context of an international business transaction are illegal pursuant to Section 122 of the Danish Criminal Code. They also recommend that the Working Group monitor the application of the exception for small facilitation payments in foreign bribery as cases develop.

b) Jurisdiction

(i) Territorial Jurisdiction

188. Section 6 of the Danish Criminal Code provides for Danish criminal jurisdiction over acts committed within the territory of the Danish state. In Phase 1, the Danish authorities indicated that territorial jurisdiction applied to cases where the entire criminal activity or a part thereof was carried out on Danish territory. Case law was cited to indicate that territorial jurisdiction could be established in a case where "the defendant had arranged contacts, meeting times and meeting places for the persons involved by telephone from Denmark".[152] According to Section 9 of the Danish Criminal Code, Danish territorial jurisdiction could also apply over certain punishable acts committed abroad where their consequence has taken effect or was intended to take effect in the Danish territory.

(ii) Nationality Jurisdiction

189. Pursuant to Section 7(1) of the Danish Criminal Code, acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state are subject to Danish criminal jurisdiction where the act was committed (i) outside territory recognised by international law as belonging to a state, provided that acts of the kind concerned are punishable by a sentence exceeding imprisonment for four months; or (ii) within the territory of a foreign state, provided that it is also punishable under the law in force in that territory (dual criminality requirement). The application of this dual criminality requirement has a potential for leaving outside of Danish jurisdiction a number of bribery acts committed abroad by Danish nationals and residents.[153]

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151 After the on-site visit, Denmark indicated that the MOJ booklet on corruption would contain a paragraph on "small facilitation payments" including examples in order to clarify the scope of the term.

152 Judgement from the Eastern High Court, 5 October 1989; cited in the Phase 1 Report at 14.

153 In the Phase 1 Report, the Danish authorities indicated that application of the principle of dual criminality under Section 7(1)(ii) of the Danish Criminal Code would not cover the following situation: A Danish national bribes a foreign public official from country "B" abroad in country "A", and in country "A" bribery of a foreign public official is not an offence. The Danish authorities have confirmed this information during the on-site visit.

190. The dual criminality requirement is further enhanced by Section 10(2) of the Danish Criminal Code, which requires that where the act is subject to Danish criminal jurisdiction pursuant to Section 7 of the Danish Criminal Code, the punishment may not be more severe than that provided for by the law of the territory where the act was committed. Section 10(2) of the Danish Criminal Code does not diminish the scope of the Danish jurisdiction over foreign bribery offences. However, it is likely to diminish the effectiveness, proportionality and dissuasiveness of the sanctions for foreign bribery offences committed wholly abroad in cases where active bribery is not sufficiently sanctioned in the foreign country where the act is committed.

(iii) Jurisdiction over Non-Nationals and Extraterritorial Jurisdiction

191. Pursuant to Section 7(2) of the Danish Criminal Code, Danish nationality jurisdiction applies to acts committed by a person who is a national of, or who is resident in Finland, Iceland, Norway or Sweden, and who is present in Denmark.

192. Pursuant to Section 8 of the Danish Criminal Code, certain specific acts committed outside the territory of the Danish State may also come within Danish criminal jurisdiction irrespective of the nationality of the perpetrator. However, the Danish authorities clarified that Section 8 of the Danish Criminal Code would not apply to the offence of bribery of foreign public officials.

Commentary

The lead examiners recommend that Denmark review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials. In this regard, they recommend that Denmark consider taking steps in order to establish Danish jurisdiction over acts of bribery of a foreign public official committed by Danish nationals wholly outside the territory of the Danish State irrespective of where the act has been committed.

(iv) Consultation and Cooperation with regard to Jurisdiction

193. In their responses to the Phase 2 Questionnaire (section 2.5), the Danish authorities indicated that they would, within the compass of the "general Danish legislation on passing on information concerning criminal conduct", notify the authorities of a foreign country of any information concerning the bribery of a foreign public official relevant to them. In Denmark, notification of foreign authorities of persons sentenced for bribery is carried out by the National Commissioner, who is responsible for the Danish Criminal Register. Notification is given to the authorities in the country of nationality or alternatively the country of residence[154].

Commentary

In view of the fact that foreign bribery cases are often subject to the potential jurisdiction of more than one State, the lead examiners recommend to follow up on the application of the foreign State notification procedure of Denmark in foreign bribery cases.

[154] Denmark also states that other kinds of information will, if no agreement dictating otherwise exists, most likely to be passed on to the Ministry of Justice of the state involved. If the information is deemed relevant for the countries of eventual business partners involved in a transaction, the Danish authorities will also pass on the information to them.

c) Defences[155] and Exemptions from Prosecution

(i) Consent of the Minister of Justice to Prosecution

194. As noted above, the Minister of Justice superintends the public prosecution service. Pursuant to Section 98(3) of the AJA, he/she can give instructions to the public prosecutors concerning the processing of concrete cases, including instructions to institute or continue, omit or discontinue prosecution[156].

195. In addition, Section 720(1) of the AJA states that "the Minister of Justice may provide that public prosecution in specific cases is conditional on the decision of the Minister of Justice or the Director of Public Prosecutions".

196. Both Section 98(3) and Section 720 of the AJA refer to the prosecution of criminal cases. The two provisions do not apply to the investigation of criminal cases which is not subject to any consent requirement. The Danish authorities have clarified that instructions given according to the consent requirement in Section 98(3) of the AJA would target specific (concrete) cases whereas Section 720 of the AJA would provide the Minister of Justice (or the Director of Public Prosecutions-DPP) with a broader "policy" tool to give instructions that the prosecution of certain criminal offences would be conditional on the MOJ's (or the DPP's) consent.

197. In this context, the Danish authorities have also indicated that in pursuance of Section 720(1) of the AJA the Director of Public Prosecutions has provided that the prosecution of those offences under Part 16 of the Danish Criminal Code which have been committed by royally appointed civil servants "shall be subject to decision by the Minister of Justice"[157]. Part 16 of the Danish Criminal Code includes the offence of passive bribery committed by public officials (Section 144 of the Danish Criminal Code), but not active bribery (Section 122 of the Danish Criminal Code, which figures under Part 14).

198. Act no. 368 of 24 May 2005 (requirements of notification and form concerning the Minister of Justice's instruction to the prosecution service in criminal cases) has amended Section 98(3) of the AJA, making it a requirement that the instructions mentioned herein which may be given by the Minister of Justice to the public prosecutors to institute or continue, omit or discontinue prosecution, shall be given in writing and be accompanied by grounds. In addition, the President of Parliament (*Folketing*) shall be notified in writing. Notification may be delayed if so warranted by special considerations including relations to foreign powers and the security of the State.

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155 The defence of small facilitation payments and its application under Danish law is treated under section C.2.a.i. of the report.

156 Section 98 (3) of the Administration of Justice Act states that:

"*The Minister of Justice may give instructions to the public prosecutors concerning the processing of concrete cases, including instructions to institute or continue, omit or discontinue prosecution. An instruction in pursuance of this provision to institute or continue, omit or discontinue prosecution must be given in writing and be accompanied by grounds. Furthermore, the President of Parliament (Folketingets formand) shall be notified of the instruction in writing. If the considerations which are mentioned in section 729 c (1) makes it necessary, notification may be postponed. The instruction is in regard to access to documents in pursuance of sections 729 a-d considered as materials provided by the police to be used for the case*."

157 The prosecution of offences against the independence and safety of the State and offences against the Constitution and the Supreme Authorities of the State is also subject to decision by the Minister of Justice.

199. Denmark has indicated that the new requirement of notification applies to the MOJ's instructions under Section 98(3) of the AJA, but it does not apply in situations where prosecution may otherwise be subject to the decision of the MOJ, such cases under Section 720(1) of the AJA.

200. The Danish authorities have also pointed to the long tradition of independence of the Minister of Justice from partisan considerations in exercising his discretion to give or withhold consent, noting that, within recent years, the Minister of Justice's authority to intervene in concrete cases under Section 98(3) of the AJA has only been applied once.[158] Moreover, Denmark indicated that the seriousness of a foreign bribery offence would always be considered a factor in favour of its prosecution.

(ii) The Withdrawal of Charges (Section 721 of the AJA)

201. A charge can be withdrawn in full or in part in the following circumstances: (1) where the charge is groundless; (2) further prosecution cannot be expected to lead to a conviction; or (3) completion of the case will "entail difficulties", or costs or trial periods that are not commensurate with the importance of the case and with the potential punishment in the event of a conviction.[159]

202. The competence to withdraw a charge rests with the Chief Constable in cases where the charge has proved groundless. In the other cases, the competence rests with the prosecutor, unless otherwise provided for by the Minister of Justice.[160] Parties who may be deemed to have a reasonable interest are notified of a decision to withdraw charges. They may lodge an appeal concerning such a decision with the superior prosecuting authority.[161] Where a decision has been made concerning the withdrawal of charges, prosecution of the former suspect may only be continued pursuant to a decision by the superior prosecuting authority.[162]

203. Denmark indicates that political considerations would not be taken into account in the determination of whether a case shall proceed.

Commentary

The lead examiners recommend follow-up of whether the MOJ's consent requirement to prosecution is an obstacle to effective implementation of the Convention and whether Denmark is in a position, within the exercise of the consent requirement, to fully respect Article 5 of the Convention. They also recommend that Denmark consider the appropriateness of the extension of the requirement of notification and form under Act no. 368 of 24 May 2005 to the MOJ's consent under Section 720(1) of the AJA. Denmark is also invited to compile relevant information to assist the Working Group in monitoring this issue.

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158 In the case in question, the Director of Public Prosecution had upheld the Regional Prosecutor for Copenhagen's decision of 27 March 1995 not to prosecute three policemen in connection to police actions carried out during riots on Nørrebro, Copenhagen, in May 1993. The decision made by the Director for Public Prosecution could not be appealed to the Minister of Justice. However, because doubts were raised as to whether the Director for Public Prosecution had been disqualified in rendering his decision, the Ministry of Justice considered that such special or extraordinary circumstances prevailed which warranted the use of the authority in Section 98(3) of the Administration of Justice Act. The Minister of Justice hereafter made a decision not to prosecute the three police men involved.

159 Section 721(1) of the AJA

160 Section 721(2) of the AJA

161 Section 724(1) of the AJA

162 Section 724(2) of the AJA

d) Limitation Periods and Delays in Proceedings

204. Section 93(1)(ii) of the Danish Criminal Code provides that the statute of limitations is 5 years where the offence is not punishable with a penalty more severe than imprisonment for 4 years. Thus, the limitation period for foreign bribery is five years as the maximum penalty for this crime is imprisonment of 3 years.[163]

205. The limitation period is calculated from the day when the punishable act or omission ceased.[164] Where liability depends on or is influenced by a consequence that has taken place or any other later event, the period is calculated from the occurrence of such consequence or later event.[165] The period is suspended by any legal proceedings as a result of which the person concerned is charged with the offence.[166]

206. At the time of the Phase 1 review, the statute of limitations for legal persons was 2 years.[167] The Working Group expressed concerns that a 2-year period was too short.[168] The Group was also concerned that the short limitation period could provide an obstacle to the provision of mutual legal assistance, because in applying the concept of dual criminality it appeared that Denmark might not be able to provide MLA if the statute of limitations for the offence in Denmark had expired. In June 2005, Denmark increased the statute of limitations for legal persons in foreign bribery cases to five years. Thus, the statute of limitations for legal persons is now equivalent to the one for natural persons.

Commentary

The lead examiners take note of the extension of the statute of limitations for legal persons in foreign bribery cases. They recommend that Denmark reports on the application in practice of statute of limitations in foreign bribery cases as jurisprudence develops.

3. Liability of Legal Persons

a) Criminal Liability of Legal Persons

207. Act n. 474 of 12 June 1996 amending the Danish Criminal Code lays down rules on criminal liability for legal persons. Criminal responsibility imposed upon a legal person does not exclude the possibility of also imposing criminal responsibility on natural persons. The provisions of the Danish Criminal Code that describe the standard of liability for legal persons are contained in Part 5 (Sections 25-27 of the Danish Criminal Code) and read as follows:

> *Section 25*
> *A legal person may be punished by a fine, if such punishment is authorised by law or by rules pursuant thereto.*
> *Section 26*

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163 Section 122 of the Danish Criminal Code

164 Section 94(1) of the Danish Criminal Code

165 Section 94(2) of the Danish Criminal Code

166 Section 94(5) of the Danish Criminal Code

167 Old section 93(1)(i) of the Danish Criminal Code stated that the statute of limitations for legal persons was 2 years from the day that the act or omission ceased.

168 The Working Group also recommended that where a state has criminal liability in this respect, the statute of limitations for legal persons should be equivalent to the one for natural persons.

(1) Unless otherwise stated, provisions on criminal responsibility for legal persons etc. apply to any legal person, including joint-stock companies, co-operative societies, partnerships, associations, foundations, estates, municipalities and state authorities.

(2) Furthermore, such provisions apply to one-person businesses if, considering their size and organisation, these are comparable to the companies referred to in subsection (1) above."

Section 27

(1) Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself.

(2) Agencies of the state and of municipalities may only be punished for acts committed in the course of the performance of functions comparable to functions exercised by natural or legal persons.

208. The DPP has provided some guidelines on the choice of liable person in cases involving corporate liability. The guidelines are found in Notice No. 5/1999 of 6 October 1999. The DPP guidelines are not binding on the courts. No further guidelines have been issued on this subject.

(i) Elements of Criminal Liability

209. Section 27(1) of the Danish Criminal Code does not restrict the application of the offence to high level employees and persons with managerial responsibilities. A contractual relationship (*e.g.* an agent) would be sufficient to trigger criminal liability in this respect.

210. In Phase 1, Denmark indicated that "the legal person may be held responsible even if the employee acted in conflict with explicit instructions from management, but totally abnormal actions exempt the legal person from responsibility". "Totally abnormal actions" were described as "extreme situations", that, according to the Danish authorities, were not relevant to the offence of bribing a foreign public official.[169]

211. Danish legal persons have full legal capacities provided that they are registered and fulfil some conditions (*e.g.* the minimum capital and the number of representatives).[170] The DCCA is the authority in charge of the registration of company details. Via an online link the police can have access to relevant details recorded by the DCCA about a company's management, directors, articles of association, powers to sign for the company and the auditor or auditing company used by the company.[171] DCCA's central register is also accessible to the public.

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169 Phase 1 Report, p. 9

170 Danish legal persons can be public companies (*aktieselskaber*, A/S), private companies (*anpartsselskaber*, ApS), companies or associations with limited liability (*virksomheder med begrænset ansvar*, V.M.B.A.), limited liability co-operatives (*andelsselskaber*, A.M.B.A.), limited partnerships (*kommanditselskaber*, K/S), the European Company (*Det Europaeiske Selskab*, ES) partnerships with personal liability of partners (*interessentskaber*, I/S) and commercial foundations.

171 There are normally no details on the owners of the shares in a company, but if an individual or a company owns more than five per cent of the shares in a specific company, the annual report of that company must identify the owner of such shareholding. The police have an online link to the annual reports submitted to the DCCA.

(ii) Discretionary Nature of Criminal Liability

212. Under Section 306 of the Danish Criminal Code, criminal liability of legal persons is discretionary. Section 306 of the Danish Criminal Code reads as follows: "*Companies etc. (legal persons) can be held criminally liable according to the provisions in Chapter 5 for violation of this Act."*

213. Section 306 of the Danish Criminal Code provides no guidance on the exercise of this discretion. The DPP guidelines refer to the "principle of choice" as the choice of liable person in cases where the prosecutor finds it possible to conduct criminal proceedings against a legal person and one or more natural persons in respect of the same offence.

214. Concerning companies falling within Subsection 26(1) of the Danish Criminal Code (*i.e.* any legal person including joint-stock companies, cooperative societies, partnerships, associations, etc.), if the corporate management or an executive employee have acted with intent or gross negligence, the DPP guidelines prescribe that not only the company but also the individual personally responsible "must be prosecuted"[172].

215. Where criminal liability is applicable under other criminal statutes, such as the Environmental Code and the Industrial Safety Code or in situations where the offence is of minor importance, the DPP guidelines state that "corporate liability must be the principle liability". The general rule is thus "to prosecute the company as such"[173].

216. The DPP guidelines also state that it is a condition for imposing liability on a company that the offence has been committed in the course of its business and that offence is attributable to one or more persons connected with the company.[174] Thus, offences committed by an employee in connection with purely private acts will not give rise to criminal corporate liability as the offence will generally not possess the requisite of the functional link with the business of the company.

217. Complete identification of one or more individuals or prior conviction of the natural person(s) is not a prerequisite to proceed against the legal person. During the trial of the legal person, however, it must be proved that "someone" within the company intentionally or by negligence (depending on whether intent or negligence is required in order to hold someone criminal liable) committed the crime.

218. Section 705 of the AJA provides that the criminal proceedings against the legal person will normally be conducted simultaneously with the criminal proceedings against the natural person unless this would imply a major delay or difficulty. The responsibility of the legal person does not preclude the personal responsibility of the natural person who intentionally violated the relevant provisions of the Danish Criminal Code.

219. In Phase 1, the Working Group recommended that the discretionary nature of criminal liability of legal persons would be followed-up in Phase 2 to assess how, in practice, the discretion would be applied to foreign bribery cases.[175] So far, no criminal procedures have been initiated in Denmark against a legal person for a bribery offence, whether domestic or foreign. Furthermore, at the on-site visit, Denmark has not provided the lead examiners with supporting case law or statistical data on the application of the

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172 Notice No. 5/1999 of 6 October 1999, p. 3

173 Notice No. 5/1999 of 6 October 1999, p. 3

174 Notice No. 5/1999 of 6 October 1999, p. 3

175 Phase 1 Report, p. 26

principle of discretion to legal persons. Thus, the lead examiners are unable to conclusively assess how, in practice, the principle of discretion would apply to foreign bribery cases.

(iii) State-controlled or State-owned Entities

220. Section 27(2) of the Danish Criminal Code states that "agencies of the state and of municipalities may only be punished for acts committed in the course of the performance of functions comparable to functions exercised by natural or legal persons". The DPP guidelines confirm that "unless otherwise provided" the provisions on corporate liability laid down in Section 26(1) of the Danish Criminal Code apply to municipal and state authorities. The guidelines also state that such entities may only be punished for "violations committed when carrying out activities corresponding or similar to activities carried out by private individuals or companies"[176]. This means that the criminal liability of state-controlled or state-owned entities is only available in relation to entities performing the kind of function normally performed in the private sector (*e.g.* telecommunications, public transport).[177]

(iv) Parent Companies and Subsidiaries

221. Under section on "special rules for parent companies and subsidiaries", the DPP guidelines provide that a parent company is not liable for offences committed by its subsidiaries. Conversely, subsidiaries are not criminally liable for offences committed by parent companies.[178] The lead examiners are concerned that the application of these rules can leave outside of Danish jurisdiction a number of foreign bribery acts committed by Danish companies. This could possibly discourage Danish law enforcement agencies from investigating acts of foreign bribery committed by Danish nationals abroad.

(v) Jurisdiction

222. With respect to territorial jurisdiction over legal persons, the crime is considered to have been committed in the jurisdiction where the offence was committed by the relevant natural person. Nationality jurisdiction is not available for establishing jurisdiction over offences perpetrated by legal persons. Thus, Denmark does not have jurisdiction over offences perpetrated wholly abroad by foreigners who are not resident of Denmark and are employed by companies registered in Denmark**.**

b) Administrative Liability of Legal Persons

223. There is no non-criminal responsibility of legal persons concerning bribery of foreign public officials.

Commentary

Despite the existence of criminal liability of legal persons in Denmark for six years, the lead examiners take note of the absence of prosecution of or fines imposed on legal persons for acts of active bribery, irrespective of legal qualification. They recommend follow-up on this issue to ascertain whether the offence of bribery of foreign public officials in international business transactions is effectively applied to legal persons.

176 Notice No. 5/1999 of 6 October 1999, p. 7-8

177 Notice n. 5/1999 state that municipal and state authorities are not criminally liable for offences committed in connection with the exercise of officials powers (*e.g.* the issue of an unlawful permit). In such cases only individuals are criminally liable. See Notice n. 5/1999, p. 8.

178 Notice n. 5/1999, p. 8

4. The Offence of Money Laundering

a) Scope of the Money Laundering Offence

224. Since the Phase 1 review, Denmark has revised its anti-money laundering measures by amending Section 290 of the Danish Criminal Code. The new Section 290 of the Danish Criminal Code states as follows:

> *(1) Any person who accepts or obtains for himself or for others a share in proceeds obtained by any person who unduly, by hiding, storing, transporting, assisting in disposal a criminal offence and or in a similar manner later acts to secure for another proceeds of a criminal offence is guilty of handling stolen goods and is liable to a fine or imprisonment for up to one year and six months.*
>
> *(2) The punishment may increase to imprisonment for six years where the handling of stolen goods is particularly aggravating, particularly due to the commercial nature of the offence or as a result of the gain obtained or intended, or where a large number of offences have been committed … .*

225. The offence of money laundering is no longer limited to the handling of proceeds of specific predicate offences. The offence also covers money laundering of proceeds where the predicate offence was committed outside of Denmark. A conviction for a predicate offence is not a prerequisite to punishment for money laundering. Section 290 of the Danish Criminal Code covers both laundering of the bribe and the proceeds of bribery.

b) Enforcement of the Money Laundering Offence

226. Following the 1993 Act (see, for more details, under section B.8) the Money Laundering Secretariat (Danish FIU) was established as a unit within SØK.[179] Act n. 422 of 6 June 2002 on Measures to Prevent Money Laundering and the Financing of Terrorism further amended and consolidated the 1993 Act[180]. The Money Laundering Secretariat provides a central point for collection of all intelligence relating to money laundering, and SØK plays a significant role in all anti-money laundering initiatives that are implemented in Denmark.

c) Sanctions for Money Laundering

227. An offence under Section 290(1) of the Danish Criminal Code is punishable with imprisonment for any term not exceeding 1 year and 6 months. Where the offence is of a particularly aggravated nature or where a large number of such offences have been committed, the penalty may be increased to imprisonment for any term not exceeding 6 years (Section 290(2) of the Danish Criminal Code). If the offender "*accepts the proceeds as ordinary subsistence from his family members of his cohabitants or… as normal remuneration for usual consumer goods, articles for everyday use or services, the sentence may not*

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179 Three prosecutors, seven investigators and one administrative officer are permanently affiliated with the Money Laundering Secretariat which is also a member of the Egmont Group, The Danish Police Academy organizes mandatory training courses for staff of the Danish FIU. Although it has never been the sole topic of a course or seminar, corruption is a "constituent part" of training courses on economic crimes.

180 Section 2 of Act n. 129 provided the following definition of money laundering:

"… *'money laundering' shall mean conversion, transfer, acquisition, possession or use of assets, or suppression or concealment of their nature, origin, location, movements and ownership, and attempts at or participation in such activities with the knowledge or presumption that the assets originate from activities that violate the Danish Criminal Code*."

be imposed" (Section 290 (3) of the Danish Criminal Code). The offence cannot be committed negligently. However, Section 303 of the Danish Criminal Code criminalises gross negligence in acquiring by purchase or in receiving in any other similar manner objects acquired through an acquisitive offence.[181]

228. Denmark has provided statistics on violations of Section 290 of the Danish Criminal Code. Between 2002 and 2004 there were 2496 convictions for money laundering. In 468 cases the courts imposed unsuspended jail sentences; in 1302 cases the courts imposed suspended jail sentences and fines were imposed in 726 cases. Information on the length of sentences to one year of prison or more between 2002 and 2004 show that in 32 cases the courts imposed sentences from 1 to 2 years of imprisonment, in 5 cases from 2 to 3 years and in 2 cases from 3 to 5 years of imprisonment. Although criminal responsibility can be imposed on legal persons for a violation of Section 290 of the Danish Criminal Code, no legal person has been convicted of money laundering so far. Similarly, corruption was not the predicate offence in any of these cases.

5. The Offence of False Accounting

229. In Phase 1, the Working Group was concerned that the penalty of a maximum of 1-year for accounting offences in aggravating circumstances was not sufficiently effective, proportionate and dissuasive.[182] Since then, Denmark has amended the corresponding sections of the Criminal Code to increase the maximum penalty to 1 ½ year imprisonment (Act 366/2005). Notwithstanding these amendments, the lead examiners remain concerned about the low level of sanctions for accounting offences.

230. Section 296(1) of the Danish Criminal Code, paragraph 2, prohibits making incorrect or misleading statements on "the economic conditions of joint-stock companies, co-operative societies or similar undertakings", in any public communication, report, notification, etc. Breaches are punishable with a fine or imprisonment for any term not exceeding 1 ½ year. Breaches committed through gross negligence are punished by a fine or, in aggravating circumstances, by a maximum of 4 months imprisonment.

231. Section 302 of the Danish Criminal Code prohibits any accounting violation[183] committed in particularly aggravating circumstances. Breaches are punishable with a fine or imprisonment for any term not exceeding 1 ½ year. Where these acts or omissions done in particularly aggravating circumstances are committed through gross negligence, they are punishable by a fine or by a maximum of 4 months imprisonment.

232. After the on-site visit, Denmark has expressed the position that the level of sanctions for accounting offences is not an issue in view of the Danish rules on complicity and the potential application of other more serious offences (*e.g.* money laundering and forgery of documents[184]), which might

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181 Section 303 of the Danish Criminal Code states:

"*Any person who is guilty of gross negligence in acquiring by purchase or in receiving in any other similar manner objects acquired through an acquisitive offence shall be liable to a fine or to imprisonment for any term not exceeding six months*".

182 Phase 1 Report, p. 26

183 Including failure to keep ledgers or accounts, making incorrect or misleading statements in ledgers or accounts, failure to comply with a bookkeeping requirement provided by law or destruction of accounting materials.

184 According to Section 172 of the Criminal Code anyone who uses a false document with the intent to deceive anyone in any matter involving legal consequences is liable to a fine or imprisonment up to two years and under aggravating circumstances imprisonment up to six years.

eventually be used in combination with the offence of false accounting. Furthermore, Denmark has indicated that if the false accounting is used to mislead the taxations authorities (*e.g.* by covering up a bribe in order to obtain tax deduction), the perpetrator can also be punished for tax evasion according to either the fiscal legislation (imprisonment up to two years) or Section 289 of the Criminal Code (imprisonment up to eight years).

233. Denmark has not provided any statistics on the enforcement of accounting offences.

6. Sanctions for Foreign Bribery

234. At the time of the Phase 1 review, the Working Group was concerned that the penalty of imprisonment for active foreign bribery was comparatively weak, and was particularly concerned that for aggravated cases it was not sufficiently effective, proportionate and dissuasive.[185]

a) General Criminal Sanctions

235. According to Section 122 of the Danish Criminal Code, the punishment for the offence of bribery of public officials is a fine, or imprisonment for up to 3 years. The punishment for the passive bribery of a domestic or foreign public official is, pursuant to Section 144 of the Danish Criminal Code, a fine or imprisonment for up to 6 years. Penalties for other similar offences include a maximum of 8 years of imprisonment for fraud in aggravated circumstances, and a maximum of 4 years of imprisonment for tax fraud. Sections 50 and 51 of the Danish Criminal Code lay down general rules for the calculation of fines.[186]

(i) Natural Persons

236. Section 80 of the Danish Criminal Code lays down general rules for determining the penalty in relation to natural persons. It provides that, in sentencing, courts must have special regard to the gravity of the offence and to information on the offender's character (*e.g.* his general personal and social circumstances, his conditions before and after the offence and his motives for committing).

237. Sections 81 and 82 of the Danish Criminal Code give the details of the aggravating and mitigating circumstances that Danish courts have to take into account when the sentence is determined. The punishment may be reduced if the offender has given himself up and made a full confession. The same applies if the offender has given information of decisive importance to the clearing up of criminal acts committed by others.[187] These general rules also apply in cases of corruption.

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185 Phase 1 Report, p. 26

186 A fine can be imposed as a supplementary punishment to imprisonment where the perpetrator obtained or intended to obtain, through his/her offence, a gain for himself/herself or another (Subsection 50(2) of the Danish Criminal Code). Fines for violations of the Danish Criminal Code may range from 1 day-fine of 2 DKK to 60 day-fines of an indefinite amount. The main principle of the day-fine system is that the number of day-fines reflects the seriousness of an offence, while the size of a single day-fine is set according to the economic situation of the offender (Subsection 51(1)). Where an offence involved the obtaining of a "considerable economic gain" for the perpetrator or another person, and the application of the day-fines system would not be reasonable, having regard to the amount of the profit that has been or might have been obtained by the offence, pursuant to Subsection 51(1), the court may impose a fine other than in the form of day-fines (Subsection 51(2)).

187 Section 82 of the Danish Criminal Code states as follows:

"In determining the sentence, it is generally a mitigating circumstance that:

238. No case law has evolved since the enactment of the foreign bribery offence in 2000. Statistics provided by Denmark show that of 8 cases of active bribery under Section 122 of the Danish Criminal Code between 2002 and 2004, suspended jail sentences (Section 56 of the Danish Criminal Code) were imposed by Danish courts in 3 cases, prosecution was abandoned in 2 cases and acquittals were handed down in 3 cases. The situation does not change as to cases of passive bribery under Section 144 of the Danish Criminal Code. All cases in question were of minor nature (*e.g.* bribery of traffic officers). Between 2002 and 2003, suspended jail sentences were imposed in 5 cases, prosecution was abandoned in 2 cases and acquittals were handed down in 2 cases. Statistics on the average length of the sentences or fines imposed by Danish courts were not available.

239. These figures are consistent with the low number of bribery allegations reported to Police and Prosecutors between 1999 and 2004. In fact, only 23 reports concerning active bribery and 16 reports on passive bribery were submitted to the law enforcement agencies. None of the 23 reports related to foreign bribery.

(ii) Legal Persons

240. Section 25 of the Danish Criminal Code provides that legal persons may be punished by a fine "if such punishment is authorised by laws or rules pursuant hereto". The imposition of fines in cases of corporate responsibility is governed, in principle, by the same rules as those applying to natural persons. In addition to considering the nature of the offence (Section 80 of the Danish Criminal Code), special consideration must be given to the offender's capacity to pay and to the obtained or intended gain or amount saved pursuant to Subsection 51(3) of the Danish Criminal Code. Denmark stated that this would make it possible to impose a substantially larger fine on a legal person than on a natural person. However, as noted above, Denmark did not provide the lead examiners with statistical data on the level of fines imposed over legal persons by Danish courts.

(iii) Penalties and Mutual Legal Assistance

241. For the purposes of providing mutual legal assistance, there is no requirement that a certain maximum sentence can be imposed for the criminal offence in question (as long as it is subject to public prosecution) except in respect of requests for the provision of certain coercive measures (*i.e.* 1½ years or more for the inspection of a suspect's person if such inspection involves more than inspection of the appearance and clothes, the taking of photos, fingerprints etc., and 6 years or more for a wiretap of video surveillance in a private place). This is due to a requirement under the AJA on coercive investigative measures, which, according to case law, is applied by analogy to requests for mutual legal assistance.

(iv) Penalties and Extradition

242. Pursuant to the Act on Extradition of Offenders (*udleveringsloven*), extradition of a non-Danish national to a country outside the EU can only be ordered if, under Danish law, the offence may entail a more severe penalty than imprisonment for one year, unless there is an agreement specifying otherwise with the state involved.[188] Since the maximum penalty for bribery of foreign public officials is, pursuant to

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[…]

(ix) the offender voluntarily turned himself in and made a full confession;

(x) the offender has given information of decisive importance to the clearing up of criminal acts committed by others;

[…]"

188 Please refer to the section C.1.e.ii of the report for the extradition of a Danish national.

Section 122 of the Danish Criminal Code, imprisonment for 3 years, the Act on Extradition of Offenders thus allows the extradition of persons for the purpose of prosecutions abroad.

b) Seizure and Confiscation of the Bribe and its Proceeds

243. In Phase 1, the Working Group recommended that the issues of discretionary confiscation and adequacy of the fine system for the purpose of having a comparable effect be monitored in Phase 2.

244. The rules on confiscation are included in Sections 75 and 76 of the Danish Criminal Code. Section 75(1) of the Danish Criminal Code provides that upon conviction, confiscation of the "proceeds" of bribery is discretionary.[189] Thus, proceeds of foreign bribery (*i.e.* the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery) may be subject to confiscation under Section 75(1) of the Danish Criminal Code.

245. Denmark indicates that bribes can be confiscated pursuant to Section 75(2)(i) of the Criminal Code which authorises the confiscation of "items which have been used or were intended to be used in a criminal act" where such confiscation must be regarded as necessary in order to prevent further offences or if warranted by special circumstances[190]. However, no case law seems to exist regarding the use of Section 75(2)(i) of the Danish Criminal Code (*i.e.* items produced by a criminal act) of the Danish Criminal Code in respect of bribery cases.

246. Section 76 of the Danish Criminal Code provides that confiscation may be ordered against any person to whom the proceeds of a criminal act have directly passed. According to circumstances, confiscation may also be ordered against any subsequent acquirer if he/she knew of the connection of the transferred property to the criminal act, or has displayed gross negligence in this respect, or if the transfer to him/her was gratuitous. The acquirer must consequently have had knowledge of (or have been grossly negligent with respect to) the criminal act with which the transferred property is connected, but not necessarily with the legal qualification of this act (as bribery).

247. There have been no amendments of the rules on confiscation since the Phase 1 examination. Information on the exact number and types of criminal cases in which confiscation has been adjudicated was not available. However, Denmark has provided some figures based on accounts from the 54 police districts which show that between 2002 and 2004 approximately DKK 132 million (approximately EUR 17.7 million) worth has been confiscated by the Danish courts.

c) Conclusion on Sanctions for Foreign Bribery and False Accounting Offences

248. As noted above, Denmark has not amended the punishment for foreign bribery offences (Section 122 of the Danish Criminal Code) since the Phase 1 review. No initiatives to increase the level of penalties are expected in the shorter term. It is noteworthy that the maximum sanctions for foreign bribery are lower than those for other comparable offences. Thus, the lead examiners maintain the same concerns already expressed during Phase 1 by the Working Group on the low level of the penalty of imprisonment for foreign bribery offences.

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189 Section 75(1) of the Danish Criminal Code states that: "*The proceeds gained from any criminal act, or an amount equivalent thereto, may be confiscated, either in full or part. Where the size of such an amount has not been sufficiently established, an amount thought to be equivalent to the proceeds may be confiscated.*"

190 According to the circumstances, confiscation pursuant to Section 75(2)(i) of the Danish Criminal Code may be ordered in cases of attempted active bribery under Section 122 in respect of specific amounts which were intended to be granted as bribes.

249. Regarding the false accounting offence, even though the concerns expressed in Phase 1 have in part been addressed by Denmark, the maximum penalties as provided by the corresponding sections of the Criminal Code remain low. On the possible combination of false accounting with other more heavily sanctioned offences such as forgery of documents (Sections 171 and 172 of the Criminal Code), the examination team was not provided with any relevant case law or statistical data on enforcement. Thus the lead examiners consider that the concerns expressed in Phase 1 have to be maintained, as they are not in a position to evaluate whether in practice criminal penalties for false accounting offences are effective, proportionate and dissuasive as required by Article 8 of the Convention.

Commentary

The lead examiners recommend that Denmark take steps to increase the penalty of imprisonment against natural persons for foreign bribery offences as provided by Section 122 of the Danish Criminal Code to ensure that they are effective, proportionate and dissuasive. They also recommend that Denmark seriously consider to further increase the sanctions for accounting offences as provided by Sections 296 and 302 of the Danish Criminal Code; and that Denmark compile relevant statistics on the application of sanctions for accounting offences in view of the follow-up to the Phase 2 evaluation.

The lead examiners further recommend that the Working Group monitor the level of sanctions for foreign bribery and false accounting offences and application of confiscations measures when there has been sufficient practice, in order to ensure that the sanctions against natural and legal persons handed down by the courts are sufficiently effective, proportionate and dissuasive. In this regard, they invite the Danish authorities to compile relevant statistical information concerning level of sanctions and confiscations measures imposed by the courts on natural and legal persons for foreign bribery and false accounting offences.

d) Administrative Sanctions

(i) Officially Supported Export Credits

250. The anti-corruption declaration included in all EKF contracts provides that the right to compensation under official export guarantees can be invalidated following a domestic or foreign legal judgement establishing that the exporter or financial institution has engaged in illegal bribery in connection with either the export business guaranteed by EKF or any associated agreements.

251. The EKF "Internal Guideline on Measures against Bribery" (August 2001) indicates that "cancellation of guarantee or demand for repayment of received indemnification will not take place until a legal judgement of illegal bribery has been passed". Such a denial of support had yet never occurred at the time of the on-site visit.

252. EKF has no right to exclude an exporter, bank or financial institution from applying for a new guarantee, if the person or institution concerned has been proven guilty of committing an offence of bribery. EKF would, however, enhance the underwriting investigation and ask additional information before issuing any new guarantee to any such person or institution.

(ii) Public Procurement

253. EU public procurement directives are directly applicable in Denmark, as they are incorporated integrally into Danish law. Danish Governmental Order 937 – which entered into force 1 January 2005 – implemented EU Directive 2004/18/EC. Article 45 of the EU Directive (which is annexed to Danish Governmental Order 937) requires that if "the contracting authority is aware" that a candidate or tenderer

has been the subject of a conviction by final judgement for, *inter alia*, a corruption offence, this candidate or tenderer shall be excluded from participation in a public contract. The EU Directive 2004/18/EC also foresees the possibility for EU Member States to have in place exceptions to this mandatory exclusion of convicted candidates "for overriding requirements in the general interest".

254. The EU Directive puts limited responsibility on contracting authorities, requiring them to act only if they are "aware" of a past conviction. In Denmark, a system has been set up to allow companies and contracting authorities to obtain an "official certificate" containing all relevant information for procurement cases, including past convictions for bribery offences. The system is managed by the Danish Commerce and Companies Agency (DCCA) which is the authority responsible and qualified for declaring, certifying and confirming the content of the official certificate (in accordance with EU Directive 2004/17/EC and EU Directive 2004/18/EC).

255. The official certificate is issued by the DCCA on the basis of information on convictions registered in the Criminal Record.[191] The information is collected by the DCCA directly from the MOJ. In practice, the debarring period is determined by Governmental Order 218 (as amended by Governmental Order 782), which stipulates the period for which a company or a person will be registered in the Criminal Record for a given crime.

256. The Danish Competition Authority (DCA) – although not mandated with the monitoring of contracting authorities – has indicated that the "official certificate system" is widely used by both contracting authorities and companies. As such, instances where the contracting authorities will not be "aware" of a relevant past criminal conviction are expected to be rare by the Danish authorities. However, the examining team obtained no indication that information and official certificates would generally be sought concerning the past criminal behaviour of the candidate company's directors or other persons having power of representation; or suggesting that a candidate company could be excluded on the basis of information on the past criminal behaviour of directors or other persons having power of representation.

257. Exclusion on the basis of Article 45 of the EU Directive 2004/18/EC had yet never been imposed by Danish contracting authorities at the time of the on-site visit.

(iii) Official Development Assistance

258. An anti-corruption clause is included in all Danida standard contracts.[192] A breach is punishable with the cancellation of the contract; and definite exclusion from tendering for MFA funded activities can be applied on a discretionary basis. At the time of the on-site visit, Danida had not yet witnessed any breach of this standard contract clause. The anti-corruption clause used in Danida contracts does not include a specific reference to the bribery of foreign public officials.

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191 Individual information on the past criminal behaviour can also be obtained in the form of a Certificate of Criminal Record issued by the MOJ.

192 "*No offer, payment, consideration, or benefit of any kind which constitute illegal or corrupt practices, shall be made, either directly or indirectly, as an inducement or reward in relation to:*

the tendering,

the award of the contract, or

the execution of the contract.

Any such practice will be grounds for the immediate cancellation of this contract and for such additional actions, civil and/or criminal, as may be appropriate. At the discretion of the Ministry of Foreign Affairs a further consequence of any such practice can be the definite exclusion from any tendering for Ministry of Foreign Affairs funded activities."

259. As indicated in section B.4.c of the report, the Danish International Investment Funds (IFU and IØ) also systematically include an anti-corruption clause in all contracts. Commercial sanctions can be imposed on partners in case of breach. This had yet never occurred at the time of the on-site visit.

(iv) Privatisation

260. Exclusion of convicted bribers from acquiring state-owned assets in the context of privatisation is not being considered by the Danish authorities. Danish state-owned enterprises have also not taken any specific initiatives to promote corporate social responsibility in the context of their business activities.

Commentary

The lead examiners note that Denmark has significant possible administrative sanctions for persons convicted of foreign bribery. Such sanctions had never been applied at the time of the on-site visit. The lead examiners thus recommend following up on the practical application of the administrative sanctions imposed on Danish firms and individuals as case law develops.

The lead examiners also recommend that Danida review the standard contracts that they use with their clients in order to ensure that they contain provisions that explicitly prohibit the bribery of foreign public officials related to the contracts. They also recommend that Danida and the Funds take steps to ensure the effective enforcement of the anti-corruption clauses included in their contracts.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

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

1. Recommendations

Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery

262. Concerning raising awareness of the Convention, the Revised Recommendation and the foreign bribery offence, the Working Group recommends that Denmark take measures to further raise the level of awareness of the Convention, the foreign bribery offence, and the risk that Danish companies engage in bribery abroad (i) among officials in government agencies that could play a role in preventing, detecting and reporting; (ii) among judges and new recruits; (iii) among SMEs and large enterprises doing business abroad, notably by providing guidance and support to the development and adoption of compliance programs; (iv) among accountants and auditors having in mind their reporting obligations; and (v) among business and law school students [1997 Revised Recommendation, Sections I and V.C.i) and following].

263. Concerning the prevention and detection of foreign bribery through taxation, the Working Group recommends that Denmark provide enhanced guidance and training to tax officials on the detection of bribe payments disguised as legitimate allowable expenses, and maintain detailed statistical information on tax offences and reporting by tax officials to law enforcement agencies [1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials ; 1997 Revised Recommendation, Sections I, II.ii) and IV].

264. Concerning detection and reporting of foreign bribery cases, the Working Group recommends that Denmark:

a) adopt measures for ensuring stronger whistleblower protection in the private sector in order to encourage private sector employees to report suspected cases of foreign bribery without fear of retaliation [1997 Revised Recommendation, Sections I and V.C.iv)];

b) take steps to ensure an effective system for reporting, as appropriate, to the Danish and local law enforcement authorities suspicions of bribery of foreign public officials detected in the context of the administration of development funds and export credit guarantees [1997 Revised Recommendation, Sections I, II.v) and VI];

c) issue clear guidelines for relevant public servants on how to handle suspicions of foreign bribery offences that they may come across in the course of their duties; this should include providing guidance to diplomatic and trade promotion personnel on the steps that should be taken – including encouraging reporting the matter as appropriate to the Danish and local law enforcement authorities – when there are credible allegations that a Danish company or individual has bribed or taken steps to bribe a foreign public official [1997 Revised Recommendation, Section I].

265. Concerning detection and reporting of foreign bribery through accounting and auditing, the Working Group recommends that Denmark provide clearer guidance to auditors with regard to the scope of their legal obligation to report suspicions of foreign bribery. This should include guidance on how the rules as provided by the Danish standards on auditing relate to the provisions under the ASARPA with regard to the reporting obligations of auditors [1997 Revised Recommendation, Sections V.B.iii) and iv)].

Recommendations Pertaining to Investigation of Foreign Bribery

266. Concerning investigation of foreign bribery, the Working Group recommends that Denmark:

a) make special investigative means, such as interception of communications, video surveillance and undercover operations, available in foreign bribery investigations where appropriate [Convention, Article 5 ; 1997 Revised Recommendation, Section I];

b) ensure that the Danish National Police College provides intensified training of police officers and prosecutors on investigating foreign bribery, including on the practical aspects of bribery investigations [Convention, Article 5 ; 1997 Revised Recommendation, Section I].

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences

267. Concerning the offence of foreign bribery, the Working Group recommends that Denmark:

a) clarify that all instances of small facilitation payments given to induce a foreign public official to act in breach of his/her duties in the context of an international business transaction are illegal pursuant to the Danish Criminal Code [Convention, Article 1 ; 1997 Revised Recommendation, Section I];

b) within the rules governing its relationship with Greenland and the Faroe Islands, (i) extend the OECD Convention to Greenland at the earliest possible date; and (ii) assist the authorities of the Faroe Islands in adopting the necessary legislation in order to extend ratification of the OECD Convention to the islands at the earliest possible date [Convention, Article 1 ; 1997 Revised Recommendation, Section I];

c) ensure that the application of the DPP Guidelines on the liability of legal persons is in no way an impediment to using the full scope of the jurisdictional rules as provided by the Danish Criminal Code [Convention, Article 2 ; 1997 Revised Recommendation, Section I].

268. Concerning sanctions, the Working Group recommends that Denmark:

a) increase the level of the penalty of imprisonment against natural persons for foreign bribery as provided by Section 122 of the Danish Criminal Code, and ensure that they are effective, proportionate and dissuasive [Convention, Articles 3 ; 1997 Revised Recommendation, Section I];

b) seriously consider to further increase the sanctions for accounting offences as provided by Sections 296 and 302 of the Danish Criminal Code. It also recommends that Denmark compile relevant statistics on the application of sanctions for accounting offences in view of the follow-up to the Phase 2 evaluation [Convention, Article 8 ; 1997 Revised Recommendation, Sections I and V].

2. Follow-up by the Working Group

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

a) the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and related offences that are reported to the law enforcement authorities [Convention, Article 5 ; 1997 Revised Recommendation, Sections I and V.B.iii) and iv)];

b) information on the application of the offence of bribery of foreign public officials, and the level of criminal and administrative sanctions for foreign bribery [Convention, Articles 1, 2 and 3 ; 1997 Revised Recommendation, Sections I, II.v), and VI];

c) the effectiveness of the provisions on confiscation in foreign bribery cases [Convention, Articles 3 ; 1997 Revised Recommendation, Sections I];

d) the protection of public sector employees collaborating with the law enforcement agencies, notably employees who report in good faith suspected cases of foreign bribery [1997 Revised Recommendation, Section I];

e) the application of the criminal liability of legal persons for the bribery of foreign public officials, including: (i) whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been or cannot be proceeded against, (ii) the application of the rules for establishing Danish jurisdiction over foreign bribery offences committed by legal persons [Convention, Article 2; 1997 Revised Recommendation, Section I];

f) the application of the 2006 Act on Measures to Prevent Money Laundering and Terrorist Financing, including with respect to the application of sanctions for failure to report; and the development of specific standards by the Danish authorities (in the form of typologies, guidelines and training material) for suspicious transaction reporting [Convention, Article 7 ; 1997 Revised Recommendation, Section I].

ANNEX 1
List of Participants in the On-Site Visit

MINISTRIES AND OTHER STATE ORGANS

Danish Export Credit Agency
Danish Financial Supervisory Authority
Danish International Investment Funds
Danish Ministry of Economic and Business Affairs, including:
– Danish Commerce and Companies Agency
– Danish Competition Authority
– National Agency for Enterprise and Construction
Danish Ministry of Employment (Home of Denmark's National Contact Point for the OECD Guidelines for Multinational Enterprises)
Danish Ministry of Finance
Danish Ministry of Foreign Affairs, including:
– Danish International Development Agency (Danida)
– Trade Council of Denmark
Danish Ministry of Justice
Danish Tax and Customs Administration
***Folketing* (Parliament), including:**
– Members of the Legal Committee
National Audit Office of Denmark
National Bank of Denmark
State Employer's Authority

LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

Copenhagen Police
Danish Court Administration
Danish Association of Judges
National Commissioner of Police
Office of the Director of Public Prosecutions
Office of the Public Prosecutor for Serious Economic Crimes (SØK)
Office of the Regional Prosecutor of Copenhagen

CIVIL SOCIETY

Academics
Confederation of Danish Industries
DanChurchAid
Danish Bar Association
Danish Confederation of Trade Unions
Danish Federation of Small and Medium-Sized Enterprises
Danish Institute of Human Rights
Danish Union of Journalists
Transparency International Denmark

ACCOUNTING BODIES

Institute of State Authorized Public Accountants in Denmark
Large and medium size accounting firms

PRIVATE SECTOR

Copenhagen Stock Exchange
Danish Bankers' Association
Danish multinational company – shipping sector
Danish multinational companies – pharmaceutical sector
Danish multinational company – machinery manufacturing sector
Danish SME involved in development assistance partnership programmes
Exporting Danish SME operating in developing countries
Major Danish banks
Private lawyers

ANNEX 2
Excerpts from Relevant Legislation

(Unofficial translation)

1. Danish Criminal Code

Section 25 – A legal person may be punished by a fine, if such punishment is authorised by law or by rules pursuant thereto.

Section 26 – (1) Unless otherwise stated, provisions on criminal responsibility for legal persons etc. apply to any legal person, including joint-stock companies, co-operative societies, partnerships, associations, foundations, estates, municipalities and state authorities.

(2) Furthermore, such provisions apply to one-person businesses if, considering their size and organisation, these are comparable to the companies referred to in subsection (1) above.

Section 27 – (1) Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself.

(2) Agencies of the state and of municipalities may only be punished for acts committed in the course of the performance of functions comparable to functions exercised by natural or legal persons.

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

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

1) objects which have been used or were intended to be used, in a criminal act;
2) objects produced by a criminal act; and
3) objects with respect to which a criminal act has otherwise been committed.

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

[…]

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

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

[…]

Section 110c – […] (2) Any person who, intentionally or through negligence, contravenes any provisions or prohibitions that may have been provided by law for the fulfilment of the state's obligations as a member of the United Nations shall be liable to a fine or to imprisonment for any term not exceeding four months or, in aggravating circumstances, to imprisonment for any term not exceeding four years.

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

Section 144 – Any person who, while exercising a Danish, foreign or international public office or function, unlawfully receives, demands or accepts the promise of a gift or other privilege shall be liable to imprisonment for any term not exceeding six years, or in mitigating circumstances, to a fine.

Section 152 – (1) Any person who is exercising or who has exercised a public office or function, and who unlawfully passes on or exploits confidential information, which he has obtained in connection with his office or function, shall be liable to a fine or to imprisonment for any term not exceeding six months.

[…]

(3) Information is confidential when made so in an Act or by other stipulations, or when it is necessary to keep it a secret in order to protect important public or private interests.

Section 152e – The provisions in Section 152-152d of this Act do not apply in cases where the person in question: 1) was under an obligation to pass on the information; or 2) acted in order to lawfully safeguard obvious public interests or the interests of himself or other persons.

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

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

[…]

Section 296 – (1) Any person who, in circumstances other than those covered by Section 279 of this Act,

1) …; or

2) makes incorrect or misleading statements concerning the economic conditions of joint-stock companies, co-operative societies or similar undertakings though channels of public communications, in reports, in statements of accounts or in declarations to the general meeting or any proper official of a company, in notifications to the Registrar of Commercial Undertakings or to …; or who

3) contravenes the provisions governing joint-stock companies or any other limited liability companies in regard to the issue of share certificates, …;

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

[…]

Section 302 – Any person, who in particularly aggravating circumstances

1) makes incorrect or misleading statements in ledgers or accounts which he is under an obligation to keep by law; or

2) fails to keep ledgers or accounts as he is under an obligation keep by law; or

3) fails to file ledgers or vouchers or other accounting materials as is prescribed by law, or destroys such material;

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

Section 303 – Any person who is guilty of gross negligence in acquiring by purchase or in receiving in any other similar manner objects acquired through an acquisitive offence shall be liable to a fine or to imprisonment for any term not exceeding six months.

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

2. Administration of Justice Act

Section 98 – (1) The Minister of Justice is the superior of the public prosecutor's performance and shall superintend their work.

(2) The Minister of Justice may lay down provisions governing the public prosecutor's performance of their duties.

(3) The Minister of Justice may give instructions to the public prosecutors concerning the processing of concrete cases, including instructions to institute or continue, omit or discontinue prosecution. An instruction in pursuance of this provision to institute or continue, omit or discontinue prosecution must be given in writing and be accompanied by grounds. Furthermore, the President of Parliament (*Folketingets formand*) shall be notified of the instruction in writing. If the considerations which are mentioned in section 729c(1) makes it necessary, notification may be postponed. The instruction is in regard to access to documents in pursuance of sections 729a-d considered as materials provided by the police to be used for the case.

(4) The Minister of Justice shall hear appeals concerning decisions made by the Director for Public Prosecutions at first instance, *cf.* however the provision in section 1018e (4).Section 720(1) of the AJA

Section 705 – (1) If prosecution, either before an examining court or before the sentencing court, is to take place simultaneously against the same person being charged for several crimes or against several persons being charges as having contributed to one crime, then this should happen under one case, to the extent this can be done without severe delay or difficulties.

Section 720 – (1) The Minister of Justice may provide that public prosecution in specific cases is conditional on the decision of the Minister of Justice or the Director of Public Prosecutions.

Section 721 – (1) Charges in a case may be withdrawn in full or in part in cases –

i) where the charge has proved groundless,

ii) where further prosecution cannot anyway be expected to lead to conviction of the suspect, or

iii) where completion of the case will entail difficulties, costs or trial periods which are not commensurate with the importance of the case and with the potential punishment in case of conviction.

(2) The Chief Constable has the right to withdraw charges pursuant to subsection (1)(i) above. In other cases, such right rests with the prosecutor unless otherwise provided for by the Minister of Justice.

Section 724 – (1) In case of decisions concerning withdrawal of charges, the suspect and others who may be deemed to have a reasonable interest therein are notified. In case of decisions concerning discharge, the suspect is notified. An appeal of the decision to withdraw charges can be lodged with the superior public prosecutor under the rules of Part 10. Under the same rules, the suspect can appeal a decision on discharge.

(2) Where a decision has been made concerning withdrawal of charges or discharge, prosecution of the former suspect may only be continued by the superior prosecuting authority if a notice to that effect has been served on the person in question within two months from the date of the decision, unless the circumstances of the suspect have prevented service in due time or the conditions for reopening of the case under section 975 are fulfilled.

Section 742 – (1) An information on a criminal offence shall be laid with the police.

(2) The police shall institute investigations upon an information laid or on its own initiative, when it may reasonably be presumed that a criminal offence liable to public prosecution has been committed.

Section 743 – (1) The police shall refuse an information laid if there is no basis for instituting an investigation.

(2) When there is no basis for continuing an ongoing investigation, the decision to discontinue the investigation may be made by the police if no charge has been preferred. If a charge has been preferred, the provisions in sections 721 and 722 apply.

(3) If the information is refused, or if the investigation is discontinued, those who may be deemed to have a reasonable interest therein are notified. An appeal of the decision can be lodged with the superior public prosecutor under the rules of Part 10.

Section 754a – (1) As part of the investigation of an offence, the police may not cause assistance to be offered or measures to be made with a view to inciting any person to commit or continue the offence, unless:

(i) there are reasonable grounds for suspecting that the offence or an attempt thereof is being committed;

(ii) the investigative measure is assumed to be decisive to the investigation; and

(iii) the investigation concerns an offence punishable under the law by imprisonment for six years or more.

(2) Measures taken with a view to inciting a person to commit or continue an offence do not fall within the scope of subsection (1) hereof if the police do not thereby influence material circumstances of the offence.

Section 781 – (1) Interventions in the secrecy of communications may only be made if

(i) there are specific grounds to assume that in the manner concerned messages are conveyed or items of mail are sent to or by a suspect,

(ii) the intervention must be assumed to be of decisive importance to the investigation and;

(iii) the investigation concerns an offence punishable under the law by imprisonment for six years or more, intentional violation of Parts 12 or 13 of the Criminal Code, or violation of section 124(2), 125, 127(1), 193(1), 228, 235, 266 or 281 of the Criminal Code, or violation of section 59(5) of the Aliens Act.

3. Public Administration Act

Section 27(1) – Any person acting within the public administration is bound by professional secrecy, *cf.* Section 152 and Section 152 c-152 f of the Danish Criminal Code, whenever information is designated as confidential by Statute or other legally binding provision or whenever it is otherwise necessary to keep the information secret to protect material public or private interests, including in particular

1) the security of the State and the defence of the realm,
2) Danish foreign policy and Danish external economic interests, including relations with foreign powers and international institutions,
3) prevention and clearing-up of any infringement of the law, prosecution of offenders, execution of sentences and the like, and protection of persons accused, of witnesses and others in matters of criminal or disciplinary prosecution,
4) implementation of public supervision, control, regulation and planning activities and of measures planned under taxation law,
5) protection of public financial interests, including interests relating to public commercial activities,
6) the interests of individual persons or private enterprises or societies in protecting information on their personal or internal, including financial, circumstances, and
7) the financial interests of individual persons or private enterprises or societies in protecting information on technical devices or processes or on business or operation procedures and policies.

[…]

Section 28 – […] (3) … confidential information may be passed on to another administration authority only when the information must be assumed to be of essential importance to the performance of that other authority's activities or for a decision to be made by that other authority.

3. Danish Tax Assessment Act

Section 8D – In the statement of the taxable income no deduction shall be granted for the cost of bribes of the type referred to in Section 144 of the Danish Criminal Code to an individual who has been employed, appointed or elected to carry out services or duties in legislative, administrative and judiciary agencies, be it for Denmark, the Faroe Islands or Greenland or a foreign state, including local authorities or political branches, or for an international organisation which has been constituted by states, governments or other international organisations.

Section 17 – The tax authorities shall, subject to penalty under sections 152-152a and sections 152c-152f of the Danish Criminal Code, observe absolute secrecy vis-à-vis unauthorized parties with regard to information concerning an individual's or a legal entity's financial, commercial or private matters which has come to their knowledge within the context of the performance of their duties. […]

4. Act on State-Authorised and Registered Public Accountants

Section 10 – […] (5) Where a company auditor realises that one or more members of the company management commits or has committed economic crimes in connection with the carrying out of their work, and if the auditor has a presumption on grounds that the crime involves significant amounts or is otherwise of a serious nature, the auditor must immediately notify each member of the management hereof. The notification shall always be entered into the auditing protocol. If the management has not at the latest 14 days hereafter made documentation available to the auditor that the necessary steps to stop ongoing criminal activity have been taken and made reparations to damages caused by crimes already committed, the auditor must immediately notify the Public Prosecutor for Serious Economic Crime of the presumed economic offences. The above does not apply in cases which are dealt with under rules in the Act on Preventive Measures against Money Laundering and the Financing of Terrorism.

5. Act on Measures to Prevent Money Laundering and Terrorist Financing (March 2006)

Section 6 – (1) The undertakings and persons covered by this Act shall pay special attention to customers' activities which, by their nature, could be regarded as being particularly likely to be associated with money laundering or financing of terrorism. This applies in particular to complex or unusually large transactions and all unusual patterns of transactions in relation to said customer.

(2) The purpose of the transactions mentioned in subsection (1) shall, as far as possible, be investigated. The results of such investigation shall be recorded and kept, *cf*. section 23.

Section 7 – (1) If there is a suspicion that a customer's transaction or enquiry is or has been associated with money laundering or financing of terrorism, the undertakings and persons covered by this Act shall investigate the transaction or enquiry in more detail. If the suspicion relates to offences punishable by imprisonment of more than one year and this suspicion cannot be disproved, the Public Prosecutor for Serious Economic Crime shall be informed immediately.

(2) In the event of suspicion as mentioned in subsection (1), members of the Danish Bar and Law Society may notify the secretariat of the Danish Bar and Law Society, which shall, following an assessment of whether the suspicion is subject to reporting obligations under subsection (1), immediately forward the notification to the Public Prosecutor for Serious Economic Crime.

(3) If the suspicion is related to money laundering, and the transaction has not already been carried out, the transaction shall be suspended until notification has been effected pursuant to subsection (1). If notification is effected pursuant to subsection (2), the transaction shall be suspended until the Danish Bar and Law Society has forwarded the notification to the Public Prosecutor for Serious Economic Crime or has stated that, following specific assessment, the notification will not be forwarded. If effectuation of the transaction cannot be avoided, or if this is deemed to be potentially harmful for the investigation, notification shall instead be given immediately after the effectuation, *cf.* however subsection (4).

[…]

(5) The Police may, under the regulations stipulated in the Administration of Justice Act, demand any information necessary for investigation of the case from the undertakings and persons covered by this Act.

Section 9 – If the Danish FSA or the Danish Commerce and Companies Agency learns of circumstances that are presumed to be associated with money laundering or financing of terrorism covered by the reporting obligation in section 7, said authority shall notify the Public Prosecutor for serious economic crime in this respect.

Section 10 – The Danish FSA may, when acting on the recommendations of the Financial Action Task Force, lay down more specific regulations on the duty applying to the undertakings and persons specified in section 1, requiring them to systematically submit information to the Public Prosecutor for serious economic crime concerning financial transactions with non-cooperative countries in connection with combating money laundering or financing of terrorism. In this connection, the Danish FSA may stipulate that notification is to be carried out systematically in all cases, even though no suspicion has arisen.

Section 25 – (1) The undertakings and persons covered by this Act shall prepare adequate written internal rules about customer due diligence, reporting, record-keeping, internal control, risk assessment, risk management, management controls and communication as well as training and instruction programmes for their employees in order to forestall and prevent money laundering and financing of terrorism.

(2) Undertakings and persons covered by section 1(1), nos. 1-10 shall appoint a person at management level to ensure that the undertaking complies with its obligations under this Act.

(3) Undertakings and persons covered by section 1 shall ensure that their employees know of the obligations stipulated in this Act.

(4) In employment relationships, the obligations mentioned in subsections (1) and (2) shall rest on the employer.

(5) The Danish FSA may lay down more detailed regulations on the requirements mentioned in subsection (1).

Section 35 – (1) The Public Prosecutor for Serious Economic Crime may, if investigative considerations do not contradict this, inform the notifying person about the status of the matter, including whether a charge has been made, and may inform about deletion from the money laundering register at the Public Prosecutor for Serious Economic Crime, and about a final decision, on conviction possibly in the form of a judgment or a transcript of a judgment.

(2) The notifications mentioned in subsection (1) may not unlawfully be divulged to others.

Section 37 – (1) Intentional or grossly negligent violation of section 2; section 6(2), 2nd clause; section 7(1), 2nd clause, (3) and (4), 1st clause; section 11; … ; section 25(1)-(3); section 27(1); section 30, 2nd clause; section 31(1); section 32(3); and section 34(2) and (3) shall be subject to a fine. Intentional or grossly negligent violation of section 35(2) shall be subject to a fine, unless more severe punishment is incurred under the regulations of the Criminal Code.

(2) In the event of particularly gross or extensive intentional violations of section 2; section 7(1), 2nd clause, (3) and (4), 1st clause; section 12(1)-(6); sections 14, 15 and 16(1); and section 23(1), 1st clause, (2) and (3), 1st clause, the penalty may be increased to imprisonment of up to six months.

[…]

(6) Companies, etc. (legal persons) may incur criminal liability according to the regulations in chapter 5 of the Criminal Code.

6. Act on Commercial Banks and Savings Banks, etc.

Section 53a – Members of the board of directors, members of local boards of directors or similar organs, members of the board of representatives in a commercial bank or credit co-operation, auditors and inspectors and their deputies, members of the board of management and other employees may not unlawfully divulge or use confidential information obtained during the discharge of their duties.

7. Act on Extradition of Offenders

Section 2 – (1) The Minister of Justice, acting under an agreement with a state outside the European Union, may decide that a Danish national can be extradited for prosecution in that state,

1) if the person in question has in the two years preceding the criminal act resided in the state seeking his extradition and the act constituting the offence for which the extradition is sought is punishable under Danish law by a period of imprisonment of at least one year, or
2) if the act is punishable under Danish law by a period of imprisonment of longer than four years.

(2) If, in relation to a state outside the European Union, one of the agreements specified in paragraph 1 does not apply, the Minister of Justice may adopt a decision on the extradition of a Danish national for prosecution if the conditions in paragraph 1 are otherwise met and this is indicated by special law enforcement relation to a state outside the European Union, one of the agreements specified in reasons.

Section 2a – An alien can be extradited for prosecution or execution of a judgment in a state outside the European Union if the act is punishable under Danish law by a period of imprisonment of at least one year. If the act is punishable under Danish law by a shorter period of imprisonment, the person can nevertheless be extradited if an agreement to that effect has been concluded with the state in question.

Section 10a – (1) The extradition of persons for prosecution or execution of a judgment in a Member State of the European Union for an offence that, under the law of the Member State that has requested the extradition, is punishable by imprisonment or a detention order for a period of at least three years can be effected on the basis of a European arrest warrant although a corresponding act is not punishable in Danish law. In the case of the following acts:

1) participation in a criminal organisation,
[…]
7) corruption,
8) fraud, including that affecting the financial interests of the European Communities,
9) laundering of the proceeds of crime,
[…]

(2) Persons can be extradited for prosecution in a Member State of the European Union for acts that are not covered by paragraph 1 under a European arrest warrant if the criminal act in the Member State renders the person liable to a period of imprisonment of at least one year and a corresponding act is punishable under Danish law.

(3) Persons can be extradited for execution of a judgment in a Member State in the European Union for acts that are not covered by Section 1 under a European arrest warrant if the judgment has sentenced the person to prison or a detention order of not less than four months and the corresponding act is punishable under Danish law.

(4) A person can be extradited for prosecution or execution of a judgment for a number of offences although the conditions in paragraphs 1-3 are met in the case of only one of those offences.

ANNEX 3
List of Acronyms and Abbreviations

AJA	**Administration of Justice Act**
ASARPA	**Act on State-Authorised and Registered Public Accountants**
CSR	**Corporate Social Responsibility**
CSE	**Copenhagen Stock Exchange**
DAA	**Danish Annual Accounts Act**
Danida	**Danish International Development Agency**
DCA	**Danish Competition Authority**
DCCA	**Danish Commerce and Companies Agency**
DFSME	**Danish Federation of Small and Medium Enterprises**
DI	**Confederation of Danish Industries**
DKK	**Danish Kroner (Danish currency; DKK units per 1 USD = 5.988 [year 2004]; DKK units per 1 EUR = 7.46124 [October 2005])**
DPP	**Director of Public Prosecutions**
DTAA	**Danish Tax Assessment Act**
TCD	**Trade Council of Denmark**
EKF	**Denmark's Official Export Credit Agency (*Eksportkreditfonden*)**
FDI	**Foreign Direct Investment**
FIU	**Financial Intelligence Unit**
FSA	**Danish Financial Supervisory Authority**
FSR	**Institute of State Authorized Public Accountants in Denmark**
IAS	**International Accounting Standards**
IFAC	**International Federation of Accountants**
IFRS	**International Financial Reporting Standards**
IFU	**Industrialisation Fund for Developing Countries**
IIC	**Independent Inquiry Committee (United Nations)**
IØ	**Investment Fund for Central and Eastern Europe**
ISA	**International Standards on Auditing**
MFA	**Danish Ministry of Foreign Affairs**
MLA	**Mutual Legal Assistance**
MOJ	**Danish Ministry of Justice**
NAEC	**National Agency for Enterprise and Construction**
NAOD	**National Audit Office of Denmark**
NCP	**National Commissioner of Police**
ODA	**Official Development Assistance**
OfFP	**United Nations Iraqi Oil-for-Food Programme**
SØK	**Public Prosecutor for Serious Economic Crimes**
STR	**Suspicious Transaction Report**
TCA	**Tax Control Act**
The Funds	**Danish International Investment Funds (umbrella for IFU and IØ)**
TI	**Transparency international**

ANNEX 4
Conventions and Treaties on Mutual Legal Assistance and Extradition to which Denmark is a Party

1. Mutual Legal Assistance

Convention/Treaty	Adoption	Ratification	In Effect
European Convention on Mutual Assistance in Criminal Matters	20/4/1959	13/9/1962	12/12/1962
Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters	17/3/1978	7/3/1983	5/6/1983
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters	8/11/2001	15/1/2003	1/2/2004
Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union	29/5/2000	23/8/2005	23/8/2005
Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union	16/10/2001	February 2005	not entered into force
Nordic Agreement on mutual legal assistance	26/4/1974	1/5/1975	1/7/1975
Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Denmark concerning mutual legal assistance in criminal matters	23/12/2004		21/10/2005
Agreement between the United States of America and Denmark on mutual legal assistance in criminal matters	23/6/2005		

2. Extradition

Convention/Treaty	Adoption	Ratification	In Effect
Nordic Agreement on the Extradition of Offenders	3/2/1960	1/9/1960	1/9 /1960
European Convention on Extradition	13/12/1957	13/9/1962	12/12/1962
Additional protocol to the European Convention on Extradition	15/10/1975	13/9/1978	20/8/1979
Second additional protocol to the European Convention on Extradition	17/3/1978	7/3/1983	5/6/1983
Treaty on extradition between Denmark and the United States of America [to be supplemented by agreement of 23/6/2005]	22/6/1972	10/6/1974	
Treaty between Denmark and Canada concerning extradition	30/11/1977	15/12/1978	13/2/1979
Council framework decision on the European arrest warrant and the surrender procedures between the Member States	13/6/2002		1/1/2004

ANNEX 5
Reports of active and passive bribery cases (1996-2004)

	1996	1997	1998	1999	2000	2001	2002	2003	2004
Reports									
Active Bribery, Section 122 of the Danish Criminal Code	7	8	0	4	6	5	4	0	4
Passive Bribery, Section 144 of the Danish Criminal Code	1	1	1	0	10	2	0	3	1
Solved									
Active Bribery, Section 122 of the Danish Criminal Code	7	8	0	4	6	4	3	0	4
Passive Bribery, Section 144 of the Danish Criminal Code	1	1	0	0	9	2	0	0	1

Note: Statistics are shown as provided by Denmark. All reports and cases listed herein were indicated as being domestic bribery cases.

ANNEX 6
Sanctions in active and passive bribery cases (2002-2003)

Type of Sanction	Total	Type of Decision						
		Unconditional Prison sentence	Conditional prison sentence	Fine	Charge Withdrawn	Prosecution Abandoned	Other decision	Acquittal
2002								
Active Bribery, Section 122	5	.	.	.	.	3	.	2
Passive Bribery, Section 144	4	.	1	.	.	2	.	1
2003								
Active Bribery, Section 122	3	.	2	.	.	.	.	1
Passive Bribery, Section 144	1	.	1	.	.	.	.	.

Note: Statistics are shown as provided by Denmark. All cases listed herein were indicated as being domestic bribery cases.