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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

Cancels & replaces the same document of 27 September 2018

Phase 3 follow-up: additional written report by South Africa

Paris, 9-11 October 2018

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PHASE 3 EVALUATION OF SOUTH AFRICA: DRAFT WRITTEN FOLLOW-UP REPORT

Name of country: South Africa

Information to be submitted: 24 September 2018

FEEDBACK ON WORKING GROUP ON BRIBERY RECOMMENDATIONS

1. In June 2017, the Working Group on Bribery (WGB) asked South Africa to report back in writing in one year's time (in June 2018) on measures taken to actively enforce its foreign bribery offence, including against legal persons (Phase 3, recommendation 1).¹

Recommendation 1: The Working Group recommends that South Africa significantly step up efforts to detect, investigate and prosecute foreign bribery. [Convention Article 1, 2009 Recommendation, V]

INTRODUCTION

Fighting corruption, including foreign bribery, remains one of the highest priorities of the South African Government. The South African Government has adopted a multi-agency approach based on a comprehensive anti-corruption architecture, which comprises a range of different pieces of legislation as well as policy documents and institutions to address corruption from different angles.

An important policy document guiding government's policies and approaches is the National Development Plan: Vision 2030. It deals substantially with fighting corruption (Chapter 14: Fighting Corruption). Government also established an Anti-Corruption Inter-Ministerial Committee (ACIMC) with as its operational arm, the Anti-Corruption Task Team (ACTT) (comprising of representatives at the highest level of the National Prosecuting Authority (NPA), Special Investigating Unit (SIU), Directorate for Priority Crime Investigation (DPCI), Department of Justice and Constitutional Development (DOJ), the Presidency and the South African Police Service (SAPS), to implement Government's anti-corruption strategy. Funding from the Criminal Assets Recovery Account (CARA), in terms of monies and assets obtained in terms of the Prevention of Organised Crime Act (Act 121 of 1998), has been allocated to assist with the work in this regard. South Africa is also in the process of finalising its National Anti-Corruption Strategy, which addresses the OECD offence and a comprehensive Anti-Corruption Communication Plan.

EFFORTS TO DETECT FOREIGN BRIBERY

Since 2016, South Africa reported on the coordinated approach adopted by the ACTT to fight foreign bribery by ensuring that all role players in the ACTT dedicate investigative and prosecutorial resources, and further ensure that other agencies which have law enforcement capabilities assist in fast tracking activities to speed up investigations. This arrangement led to significant efforts to raise awareness and to improve the detection of the OECD offence.

The ACTT has adopted a pro-active approach in the fight against corruption. This approach entails conducting, amongst others, risk assessments by the SIU of the corruption vulnerable sectors, such as State-

¹ Draft Summary Record: Working Group on Bribery in International Business Transactions, 13 – 16 June 2017, Paris, France, page 5.

owned Companies (SOC's). Vulnerable sectors are those that have a high vulnerability to the manifestation of corrupt activities that could open the development of a country or functioning of government up to potential exploitation. The approach to the fight against corruption includes foreign bribery. This is so, as foreign bribery fits in the description of corruption in accordance with the Prevention and Combating of Corrupt Activities Act (Act 12 of 2004, PRECCA).

Detection efforts previously reported to the WGB include the training of investigators and prosecutors, engagements with Interpol, using Financial Intelligence Centre (FIC) officials to work with prosecutors to gather financial intelligence relevant to the OECD offence, the assistance of Specialised Audit Services of National Treasury in investigations of OECD offences involving SOCs or Government Departments, referring of all incoming Mutual Legal Assistance (MLA) requests of an economic nature to the ACTT before deciding whether to approve such requests, and establishing an email address dedicated solely to the receipt of complaints relating to the foreign bribery offence. The WGB also expressed satisfaction for assistance South Africa provided to another Party to the Convention in concluding its own foreign bribery case. South Africa also stepped up the implementation of whistle-blower protections, which the lead examiners welcomed. Recently, on 13 October 2017, more workshops were held with stakeholders to improve detection, such as with Companies and Intellectual Property Commission (CIPC), South African Revenue Service (SARS), the FIC, and the Export Credit Insurance Corporation (ECIC). The Independent Regulatory Board for Auditors (IRBA) was also engaged to create awareness on the OECD offence among auditors. IRBA's role, as the Regulatory body for Auditors, is to protect the public by regulating the auditing profession and setting auditing and ethics standards, and deal with false accounting practices. As false accounting practices can assist in concealing foreign bribery, a training session on foreign bribery and IRBA's role on the detection of false accounting practices is to be held at a date suitable.

As soon as training on the detection of foreign bribery is completed, these stakeholders will form part of a task team that will meet regularly to discuss potential foreign bribery cases which were detected. As these stakeholders are pivotal to the foreign bribery investigations, they also form part of a task team that meets bi-monthly to ensure that there is traction on all foreign bribery investigations.

South African Authorities are also engaging with the World Bank with the view to determining whether investigations involving South African companies had been referred to the South African authorities. Once this has been established, prosecutors will be appointed to guide the said investigations.

The DOJ has a unit dealing with MLA requests received from other States to the NPA for their consideration and guidance as to the way forward.

The South African authorities have, since June 2017 to date, directed Mutual Legal Assistance Requests to 8 countries, involving 5 foreign bribery investigations. The execution of such Requests is awaited.

EFFORTS TO INVESTIGATE FOREIGN BRIBERY

To address investigations, the ACTT tasked the Serious Corruption Investigation Unit of the Directorate for Priority Crime Investigation (DPCI) to investigate all OECD-related offences. The National Director of Public Prosecutions (NDPP) has further tasked the Specialised Commercial Crimes Unit (SCCU) within the National Prosecuting Authority (NPA) to provide the DPCI with prosecutorial guidance. The selected investigators and prosecutors allocated to these cases are well trained and experienced, as previously reported to the WGB. Constitutional and legislative guarantees within the NPA and South African Police Service (SAPS) Acts (which governs the DPCI) require of all dedicated officials involved with the OECD offence to perform their duties without “fear, favour or prejudice”. In addition thereto, the South African courts have the power to review decisions (including decisions not to initiate investigations and to decline to prosecute) on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute. Complaints may also be made to the Independent Police Investigative Directorate (IPID), which has been established to ensure independent oversight over SAPS and the Municipal Police Services (MPS), and to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS and the MPS, and make appropriate recommendations. The current status pertaining to investigations are herewith attached as Annexure A.

Indicating the seriousness with which Government views the fight against corruption, a Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (The Commission) was appointed by the President of the Republic of South Africa in terms of section 84 (2) (f) of the Constitution of the Republic of South Africa of 1996, to investigate allegations of state capture, corruption and fraud in the Public Sector, including organs of State in line with the Commission’s Terms of Reference. The Honourable Mr Justice R M M Zondo, Deputy Chief Justice of the Republic of South Africa, was appointed as the Chairperson of the Commission. Its work is currently continuing.

Further, it should be noted that the CIPC of South Africa, which has the function to, amongst others, ensure efficient and effective enforcement of the Companies Act (Act 71 of 2008), has potential instruments that can be used as non-trial resolution mechanisms to resolve foreign bribery cases with some form of sanction. These are Compliance Notice, and Consent Orders.

Compliance Notice

Section 171 of the Companies Act empowers the CIPC to issue a compliance notice to any person whom the CIPC, on reasonable grounds, believes: (a). has contravened this Act; (b). assented to, was implicated in, or

directly or indirectly benefited from, a contravention of this Act, unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.

A Compliance Notice may require the person to whom it is addressed to- (a). cease, correct or reverse any action in contravention of this Act; (b). take any action required by this Act; (c). restore assets or their value to a company or any other person; (d). provide a community service, in the case of a notice issued by the CIPC; or (e). take any other steps reasonably related to the contravention and designed to rectify its effect, for example a Compliance Programme.

Consent Orders

If a matter has been investigated in terms of this Part (i.e. Part D - Complaints to the CIPC) - and the CIPC and the respondent have agreed a resolution of the complaint, the CIPC may: (A). record the resolution in the form of an order; and (b). if the person who is the subject of the complaint consents to that order, apply to the High Court to have it confirmed as a consent order, in terms of its rules. This is in terms of Section 173 of the Companies Act.

Representatives of APA has given South Africa an undertaking to fast track MLA requests related to the foreign bribery offence. During the 23 Conference of the International Association of Prosecutors, all heads of Prosecution Services resolved on the prioritization of informal cooperation including the foreign bribery offence.

Pertaining to the issue of legal entities, it should be noted that whenever there are allegations of corruption, including foreign bribery, against South African legal entities/persons, investigations are conducted against both the legal persons themselves and individuals in the employ of such legal entities. In the past (March 2016), South Africa referred to the JA Brown case as an example: In 2014, an accused, JA Brown, received a non-custodial sentence having been convicted of an extremely serious pyramid scheme, where pension funds were defrauded. The NPA appealed against the sentence imposed and the Appeal Court imposed an effective 15 years direct imprisonment. The rationale of the court was that wealthy accused should not be permitted to “buy their way out of going to jail”. In addition to the JA Brown matter, reference was made to the case of *S v Dithakanyane and others*. The accused faced charges of racketeering in terms of the Prevention of Organised Crime Act, 121 of 1998, relating to the commission of the offences of, amongst others, fraud, theft and money laundering. Accused 1 recruited employees of the Post Office to assist him in stealing money from accounts held with the Post Office, and they specifically targeted accounts registered in the names of the pensioners who had their life savings deposited into the accounts. A total of R9 million was as a result thereof transferred from various Post Office accounts into Accused 1’s bank account. The 12 accused were collectively sentenced to 1 680 years’ imprisonment.

These cases, as well as others provided in June 2017, are Indicative of the prosecutors’ knowledge of the provisions of section 332 of the Criminal Procedure Act (CPA), and their capability in enforcing the liability of legal persons. It is thus inevitable that the prosecutors will, upon being tasked to conduct the prosecution of legal entities in foreign bribery cases, do so with the required diligence.

EFFORTS TO PROSECUTE FOREIGN BRIBERY CASES

Arrangements for the enrolment of a foreign bribery case are underway.