

**DEVELOPMENT CO-OPERATION DIRECTORATE
DEVELOPMENT ASSISTANCE COMMITTEE**

POLICY COHERENCE FOR DEVELOPMENT AND THE OECD ANTI-BRIBERY CONVENTION

DAC Meeting, 10 May 2012

This document is submitted for DISCUSSION under Item 6 of the Draft Annotated DAC Agenda [DCD/DAC/A(2012)5].

This is a background document for the presentation by the secretariat of the Working Group on Bribery in International Business Transactions (WGB). The session is part of the Policy Coherence for Development (PCD) action plan [DCD/DAC(2011)32].

Delegates are invited to comment on the proposed areas for further action and to reflect on how to take the work forward, in particular considering whether any of the proposed activities merit collective action by the DAC.

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ANTI-BRIBERY AND POLICY COHERENCE FOR DEVELOPMENT (PCD)

I. Background:

Focusing on foreign bribery as a challenge to development

1. The issue of bribery in international business transactions has again surfaced as one of the components of the broader PCD challenge of Illicit Financial Flows (IFFs) which has been identified as a priority by the OECD in its Development Strategy, as well as by other major international processes and initiatives such as the G8 Deauville Partnership and the G20. The payment of bribes constitutes an element of illicit financial flows. Such payments can take several forms, and may generate financial flows into or out of developing countries.

2. At the fourth High Level Forum for Development Effectiveness (HLF4), partners agreed to “intensify our joint efforts to fight corruption and illicit flows, consistent with the UN Convention Against Corruption and other agreements to which we are party, such as the OECD Anti-Bribery Convention”. Concretely, signatories of the Busan partnership agreed to “Implement fully our respective commitments to eradicate corruption, enforcing our laws and promoting a culture of zero tolerance for all corrupt practices. This includes efforts to improve fiscal transparency, strengthen independent enforcement mechanisms, and extend protection for whistleblowers”.

3. The DAC work on PCD aims to identify areas where official development assistance can be leveraged to either change policies which are proved to be damaging to developing countries, or to improve implementation of policies that benefit developing countries.

OECD Anti-Bribery Convention

4. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), which entered into force in 1999, is the first and only legally binding international instrument to focus on the supply of bribes to foreign public officials. Under the Convention, all 39 Parties—including the 34 OECD Member countries plus Argentina, Brazil, Bulgaria, Russia and South Africa—must make the bribery of foreign public officials in international business transactions, or “foreign bribery,” a criminal offence. They are obligated to prosecute individuals and companies who offer, promise or give bribes to foreign public officials and subject those who bribe to heavy penalties, including fines and prison time. They are also required to deny the tax deductibility for such bribes.

5. A clean and competitive global economy is impossible if companies and individuals continue to bribe in their international business dealings. Bribery distorts markets and raises the cost of doing business. It also weakens good governance and hurts the world’s poorest and most vulnerable. A one million dollar bribe can rapidly amount to a 100 million dollar loss - through derailed projects and inappropriate investment decisions - a cost that poor countries can ill afford. The public works and contracts, construction, real estate, property, legal and business services, oil and gas, and mining sectors¹, as well as

¹ Transparency International, Bribe Payers Index 2011 (<http://bpi.transparency.org>)

defence and military industries and natural resources and energy are particularly exposed to risks of bribery for obtaining contracts. Bribery can also undermine development assistance when bribes are paid to foreign public officials within the context of aid-funded contracts and projects.

Monitoring of the Convention and related instruments, including the 1996 DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement

6. The fight against corruption does not stop with country ratification of the OECD Anti-Bribery Convention. Under the Convention, each country must regularly undergo a rigorous evaluation by its peers. This peer-review process takes place in three phases: **Phase 1** evaluates the adequacy of a country's legislation to implement the Convention. **Phase 2** assesses whether a country is applying this legislation effectively. **Phase 3**, launched in 2010, focuses on enforcement of the Convention, the new 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and outstanding recommendations from Phase 2.

7. Each Phase 2 and Phase 3 evaluation includes an on-site visit to the evaluated country, where the examination team meets with a range of stakeholders, including a wide range of government representatives and representatives from civil society and the private sector. The input we received during these meetings is very important, as it helps the evaluation team to determine how effectively that Party is implementing its anti-bribery laws and measures, as well as the impact that the laws and enforcement have had on behaviour in the public and private sectors. The information received from the evaluated country in response to the Phase 2 and Phase 3 questionnaires, as well as the information received during the on-site visit are used to develop an in-depth report with recommendations for the evaluated country made by the Working Group on Bribery in International Business Transactions (WGB), which is made up of the representatives from the 39 Parties to the Convention plus Colombia, which is in the process of joining the Convention. These reports are published in their entirety on the OECD website (www.oecd.org/bribery). Countries must provide regular follow-up reports on their implementation of these Recommendations.

8. These reports systematically include a section on Parties' efforts to prevent, detect, investigate and prosecute the bribery of foreign public officials as it relates to the granting of public advantages. Phase 3 reports pay particular attention to this issue, as per Section XI of the 2009 Anti-Bribery Recommendation, which refers to the 1996 Development Assistance Committee Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement and its requirement for Parties to include anti-corruption provisions in bilateral aid-funded procurement, to promote the proper implementation of anti-corruption provisions in international development institutions, and to work closely with development partners to combat corruption in all development co-operation efforts. As per Section IX of the 2009 Anti-Bribery Recommendation, the reports also look at what measures Parties have put in place to facilitate the reporting by public officials, in particular those posted abroad, to law enforcement authorities of suspected acts of foreign bribery detected in the course of their work and to protect those who report such allegations from discriminatory or disciplinary action.

Enforcement of the Anti-Bribery Convention

9. Since the Anti-Bribery Convention entered into force in 1999, all 39 Parties to the Anti-Bribery Convention, plus Colombia, which is in the process of acceding to the Convention, have criminalised foreign bribery. Foreign bribery is also no longer tax deductible in any of these countries. According to the latest enforcement data published by the Working Group on Bribery, which dates from 1999 through

December 2010², 199 individuals and 91 entities have been sanctioned under criminal proceedings for foreign bribery in 13 Parties between the time the Convention entered into force in 1999. At least 54 of the sanctioned individuals were sentenced to prison for foreign bribery. And, a record amount of EUR 1.24 billion was imposed in combined fines on a single company for foreign bribery. These numbers should increase in coming years, since, as of December 2010, there were approximately 260 investigations ongoing and criminal charges had been laid against over 120 individuals and 20 entities.

Box 1. How are bribery cases detected? Some illustrative examples

Bribery cases can be detected via a number of means. Some avenues of detection include:

- Self-reporting: many countries have in place laws that encourage company self-reporting of suspected corruption and bribery with the provision that self-reporting could play a mitigating factor in an eventual judgment or settlement.
- Auditors and Tax Authorities: some countries have laws in place that require financial auditors and tax authorities to report suspicions of bribery to the authorities.
- Industry-wide sweeps (investigations): such targeted investigations by industry, have been carried out with great success in several cases, notably the US.
- Whistleblowing and corruption hotlines: the countries with active enforcement have systems in place which protects whistleblowers, and this has proved to be an effective way of detecting corrupt practices. The US has recently put in place an incentive system in place that awards between 10-30% of the monetary sanctions imposed and collected to qualified whistleblowers. The MFA and Norwegian Development agency have engaged an independent law firm to operate a corruption hotline. A significant number of cases originate from whistleblower reports and such mechanisms.
- Mutual Legal Assistance requests from foreign jurisdictions: a very limited number of bribery cases are detected through the submission of MLAs.
- Public Sector and Embassy Staff: in the case of the US, embassy staff are important sources of information about violations.
- Information related to international financial crime from professional networks, such as information on suspicions on money laundering from the Financial Crimes Enforcement Network (FinCEN): international networks provide an important opportunity to liaise amongst relevant judicial authorities, building trust and establishing networks that can lead to increased sharing of information and detection – or help facilitate the sharing of information, provision of MLA, and support needed for investigations.

II. A Role for Development Co-operation

10. There is recognition that there is an important role to be played by development agencies in the implementation of the Anti-Bribery Convention. The Working Group on Bribery, in its review of Parties' implementation and enforcement of the Convention, specifically looks at steps taken by government agencies administering ODA to prevent, detect, and investigate foreign bribery in ODA-assisted projects and the role of ODA officials in preventing, detecting and reporting the bribery of foreign public officials.

² Updated WGB enforcement data will be available in mid-May 2012 on www.oecd.org/bribery. The enforcement data as of December 2010 does not include data provided by Russia, which acceded to the Convention in 2012. Nor does it include data provided by Colombia, which is currently in the process of joining the Convention.

a) Actions for Aid Agencies

11. Building on lessons from previous and ongoing joint efforts between the DAC and the WGB, the following are areas where action could be focused for potential impact. It is not intended to be exhaustive, and the specific issues of most relevance would depend on specific country circumstances. The DAC is requested to discuss and reflect on these as potential avenues for additional activity. The issues will continue to form part of an ongoing and iterative process that should lead to more effective use of ODA for greater policy coherence for development. Once the DAC has considered these potential areas for further action, they should be shared with the WGB for its review and consideration. (A representative from the DAC Secretariat could present these proposals to the WGB at one of its four plenary meetings held per year at OECD headquarters.)

- **Awareness raising** for the private sector and for public officials is an important element of prevention, and effective and targeted information campaigns are important elements of prevention. Development agencies could take a lead in designing and delivering information campaigns targeted at companies bidding on contracts financed by aid agencies and in general for companies with significant activities in developing countries, public officials, embassy staff, and development agency staff.
- Development agencies could consider the **establishment of whistleblowing mechanisms** for reporting suspected acts of bribery of foreign public officials in the cases where these do not exist. Development agencies could also support developing countries in strengthening their capacities for detecting, reporting on suspected corrupt behaviour, including for developing technical capacities of legal authorities to engage effectively with judicial authorities in OECD countries, through Mutual Legal Assistance (MLA), and for developing investigative skills on economic crime and corruption. Ensuring participation of developing country authorities in international networks and fora is another avenue for support.
- **Collaboration with judicial authorities at home.** In many countries, legal cases that require extensive exchange of information with developing jurisdictions and reliance on their capacities for investigation, tend to not be prioritised given the burden they represent in terms of financial and technical resources, and hence their real or perceived low chance of leading to successful prosecution. In response, some countries, such as the US and the UK have chosen to establish specialized units, or additional personnel to deal with cases that involve developing country jurisdictions. Some DAC Member countries have decided to use ODA funding for financing capacity gaps in their own judicial systems, with a view to phase out such support once the operation becomes self-sustaining through cost recovery measures. While this may not be a feasible option for many DAC Members, development agencies could nevertheless consider initiating a dialogue with their relevant home country judicial institutions to raise awareness on developing country impact and propose collaboration where feasible.
- **Debarment from future ODA financed contracts** has been shown to be an effective deterrent for companies engaging in corrupt practices. Most of the multilateral agencies operate some form of debarment system, and many now are sharing information for cross-debarment of companies convicted of corruption offences, but few countries have an effective debarment system in place. Development agencies which do not have a debarment system in place may consider the establishment of such a system and ensure linkages with existing international initiatives.

b) DAC Action

12. The WGB and the DAC have already worked together to explore concrete ways of using development agencies in the prevention, detection and reporting on bribery of foreign officials. The latest such initiative is outlined in the “Proposed Co-Operation between the OECD DAC Network on Governance (GOVNET) and the Working Group on Bribery (WGB)” [[COM/DAF/DCD\(2007\)29](#)]. This initiative proposed a number of measures, mainly focused on provision of information to private sector actors and overseas embassy staff, and a systematic review of ODA provisions in the anti-bribery instruments.

Specific activities proposed included:

- The development of training modules for overseas personnel,
- A conference on the role of the private sector in preventing bribery
- Review of the ODA provisions in the OECD anti-bribery instruments
- Systematising donors’ inputs into Phase 3 Peer Reviews of the OECD convention
- Participation in the WGB’s regional anti-corruption initiatives in Africa (with the African Development Bank), Asia-Pacific (with the Asian Development Bank), Eastern Europe and Central Asia, Latin America (with the Organisation of American States) and MENA regions

13. In addition to the above activities, which still remain relevant and should be implemented, the following could be considered by the DAC:

- Update the 1996 Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement. This Recommendation is a reference for WGB review of ODA related work on anti-corruption and is referenced in Section XI.ii. of the 2009 Anti-Bribery Recommendation. The DAC and the WGB have collaborated since 2004 on issues such as aid funded and public procurement and held international events jointly which have contributed to increased dialogue and synergies between the two groups. Specifically, two of the most important converging points between the work of the DAC and the WGB concern the use of ODA to further anti-corruption efforts in countries receiving aid, and the need to prevent, detect and report the bribery of foreign public officials in relation to aid-funded procurement. It could benefit from an update, with a view to take into account recently developed instruments and tools related to risks and sanctions related to aid funded procurement. In addition, lifting the recommendation to the OECD Council level would make it applicable to all OECD members.

ANNEX

**COMPILATION OF WORKING GROUP ON BRIBERY REPORTS AND
RECOMMENDATIONS ON ODA
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BULGARIA

11. Public advantages

(a) *Official development assistance*

14. Bulgaria has only recently started elaborating its development assistance policy. A Council, composed of 16 other institutions and chaired by the Minister of Foreign Affairs, leads this work; there is also a unit dealing with official development assistance (ODA) in the MoFA. The priority countries for Bulgarian development assistance include six countries in the Balkan and in the Black Sea and Caucasus regions, which coincidentally are regions perceived to have high levels of corruption.³ The current ODA budget is limited and involves low-level procurement. While ODA-specific regulations are being developed, the Law on Public Procurement is currently used as a legal basis for implementing ODA. It is foreseen that future ODA-specific regulations will be based on EU practice, and will include criteria for granting ODA and a system to carry out checks on applicants and to ensure that they have not been blacklisted. So far no measures have been taken to raise awareness of foreign bribery risks in ODA or to create channels for reporting suspicions of foreign bribery in this field.

Commentary

The lead examiners note that ODA policy and procedures in Bulgaria are at an early stage of development and involve small amounts of public funds. They recommend that, in the course of developing these policies and procedures, Bulgaria adopt measures to prevent, detect and report foreign bribery in the award and execution of ODA contacts....

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

1. Regarding official development assistance (ODA), the Working Group recommends that Bulgaria, in the course of developing its ODA policies and procedures, adopt measures to prevent, detect and report foreign bribery in the award and execution of ODA contacts (2009 Recommendation II, IX(i) and IX(ii)).

³ Transparency International, Global Corruption Barometer, 2009 (www.transparency.org/policy_research/surveys_indices/gcb/2009).

CANADA

11. Public advantages

15. For all public advantages administered by Canadian authorities, the consequence of conviction of an offence of foreign bribery does not automatically result in termination of the contract or support, or of debarment from future eligibility to apply for public procurement tenders, official development assistance contracts, or officially supported export credits. Debarment as a form of administrative sanction is a matter considered in Part B.3.(e) above.

(a) Official development assistance

16. Official Development Assistance (ODA) is administered by CIDA. Contracting with CIDA is regulated by various rules⁴ and conditions⁵, which are publicly available on CIDA's website. According to these rules and conditions, since 2003, organisations wishing to obtain contribution funding from CIDA are required to sign an Anti-Corruption Declaration form, confirming that within the three years before signing the agreement, they have not been convicted of any corruption-related offence.⁶ The Declaration also states that neither the organisation nor any of its officers, employees and subcontractors included in the project/program proposal is currently under sanction for corruption-related offence. In addition, one of the general conditions of contracting with CIDA is an anti-corruption clause, pursuant to which the contractor warrants that "no offer, gift or payment, consideration or benefit of any kind, which constitutes an illegal or corrupt practice, has or will be made to anyone, either directly or indirectly, as an inducement or reward for the award or execution" of the contract/contribution agreement. The anti-corruption clause does not require that the contractor include such an obligation in its contracts with sub-contractors.

17. In Phase 2, the Working Group recommended that Canada consider revisiting the policies of agencies such as CIDA, EDC, and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption [Recommendation 5(e)]. CIDA requires applicants to declare previous corruption-related convictions, although the existence of such a conviction may not exclude the award of a contract if the applicant can show that steps have been taken by it to counter the problem and prevent future similar conduct. Although such declarations are not subject to due diligence, CIDA does consider the compliance mechanisms in place within applicant companies. Representatives from CIDA explained that the evaluation criteria in this regard will be higher in the case of high-value ODA contracts, operations in high-risk industries or geographic areas, and will almost always be more thoroughly applied in the case of SMEs due to the practical difficulties that SMEs face in establishing and implementing CSR mechanisms.

⁴ The rules are set out in the following document available on CIDA's website: <http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/NIC-56143617-PTT>

⁵ See the general conditions for contracting with CIDA: <http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/REN-218124737-P7R>

⁶ The Anti-Corruption Declaration is available at: [http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Form/\\$file/CIDA_497.pdf](http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Form/$file/CIDA_497.pdf).

CIDA's Principles and Guidelines for Investigations call for CIDA to take appropriate action against consultants, contractors and suppliers who subsequently engage in fraud or corruption, including termination of contracts. However, applicant declarations are not subject to due diligence, and there do not appear to be mechanisms for CIDA to learn of corrupt activities by existing contractors that occur during the course of a contract.

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Commentary

The lead examiners are encouraged by the approach of CIDA, in determining whether or not to grant an ODA contract, to evaluate with higher levels of scrutiny applications concerning high-value contracts, operations in high-risk industries and geographic areas, and applications made by SMEs who might, by virtue of their size, operate without adequate compliance programs. They recommend that CIDA procedures could be further strengthened by undertaking due diligence concerning applicants' declarations about corruption-related convictions....

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

9. Regarding public procurement contracting in Canada, the Working Group reiterates the Phase 2 recommendation that Canada revisit the policies of Public Works and Government Services Canada on dealing with applicants convicted of CFPOA violations. In addition, the Working Group recommends that Canada consider further strengthening CIDA procedures by undertaking due diligence concerning applicants' declarations about corruption-related convictions. [Convention, Article 3.4; Commentary 24; 2009 Recommendation XI (i)]

FINLAND

11. Public advantages

(a) *Official development assistance*

18. Official Development Assistance (ODA) is administered by the Ministry of Foreign Affairs (MFA). The civil society unit of the MFA, VIRKE (the Project for the Developments of Inter-Authority Cooperation), checks information provided by applicants. ODA contracts include a provision to the effect that the contractor or agency “shall ensure that no illegal or corrupt practices relate to the use of the Finnish contribution”. During the on-site visit, in response to concerns raised by the lead examiners that this provision does not specify a prohibition against engaging in foreign bribery, a representative of the MFA stated that “we trust that our companies should know”. Finnish authorities maintain that it has been a consistent guiding principle of the Ministry of Foreign Affairs to urge Finnish companies not to engage in bribery. However, given the relatively low level of direct engagement by the public sector with the private sector in awareness-raising activities in Finland (see Part B(10)(b) above), the Working Group considers that ODA contracts should more expressly refer to the prohibition against engaging in foreign bribery.

19. The Group is also concerned by the fact that there is no provision expressly requiring sub-contractors or contracted local agents to be bound by the same obligation, especially in light of the apparent lack of understanding by some representatives of the business sector in Finland that payments through local agents overseas could constitute acts of foreign bribery, or at least that this poses risks of unlawful conduct (see part B(1)(b) above). This is somewhat offset by clause IX(17) of Finland’s model consultant contract, which means that corrupt practice by a contractor or subcontractor can allow the MFA to cancel the contract. The same provision would render the contractor liable to compensate the MFA for any damage or loss caused to the Ministry.

22. The Working Group is also concerned that agents and contractors are not required to declare that they have not been convicted of corruption offences and that the MFA does not carry out due diligence concerning the criminal record of applicants prior to the granting of an ODA contract.

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Commentary

Measures to prevent, detect and report foreign bribery by Finnish agencies involved in public advantages suffer from various deficiencies. Concerning official development assistance, the lead examiners recommend that persons applying for ODA contracts be required to declare that they have not been convicted of corruption offences and that due diligence be carried out prior to the granting of ODA contracts. ODA contracts should specifically prohibit contractors and partner agencies from engaging in foreign bribery and should bind sub-contractors and contracted local agents by the same prohibition....

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

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- I. Regarding official development assistance (ODA), the Working Group recommends that Finland take steps to ensure that: (i) persons applying for ODA contracts be required to declare that they have not been convicted of corruption offences; (ii) due diligence is carried out prior to the granting of ODA contracts; (iii) ODA contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery; and (iv) sub-contractors and contracted local agents be bound by the same prohibition (2009 Recommendation XI).

GERMANY

11. Public advantages

20. The various agencies in Germany that administer public contracts or other public advantages, including development assistance and export credits, have put measures in place to limit access to such funds by individuals and companies which have been convicted for bribery. Similarly, efforts have been made to strengthen requirements for companies participating in tenders for public procurement. However, these measures remain limited. For example, there is no centralised registry of companies (German or foreign) excluded from receiving public funds, nor is there a centralised mechanism in place to take into account debarment lists compiled by international development banks.

21. The Phase 2 follow-up report noted that “a Federal register of unreliable companies was to be established in 2006”. However, no such register has been established. The discussion about establishing a central “corruption-register” has been put aside during the last reform of public procurement law. According to the German authorities, the discussion will be pursued in the future, but a timeline for this reform has not been set. On the other hand, some *Länder* (Bavaria, Baden-Württemberg, Berlin, Bremen, Hesse, North-Rhine-Westphalia and Rhineland-Palatia) maintain a register of “unreliable companies”. However, there is no mechanism in place to share the information in these registers with authorities from other *Länder* or the federal authorities. According to the German authorities, an assessment is underway to determine the usefulness of *Länder*-level registers, and whether a federal register should be established.

22. The Federal Government has no information on whether any enterprise has been debarred from access to public advantages following a conviction for foreign bribery, as most awarding procedures are made at *Länder* or municipal level, and information thereon is not available to the Federal Government. After the on-site visit, the German authorities reported that, at federal level, companies linked to allegations of foreign bribery were on many occasions subjected to enhanced due diligence procedures.

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(b) *Official development assistance*

23. The Federal Ministry for Economic Cooperation and Development does not directly issue calls for tender involving public development cooperation funds, but has its implementing agencies issue them. The implementing agencies are the Development Bank (KfW) and, until end 2010, the Association for Technical Cooperation (GTZ). In 2011, the latter was merged with two other development assistance agencies and has changed its name to Agency for International Co-operation (GIZ). GIZ is now responsible for implementing German technical cooperation, whereas KfW handles financial development cooperation. Both institutions are 100% state-owned and subject to public procurement law. Both the KfW and the GIZ must ensure that only companies complying with the Law, as provided in the Public procurement law are eligible to tender for contracts involving development assistance (ODA) funds.⁷

24. Companies tendering for ODA-funded contracts must make a declaration of compliance with the Law. According to information provided after the on-site visit, GIZ requires tendering

⁷ See references to German procurement regulation in the sub-section “Public procurement” of this chapter.

companies to acknowledge in writing that they have full knowledge of the integrity rules and standards of GIZ and accept that any violation of these rules and standards will lead to exclusion in the tender process. All suppliers of works and services of GIZ are obliged under the general contract conditions to refrain from corrupt activities. Any violation will lead to claims for damages as well as contractual penalties. In addition, KfW and GIZ are required to check that selected companies have not been convicted. e.g., by verifying debarment lists of multilateral development banks.⁸ Both the KfW and the GIZ have a code of conduct, which addresses, *inter alia*, bribery.⁹ The KfW also has internal regulations to prevent corruption in the award of contracts to consultants and suppliers. In tenders concerning ODA-funded projects financed by KfW, applicants must submit an anti-corruption declaration. Firms debarred in the country of the recipient are not eligible for tendering. At present, there seems to be no evidence that any company has been excluded from tendering for ODA-funded contracts in relation to a conviction for foreign bribery.

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Commentary:

The lead examiners note that Germany has put in place measures for agencies in Germany that administer public contracts or other public advantages to prevent, detect and report foreign bribery. They recommend that Germany consider establishing a federal register of non-reliable companies and improve co-ordination among Länder registers.

They also recommend that Germany issue guidelines to public procurement authorities to take the following measures, where they are not already in place: (i) take international debarment into consideration during the tender process; (ii) take such listing as a possible basis for enhanced due diligence of applications for public tenders; (iii) establish mechanisms for the verification, when necessary, of the accuracy of information provided by applicants; and (iv) include, within public procurement contracts, termination and suspension clauses in the event of the discovery by procurement units that information regarding compliance with foreign bribery legislation provided by the applicant was false, or by reason of the contractor subsequently engaging in foreign bribery during the course of the contract.

The lead examiners note the enhanced transparency measures applied to the award of contracts in tender processes with limited competition.

The lead examiners commend Germany for the measures put in place to implement the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits.

The lead examiners are encouraged by measures taken to apply due diligence prior to the granting of ODA-funded contracts. They recommend that Germany ensure that ODA-funded contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery and that this prohibition also apply to sub-contractors and contracted local agents.

⁸ One example is the World Bank Group's debarment list, <http://web.worldbank.org> ("Projects & Operations" / "Procurement").

⁹ [GTZ Code of Conduct](#) Error! Hyperlink reference not valid.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

11. Regarding public advantages, the Working Group recommends that Germany

...

c) Ensure that ODA-funded contracts specifically prohibit contractors and partner agencies from engaging in foreign bribery and that this prohibition also applies to sub-contractors and contracted local agents [2009 Recommendation XI.].

HUNGARY

11. Public benefits

a) Official development aid (ODA)

25. The 1996 Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement calls upon Parties to require anti-corruption provisions in bilateral aid-funded procurement, to promote the proper implementation of anti-corruption provisions in international development institutions and to work closely with development partners to combat corruption in all development cooperation efforts. The 2009 Recommendation further requires that that there be a possibility to suspend from competition for public advantages (such as contracts funded by official development assistance) enterprises determined to have bribed foreign public officials.

26. In Hungary, aid projects are managed and supervised by the Ministry of Foreign Affairs (MFA). During the Phase 3 on-site visit, representatives of the MFA explained that about one half of the bilateral ODA is funded through NGOs; the other half of the bilateral ODA is implemented through memorandums of understanding with the recipient governments. They further noted that ODA represents a small budget and involves small scale projects that are not based on the public procurement rules (due to their small size). The MFA has adopted a rather limited approach to preventing foreign bribery in ODA-funded projects. The Hungarian embassies and foreign missions examine ODA project proposals. However, representatives of the MFA interviewed during the Phase 3 on-site visit were not aware of any procedure in place to supervise such projects during the selection or execution in relation to anti-corruption risks. There is no requirement of anti-corruption declarations or internal control and financial audits within implementing organisations. It also appears that there are no procedures for suspending companies convicted for foreign bribery from ODA contracts or for the use of blacklists established by development banks for these purposes. The usefulness of such blacklists itself was questioned (since it is very easy to form a new company). In addition, to be useful, any blacklist would need to identify the individuals associated with the blacklisted company. This lack of anti-corruption measures appear to fall short of 1996 and 2009 Recommendations, which requires anti-corruption provisions to guide bilateral aid-funded procurement, and that there is a possibility to deny public advantages, such as contracts funded by official development assistance, as a sanction for bribery.

27. The representative of Eximbank (one of the Hungarian export credit agencies discussed in part 11(b) below) interviewed during the on-site visit noted that Eximbank was involved in ODA contracts by providing tied aid credits under bi-lateral government agreements with foreign states, and that these contract included references to the 2006 OECD Recommendation of the Council on Bribery and Officially Supported Export Credits to the OECD DAC provisions.

Commentary

The lead examiners recognise that the Hungarian ODA represents a small budget. However, they regret that apart from the efforts of the Hungarian export credit agencies to prevent the risk of foreign bribery in tied aid credits, no efforts have been made by the MFA to establish mechanisms to prevent risks of foreign bribery in ODA funded operations. As the ODA sector develops in Hungary, the MFA should introduce such mechanisms, including anti-corruption provisions during selection and control of ODA funded projects, as well as sanctions to allow suspension from such contracts for companies convicted for corruption, as required by the 1996 Recommendation and the 2009 Recommendation provisions related to ODA.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP**1. Recommendations of the Working Group*****Recommendations for ensuring effective prevention and detection of foreign bribery***

9. Regarding public advantages, the Working Group recommends that Hungary:

...

- (b) establish (i) mechanisms to prevent risks of foreign bribery in contracts funded by official development assistance (ODA), including during the selection and monitoring phase of ODA funded projects, and (ii) sanctions to allow suspension from such contracts of companies convicted of bribery of foreign public officials [2009 Recommendation XI (i)-(ii)].

ICELAND

11. Public Advantages

a) *Official Development Assistance*

28. Official Development Assistance (ODA) is administered by the Icelandic International Development Agency (ICEIDA). ICEIDA is not a member of the OECD Development Assistance Committee (DAC), but claims to “honour DAC rules in the course of [their] work”. The lead examiners noted, however, that no measures had been undertaken to address foreign bribery in ODA-funded contracts, including through the incorporation of anti-corruption clauses in contracts. There is no requirement for agents and contractors to declare that they have not been convicted of corruption offences to qualify for an ODA-funded contract, and no form of due diligence is carried out by ICEIDA officials prior to the granting of an ODA-funded contract. Furthermore, there are no measures in place for the suspension of companies that have engaged in foreign bribery from obtaining ODA-funded contracts. During the on-site visit, ICEIDA officials stated that because their programs are small scale, it is not difficult to monitor how their funds are administered, and that they “rely on the host country” to find appropriate contractors. In this regard, ICEIDA officials explained that contracts are granted on the basis of the tendering procedures applied in the host country, which usually maintain an assured list of contractors. In this regard, the lead examiners note with concern that ICEIDA does not undertake any due diligence of its own on these lists.

29. With regard to reporting suspicions of foreign bribery, section 19 of ICEIDA’s Code on Conduct states that “employees who become aware of corruption or illegal or inappropriate conduct should inform their highest ranking superior, head of personnel or Director General thereof”. However, there appear to be no obligations within the Code of Conduct for such designated persons to, in turn, report to law enforcement authorities. The perceptions of ICEIDA officials, who, during the on-site visit claimed that “foreign bribery is not a problem for a bilateral aid agency” are concerning. In view of these perceptions, and that many of ICEIDA’s projects are executed in high risk geographic locations, the lack of preventive and due diligence measures in place to combat foreign bribery in ODA-funded procurement is particularly problematic.

...

Commentary:

The lead examiners are concerned about the absence of measures in place to prevent and sanction foreign bribery in ODA-funded contracts, and recommend that Iceland consider systematically including anti-corruption provisions that include both preventive and punitive measures (such as the termination of contracts or other civil or criminal actions, where applicable) in bilateral aid-funded procurement, as recommended by the 1996 DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement....

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

Recommendations for ensuring effective prevention and detection of foreign bribery

10. Regarding official development assistance, the Working Group recommends that Iceland’s official development agency (i) systematically require anti-corruption provisions in bilateral

aid-funded procurement that include both preventive and punitive measures (such as termination of contracts or other civil or criminal actions, where applicable), and (ii) where international business transactions are concerned, and as appropriate, take into consideration applicant companies' internal controls, ethics and compliance programmes or measures [2009 Recommendation X.C.(vi) and XI.(ii); 1996 DAC Recommendation].

ITALY

11. Public advantages

...

c) *Official development assistance*

30. The Ministry of Foreign Affairs is Italy's agency for official development assistance (ODA) through the Italian Development Cooperation Programme (Cooperation Programme). According to participants in the on-site visit, any public procurement carried out with the financial resources of the Cooperation Programme is subject to Italy's general procurement laws, including Decree 163/2006. To ensure that funds are used for their intended purpose, the Cooperation Programme has produced additional guidelines on preventing and combating corruption in projects funded by it (CP Guidelines).

31. Under the CP Guidelines, the Cooperation Programme "reserves the right to suspend or cancel Project financing if corrupt practices of any kind are discovered at any stage of the award process and if the contracting authority fails to take all appropriate measures to remedy the situation." Corrupt practices covered by this provision include "the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the contracting authority."¹⁰ In addition, "all tender dossiers and contracts for works, supplies and services must include a clause stipulating that tenders will be rejected or contracts terminated if it emerges that the award or execution of a contract has given rise to unusual commercial expenses," such as commissions not paid in return for an actual and legitimate service, commissions paid in tax haven countries, commissions paid to recipients that are not clearly identified or commissions paid to a company that appears to be a front company (clause 4.12). If a contractor has paid such an unusual commercial expense, the contract may be terminated and the contractor may be permanently excluded from receiving Cooperation Programme funds (clause 4.14). The contractor also may be excluded from other Cooperation Programme contracts or required to pay penalties (clause 4.15). The Cooperation Programme requirements also apply to subcontractors and local agents. In addition, the conduct of local agents acting in the name of contractors or subcontractors of the Cooperation Programme (or in the name of local governments who receive budget support under Italian ODA programmes) is imputable to the subjects they represent.

32. Unlike officials of SACE and CONSIP, officials of the Cooperation Programme are public officials. Thus, they are subject to the general reporting requirements discussed in subsection 10.b above.

Commentary:

...

The lead examiners are encouraged by the measures to prohibit bribery taken in regard to ODA-funded contracts. However, they are concerned that CONSIP only considers bribery of EU officials when deciding whether to award a contract. The lead examiners recommend that AVCP and other agencies administering public contracts extend the

¹⁰ Clause 4.11 of Eligibility Criteria, Ethical Clauses, Contract General Principles, 1 June 2009.

grounds for debarment from public tenders to cover all offences falling within the scope of Article 1 of the Anti-Bribery Convention.

Finally, because personnel at SACE and CONSIP do not appear to view themselves as public officials, the lead examiners recommend that these agencies formalise procedures to be followed by employees for reporting credible evidence of the bribery of a foreign official to law enforcement.

JAPAN

11. Public advantages

33. As of Japan's Phase 2 written-follow up report, the WGB decided that the issue of public procurement authorities' policies for dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official is an issue for follow-up. This includes policies of agencies with oversight over public procurement contracting funded by ODA – including JICA – and agencies providing overseas investment assistance, including the Nippon Export and Investment Insurance (NEXI) and JBIC.

a) *Official development assistance*

34. According to the OECD Development Assistance Committee (DAC), Japan was the fifth-largest amongst DAC donors in 2009 (the latest year for which figures are available), at USD 9.5 billion (or 0.18 percent of Japan's gross national income). Sixty-five percent of this aid is disbursed via bilateral aid agreements, mostly with Asian governments (41.4 percent) and African governments (24.3 percent), via loans (58 percent of gross bilateral aid in 2009), grants (24 percent), and technical cooperation (17 percent).¹¹ The agencies responsible for ODA underwent reforms in 2008. The 'new JICA' coordinates all three of Japan's previously disconnected development assistance channels: loans, grants and technical cooperation. It integrates parts of the former JBIC, which managed Japan's ODA loans, as well as responsibilities for some grants previously managed by MOFA.

35. In February 2011, MOFA updated the MOFA Guidelines for Measures against a Person Engaged in Fraudulent Practices in Japanese official Development Assistance Projects (MOJFA Guidelines for Measures). These updated rules expand the period of sanctions against bribery to foreign public officials from 2 to 12 months to from 6 to 36 months. And these updated rules install measures against repeated cases (the minimum period of measures will be twice in the repeated cases and 2.5 times in the repeated cases of bribery to foreign public officials.) Also, the 'new JICA' issued in March 2011 updated *JICA Rules on Sanctions against Persons Engaged in Fraudulent Practices, etc. in Projects of ODA Loan and Grant Aid* ('JICA Rules on Sanctions'). These updated rules expand the period of sanctions against bribery from 2 to 24 months to 2 to 36 months. The rules also expand from three to four years the time after the expiration of the period of sanctions related to foreign bribery when sanctions become applicable again to contractors working on ODA-assisted projects. JICA and MOFA said the revisions were adopted in response to the abuse of ODA funds discovered during the investigation and prosecution of Case #2, described in Section A.5 above.

36. JICA, MOFA and MOJ provided extensive information to the evaluation team regarding JBIC's (now JICA) and MOFA's decision to debar the company in Case # 2 after conviction. While debarment is not automatic upon conviction in foreign bribery cases, agencies can decide to debar companies suspected or convicted of foreign bribery under the JICA Rules on Sanctions. JBIC (now JICA) and MOFA therefore decided according to JBIC Rules on Sanctions and the MOFA Guidelines for Measures to disqualify the company from receiving orders for ODA loan and grant aid projects for the maximum period of 24 months (from August 2008 to August 2010). Following this case, Japan also suspended the process of providing new ODA loans to Vietnam (the country of the bribed foreign

11. For a full discussion of the OECD DAC's review of Japan's development assistance policies and measures, see the 2010 DAC peer review of Japan, available online here: http://www.oecd.org/document/39/0,3343,en_2649_34603_45378791_1_1_1_1,00.html

public official) from August 2008 to February 2009.¹² Japan reports that the company in Case #2 has not returned to the JICA lists of consultant firms, as it has withdrawn from ODA business.

Commentary

On ODA, the lead examiners commend Japan for deciding to debar the company convicted of foreign bribery in Case No. 2 and for learning from this experience to strengthen its JICA Rules on Sanctions. On export credit, the lead examiners encourage JBIC and NEXI to coordinate their efforts to prevent and detect foreign bribery in international business transactions benefitting from official export credit support. The lead examiners also welcome NEXI's willingness to require written confirmation from applicant exporters requesting official export credit that they have appropriate anti-bribery management control systems in place. Given that more Japanese companies—especially SME's—will be looking for business opportunities overseas, the lead examiners welcome further efforts by JICA, JBIC and NEXI to raise awareness of the risks of foreign bribery.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

Recommendations for ensuring effective prevention and detection of foreign bribery

14. The Working Group recommends that Japan take appropriate steps to coordinate the efforts of the Japan Bank for International Cooperation (JBIC) and Nippon Export and Investment Insurance (NEXI) to prevent and detect foreign bribery in international business transactions benefitting from official export credit support and that NEXI and JBIC also raise awareness of the risks of foreign bribery among Japanese companies, especially SMEs. [2009 Recommendation, para. III vii), XII ii); 2006 Recommendation on Bribery and Officially Supported Export Credits, para. 1 (a)]

12. For a full discussion of joint anti-ODA-related corruption measures undertaken by Japan and Vietnam in the wake of the PCI case, see the Ministry of Foreign Affairs summary (also referenced in Japan's Phase 3 questionnaire responses) here: <http://www.mofa.go.jp/region/asia-paci/vietnam/oda-related0902.pdf>

KOREA

11. Public advantages¹³a) *Official development assistance*

37. Official development assistance (ODA) is mainly administered by the Korean International Cooperation Agency (KOICA). In Phase 2, the Working Group issued a recommendation to Korea with regard to disclosure policies and reporting obligations of KOICA on suspicions of FBPA violations.¹⁴ In the Phase 2 Follow-up, the Working Group concluded that this Recommendation had not been implemented. Since the Phase 2 Follow-up Report, KOICA has undertaken procedural steps to report to competent authorities suspected violations of the FBPA. KOICA has developed a “Memorandum of Anti-Bribery and Integrity” (‘Memorandum’) as a part of its internal regulations of operation that provide guidance for disclosing suspected acts of bribery, which KOICA would then report to law enforcement authorities. However, no such reports have been made to date.

38. With regard to prevention and detection efforts more generally, all companies contracting with KOICA must adopt the Memorandum, which requires companies to establish rules to prevent the bribery of foreign public officials, as well as establish whistleblower channels and protection mechanisms. The Memorandum also makes explicit reference to the Anti-Bribery Convention, and recommends that companies awarded ODA-funded contracts establish internal controls, ethics and compliance systems or measures. KOICA indicated that since the requirement to adopt the Memorandum came into effect in March 2010, they have received an increasing number of inquiries on the FBPA and the Anti-Bribery Convention from Korean companies and institutions, which has in turn contributed to awareness-raising efforts. If a contractor is found to have engaged in bribery, KOICA can impose a number of sanctions, including cancellation of the contract and exclusions from future tenders.

39. KOICA has also engaged in information-dissemination and training programmes on the Anti-Bribery Convention to companies that have contracted, or have the potential to contract, with KOICA. Korean authorities further indicated that if Korean companies confront difficulties concerning bribe solicitations abroad while implementing a KOICA-funded project, they may report to KOICA’s overseas offices or headquarters for assistance. However, no such instances have been recorded to date.

Commentary

The lead examiners commend Korea on the various measures undertaken to prevent, detect and report foreign bribery by Korean agencies involved in the disbursement of official development assistance and officially-supported export credit, including the considerations given to internal controls, ethics and compliance measures. In view of the close working relationship between Korea Eximbank and K-Sure, the lead examiners further recommend that Korea consider applying a more harmonized approach to their anti-bribery guidelines, in order to more effectively implement the 2006 Recommendation.

...

13 See also section 3 for related discussion on civil and administrative sanctions.

14 Phase 2, Recommendation 3(b).

RECOMMENDATIONS AND FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

1. Regarding the prevention, detection and reporting of suspicions of foreign bribery by Korea's two public agencies that provide contracting opportunities, the Working Group recommends that Korea:
 - a. Consider applying a more harmonised approach to the anti-bribery guidelines of Korea's officially supported export credit agencies -- Korea Eximbank and K-Sure -- to more effectively implement the 2006 Recommendation on Bribery and Officially Supported Export Credits (2009 Recommendation XI (i) and XII); and
 - b. Consider adopting a systematic approach to providing access to information on companies convicted of corruption, such as through a national debarment register, to facilitate debarment by public contracting agencies of companies convicted of foreign bribery (Convention, Article 3.4, Commentary 24, 2009 Recommendation XI (i)).

LUXEMBOURG

11. Public benefits

(a) Official development aid

40. Almost all the resources allocated by the Luxembourg government to official development are managed by the Luxembourg development cooperation agency Lux-Development SA, a private company.

41. In accordance with the 2006 Recommendation of the Development Assistance Committee on Anti-corruption Proposals for Bilateral Aid Procurement, Lux-Development's general procurement regulations contain an anti-bribery clause under which financing of contracts may be suspended or cancelled if corrupt practices are discovered at any stage of the award process and appropriate steps to remedy the situation are not taken. In addition, the regulations provide that all tender dossiers and contracts must include a clause stipulating that tenders will be rejected or contracts terminated if unusual commercial expenses are found to have been paid.

42. The Integrity Code for Lux-Development staff was adopted in October 2007. The code defines bribery and its sources, how to behave in the event of a conflict of interest, and improper advantages such as travel, discounts, invitations, etc. The chapter of the code entitled "What to do if in doubt" recommends that Lux-Development employees finding themselves in a work-related situation that calls their integrity into question should contact their line manager or the Executive Committee or send an e-mail to a dedicated address, integrity@lux-development.lu. According to those interviewed during the Phase 3 visit, no such e-mail has yet been received.

43. Lux-Development's Quality handbook, adopted in June 2010, describes a procedure to prevent fraud, including a reporting procedure (described in the previous section).

Commentary

...

The Luxembourg development cooperation agency (Lux-Development) and the Office du Ducroire have stepped up internal measures to better prevent corruption in the provision of public funds. Generally, they seemed aware of the problem of transnational bribery and of the importance of implementing the necessary measures. The lead examiners note that a limited number of actions have been taken to prevent bribery in public procurement.

The lead examiners regret that no case of bribery of foreign public officials has been reported by staff of the Office du Ducroire and Lux-Development. No enterprise has been excluded for bribery in connection with the provision of public advantages.

The lead examiners recommend that Luxembourg take steps to raise awareness in these two agencies of the new law on whistleblowers and the new reporting requirements for their staff under Article 23.1 of the Code of Criminal Procedure. They also recommend that the relevant agencies use the existence of internal control, ethics and compliance measures as a criterion in their decisions to grant public benefits. Finally, the lead examiners recommend that foreign bribery and the requirement to report it to the prosecuting authorities are specifically mentioned in the Integrity

Code and Quality manual of Lux-Development, as well as in the internal procedures of the Office du Ducroire.

C. RECOMMENDATIONS AND ASPECTS TO BE MONITORED

Recommendations to ensure effective prevention and detection of transnational bribery

9. Regarding public benefits, the Working Group recommends that Luxembourg:
 - a. Make sure that the integrity code of the Luxembourg development co-operation agency be updated to include an explicit reference to the bribery of foreign public officials, and to the requirement that its staff report any suspicions of such bribery to the prosecuting authorities under Article 23.1 of the Code of Criminal Procedure and the protection of whistleblowers instituted by the new law [2009 Recommendation, IX.];
 - b. Take the steps necessary to ensure that public procurement authorities impose stricter enforcement of existing provisions to bolster the integrity of public procurement, and especially of those excluding bids (i) submitted by economic operators that have been convicted of bribery or (ii) appearing on the development banks' exclusion lists [2009 Recommendation, IX. and XI.];
 - c. Explore the feasibility of taking measures so that, when deciding to grant contracts and other public benefits, the relevant agencies would use the existence of internal control, ethics and compliance measures as a criterion for those decisions [2009 Recommendation, X. C, vi) and XI. i)].

MEXICO

11. Public Advantages

44. This section will address mainly the denial of public advantages including debarment from public procurement, which is the subject of Phase 2 Recommendation 5(d). The section will also deal with developments since Phase 2, including the Anti-Corruption Bill that is before the Mexican Congress, and Mexico's emerging programme on official development assistance (ODA).

...

c) *Official Development Assistance*

45. Mexico has provided limited official development assistance (ODA) thus far. Mexico states that assistance has been provided within a South-South co-operation framework, mostly as technical co-operation by Mexican officials in the form of policy advice, training, information sharing and research. Recipients of assistance have included countries in Central America and the Caribbean. This included a five-year project with Colombia on anti-corruption.

46. However, Mexico's ODA programme will likely expand in the near future. On 6 April 2011, Mexico enacted the Law of International Co-operation for Development (LICD). The Law deals with ODA projects funded by Mexico, and identifies Central America, Latin America and the Caribbean as priority areas for assistance (Article 24(II)). The Law also establishes an International Programme for Development Co-operation, and creates the Mexican Agency for International Development (AMEXCID) to oversee the Programme.

47. Specific anti-corruption measures have yet to be developed for this emerging ODA programme. LICD emphasises the importance of ensuring full transparency in the management and control of ODA resources (Article 2(III)) but does not prescribe particular anti-corruption measures. At the time of this report, AMEXCID had not been set up, and officials were still considering how to implement the Law. Nonetheless, a Mexican official stated that going forward Mexico would consider international best practices on anti-corruption in ODA. Mexico would also develop rules on debarment if AMEXCID begins to award ODA-funded contracts.

Commentary

The lead examiners are encouraged by Mexico's stated commitment to develop anti-corruption measures in its expanding ODA programme. They recommend that the Working Group follow up developments in this area as Mexico implements its ODA programme.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

2. Follow-up by the Working Group

1. The Working Group will follow up the issues below as case law and practice develops:

- (d) Anti-corruption measures in Mexico's ODA programme.

NORWAY

11. Public advantages

a) *Official development assistance*

48. Official development assistance (ODA) is mainly administered by the Norwegian Ministry of Foreign Affairs and its missions abroad. Approximately 10% of the administration of ODA is delegated to the Norwegian Agency for Development Cooperation (Norad). The MFA and Norad emphasise that they practice a “zero-tolerance” approach towards corruption, fraud and any other misuse of funds (financial irregularities). This approach is expressly stated in a number of official memos and documents, including the MFA Policy Memo (dated 09.06.2010), the revised Guidelines for Handling Suspicions of Financial Irregularities in the Foreign Service (dated 18.03.2011), Norad’s Guidelines (dated 26.01.2011), texts in annual instructions and grant management letters from the MFA to all embassies and permanent delegations, and in the Grant Scheme Rules for budgetary allocations. The MFA is also in the process of developing guidelines for risk management, including risk for corruption. This means that the grant recipient is obliged to organise its activities in such a way that financial irregularities are effectively prevented, detected, reported and handled through the organizational chain down to the end user. The grant recipient shall immediately notify the MFA or Norad of any suspicion of financial irregularities, including corruption. A standard clause to this effect is also included in agreements and contracts with recipients of Norwegian grants from the MFA and Norad (ODA and non-ODA). During the on-site visit, Norad officials further explained that recipients of grants from Norad shall always be assessed as part of the decision-making process; assessment criteria include internal controls, ethics and compliance programmes, as well as anti-corruption measures and the capacity of the recipient to carry out the contract. Corruption risk assessments shall also be a part of the decision-making process; applicants for grants are required to perform risk assessments in their applications, which the MFA will assess, as well as follow up with risk analysis during the implementation phase. The MFA and Norad also conduct financial management and anti-corruption training, as well as training on the zero-tolerance policy and practice for employees charged with administering ODA and non-ODA grants, including those situated in Norwegian embassies abroad.

49. All MFA and Norad officials are required to report suspicions of financial irregularities to the Foreign Service Control Unit of the Ministry of Foreign Affairs or the ‘Alert Team’ in Norad, in accordance with the *Guidelines for Dealing with Suspicions of Financial Irregularities in the Foreign Service* and the *Norad Guidelines*, respectively. The term “financial irregularities” is considered to include corruption, embezzlement, misuse of funds, fraud, theft and favouritism or nepotism. The concept also includes the use of funds in conflict with the objectives and conditions in the agreement, and the inability to satisfactorily account for the use of funds. Financial irregularities may involve intent as well as acts of negligence, such as passivity, failure to act or lack of good judgement in the management of funds. During the on-site visit, MFA officials confirmed that this would also include the reporting of suspicions of foreign bribery. MFA and Norad officials, as well as the general public, may also report directly and anonymously through the external whistleblower reporting channel managed by an external law firm, as mentioned above.

50. If there is a reasonable suspicion of financial irregularities, irrespective of the reason, all transfer of funds - to which the suspicion applies - to a final recipient are to be frozen as a general rule until the case has been investigated.¹⁵ Other sanctions include repayment of funds, civil action,

¹⁵ Section 5.1, *The Ministry of Foreign Affairs’ Zero-Tolerance Policy on Corruption. How can it best be put into practice?*, 9 June 2010.

required implementation of measures to improve financial management and control, termination of agreement, measures in accordance with labour legislation, rules and regulations, and criminal prosecution. The MFA and Norad do not keep a register or list of companies which it has debarred from obtaining ODA-funded contracts on such grounds. There is no mandatory obligation to report such suspicions directly to law enforcement authorities; however, the Guidelines expressly state that “criminal prosecution shall always be considered” as one of the reactions to be taken against findings of financial irregularities. During the on-site visit, Norad officials explained that the Director would decide whether suspicions point to civil or criminal offences and would report the latter to law enforcement authorities accordingly. In the MFA, the Secretary General decides such matters. It should be noted that the Consulting Company foreign bribery case originated from a referral by Norad and the World Bank.

51. The MFA and Norad are also actively engaged internationally in corruption prevention and anti-corruption capacity building programmes, including by working with national anti-corruption commissions, supreme audit institutions and good governance programmes, more generally. Both have also been focusing in recent years on emerging issues such as illicit capital flight, money laundering and tax evasion, and the impact on developing countries. In particular, Norad has a special anti-corruption project in place with a dedicated anti-corruption team. The MFA is also actively engaged in promoting a zero tolerance policy towards financial irregularities in the multilateral organisations on a systemic level, as well as in individual financial irregularity cases where Norwegian funds are affected. Norad also works in partnership with the multilateral development banks and other international organisations on anti-corruption issues, and is responsible for the coordination of the recently established Corruption Hunters Network.

...

Commentary

The lead examiners commend Norway on the various measures undertaken to prevent, detect and report foreign bribery by Norwegian agencies involved in public advantages, including the consideration given to internal controls, ethics and compliance. In this regard, the lead examiners encourage Norway to raise awareness of the Good Practice Guidance on Internal Controls, Ethics and Compliance, in Annex II of the 2009 Anti-Bribery Recommendation as a tool to further assist agencies in undertaking due diligence.

The lead examiners further note that these public agencies can also debar companies convicted of corruption offences, which can be a significant deterrent for companies to engage in bribery. However, given that court judgments are anonymized in Norway, this may render it difficult for agencies to cross-check information provided in declaration forms. The lead examiners recommend that Norway consider a systemic approach to be undertaken to allow these agencies to easily access information on companies sanctioned for corruption, such as through the establishment of a national debarment register. This could allow these agencies to more effectively and efficiently apply their debarment rules.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

- I. Regarding public advantages, the Working Group recommends that Norway consider adopting a systematic approach to allow its public agencies to easily access information on

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companies sanctioned for foreign bribery, such as through the establishment of a national debarment register [2009 Recommendation XI. (i)].

SWITZERLAND

11. Public advantages

a) *Official development assistance*

52. In Switzerland, aid projects are approved and supervised by the SDC and the SECO. The two administrations have adopted a preventive approach for excluding corruption in their projects whereby, since 2008, any government or private organisation receiving development funds or obtaining commercial contracts from the Confederation must sign an anticorruption clause that allows financing to be suspended or cancelled if corrupt practices are discovered at any stage of tendering and executing the contract.¹⁶ This declaration is accompanied by project management measures to prevent corruption during execution (internal control includes among other things financial audits, verification of internal controls within partner companies, control of blacklists established by development banks, monitoring by local offices). A typology of corruption risks and guidance for evaluating projects, have been prepared.¹⁷ The two administrations have also instituted an internal mechanism for reporting suspicions of bribery involving the programmes or projects they carry out; if the internal investigation confirms the suspicions, they are required, as of 1 January 2011, to report them pursuant to article 22 a of the LPers.

53. While welcoming the measures taken pursuant to the 1996 Recommendation of the OECD Development Assistance Committee, the examiners note that no procedure for limiting access to financing for companies already convicted for foreign bribery has been put in place. For example, the anticorruption clause contained in DDC contracts imposes no obligation on the bidding company to declare whether it has been convicted for such offences; nor do the SECO evaluation directives contain any reference to a conviction as grounds for disqualifying the bidder. The only measures in existence are the possibility of one or the other administration, on the basis of appropriate standard clauses, to terminate the contract with the beneficiary of a project tainted by bribery.¹⁸ These measures appear to fall short of Recommendation IX (i) of the 2009 Recommendation, which calls for suspending eligibility for contracts financed by official development assistance for companies convicted of bribing foreign officials.

Commentary:

The lead examiners are pleased that the Swiss Agency for Development and Cooperation (SDC) and the State Secretariat for Economic Affairs (SECO) have reinforced their measures to prevent and avoid corruption in the award of public funds. The examiners regret however that there are no systematic mechanisms for suspending from competition

¹⁶ A new version of this clause was about to be introduced in SDC contracts at the time of the Phase 3 examination: "The parties undertake, in the context of this contract, not to grant or to accept directly or indirectly any advantage of any kind. Any act of corruption or any illicit act shall constitute a breach of this contract and shall be grounds for its cancellation and/or any other measure pursuant to applicable law. The parties shall inform each other of any case of corruption detected."

¹⁷ Cf. the "Anti-Corruption Handbook" of SECO, detailing the procedures to be followed by employees to prevent corruption in SECO projects: www.seco-cooperation.admin.ch/themen/00960/01032/index.html?lang=fr.

¹⁸ At the time of the on-site visit, no partner had been excluded for transnational bribery: a case of suspected bribery and embezzlement in a project being executed in Bangladesh by an NGO was subjected to an audit by the SDC to verify the suspicion that its managers had granted advantages to local public officials.

for contracts funded by official development assistance companies determined to have bribed foreign public officials in contravention of national laws. The examiners therefore recommend that Switzerland take the necessary steps to allow such suspension.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

12. Regarding public advantages, the Working Group recommends that Switzerland:
 - take the necessary measures to put in place systematic mechanisms allowing for the exclusion of companies convicted of bribery of foreign public officials in violation of national law from public procurement contracts or contracts funded by official development assistance [2009 Recommendation XI (i)];
 - to apply a more systematic approach to enhanced due diligence and to the consequences for an exporter or for an applicant if he or she is the subject of bribery allegations or convictions either before or after the approval of the contract, in order to better implement the 2006 Recommendation in practice [2006 Recommendation 1].

UNITED KINGDOM

11. Public Advantages

a) *Official Development Assistance*

54. The UK is a significant contributor of official development assistance (ODA), which is administered by the Department for International Development (DfID). The UK government has committed to dedicate 0.7% of its Gross National Income to ODA by 2013¹⁹ and DfID's spending on aid is due to increase by a third in real terms over the next four years. The top five recipients of UK bilateral aid in 2009 – 2010 were India, Ethiopia, Bangladesh, Sudan and Tanzania.²⁰

55. A 2011 Public Accounts Committee Report criticised DfID's financial management and loss of aid money to fraud and corruption. The Report found that fraud and corruption investigation was reactive, and recommended that DfID give more attention to tackling fraud.²¹ DfID stated that it has zero tolerance to fraud and corruption and has taken recent steps to prevent and detect foreign bribery in ODA-funded contracts. It has engaged an external firm to conduct pre-grant due diligence which includes reviewing the anti-bribery policies and procedures of organisations selected for DfID grants. A Counter-Fraud Unit has been established to investigate corruption involving DfID funds. A detailed guidance note on the Bribery Act and its implications for DfID's work has also been circulated to staff.

56. DfID's procurement contracts incorporate anti-foreign bribery clauses that disqualify contractors who commit an offence under the pre-Bribery Act legislation; DfID stated that the clause will be updated to refer to the Bribery Act. DfID checks whether a contractor or supplier has been debarred by multilateral development banks. A pre-qualification questionnaire asks a contractor or supplier whether it has been convicted of bribery offences. DfID stated that the effectiveness of its due diligence measures was limited by the absence of a national registry listing companies that have been convicted or debarred by other government procuring agencies.

19 Source: www.parliament.uk.

20 DfID, *DFID in 2009-2010* at p. 7 (www.dfid.gov.uk).

21 Public Accounts Committee (12 October 2011), *Fifty-Second Report - DfID Financial Management*. See also *The Times* (20 October 2011) "Millions in Aid Lost to Fraud and Corruption".