DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

ESTONIA: PHASE 1

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 REVISED RECOMMENDATION

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ESTONIA

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 REVISED RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

1. Estonia is the second country, after Slovenia,[1] to accede to the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention")[2] in compliance with Article 13 of the Convention, which regulates accession.[3] Estonia started to be a full participant in the OECD Working Group on Bribery in International Business Transactions (the Working Group) in June 2004, and deposited its instrument of accession on 23 November 2004. The Convention entered into force in Estonia on 22 January 2005.

The Convention and the Estonian legal system

2. Estonia's legal system, including provisions on the fight against transnational bribery, has been characterised by rapid changes in recent years. Today, the criminal legislative framework for combating corruption is principally contained in the 2002 Penal Code, the 1999 Anti-Corruption Act[4] and the 2004 Code of Criminal Procedure.

3. The implementing legislation[5] came into force on 1 July 2004: Sections 297 and 298 of the Penal Code sanction the active bribery of "officials" and Section 288 defines "officials" as those in Estonia and in foreign countries. Legal persons are liable for the two offences.

4. The Estonian Constitution provides that "If laws or other legislation of Estonia are in conflict with international treaties ratified by the [Parliament], the provisions of the international treaty shall apply." However, the Estonian authorities do not elaborate on the application of this provision in practice. The Estonian authorities explain that the Commentaries to the Convention have been integrated in the preparatory works to the law on the approval of the Convention and therefore serve as a primary legal source when interpreting the legislation.

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1 Slovenia acceded to the Convention in 2001.

2 Estonia is not an OECD member country. Five other countries, which were not OECD member countries, signed the Convention in 1997: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic (the latter became a member country in 2000).

3 Pursuant to Article 13 of the Convention, the Convention is "open to accession by any non signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions".

4 The first version of this Act was passed by the Parliament in January 1995. RT I 1999, 16, 276; 87, 791; 2000, 25, 145; 2001, 58, 357 (RT = *Riigi Teataja = State Gazette)*. Criminal offences are set forth in the Penal Code. The Anti-Corruption Act, a special law, sets forth misdemeanours.

5 This legislation implements the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union as well.

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

5. The relevant sections of the Estonian Penal Code are as follows:

Section 297. Giving a gratuity
(1) Giving or promising a gratuity is punishable by a pecuniary punishment or up to 3 years' imprisonment.
(2) The same act, if committed at least twice, is punishable by up to 5 years' imprisonment.
(3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

Section 298. Giving bribe
(1) Giving or promising a bribe is punishable by 1 to 5 years' imprisonment.
(2) The same act, if committed at least twice, is punishable by 2 to 10 years' imprisonment.
(3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a pecuniary punishment.
(4) An act provided for in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment or compulsory dissolution.

Section 293. Accepting of gratuities
(1) An official who consents to a promise of property or other benefits or who accepts property or other benefits in return for a lawful act which he or she has committed or which there is reason to believe that he or she will commit, or for a lawful omission which he or she has committed or which there is reason to believe that he or she will commit and, in so doing, takes advantage of his or her official position shall be punished by a pecuniary punishment or up to 3 years' imprisonment.
(2) The same act, if committed: 1) at least twice; 2) by demanding gratuities; 3) by a group, or 4) on a large-scale basis, is punishable by up to 5 years' imprisonment.
(3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

Section 294. Accepting bribe
(1) An official who consents to a promise of property or other benefits or who accepts property or other benefits in return for an unlawful act which he or she has committed or which there is reason to believe that he or she will commit, or for an unlawful omission which he or she has committed or which there is reason to believe that he or she will commit and, in so doing, takes advantage of his or her official position shall be punished by 1 to 5 years' imprisonment.
(2) The same act, if committed: 1) at least twice; 2) by demanding bribe; 3) by a group, or 4) on a large-scale basis, is punishable by 2 to 10 years' imprisonment.
(3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a pecuniary punishment.
(4) An act provided for in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment or compulsory dissolution.

Section 288. Definition of official
(1) For the purposes of the Special Part of the Penal Code, "an official" means a person who holds office in a state or local government agency or body, or in a legal person in public or private law, and to whom administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets, or functions of a representative of state authority have been assigned.
(2) The definition of an official provided for in subsection (1) of this section also extends to officials working in foreign states or international organisations.

6. The distinction between bribes and gratuities: The Penal Code has established a distinction between giving bribes and gratuities. When the public official has acted unlawfully the appropriate offence is giving a bribe, and when the public official has acted lawfully the offence is giving a gratuity. The same distinction exists for passive bribery and bribery by intermediaries. The Penal Code contains two series of offences: giving a bribe (Section 298), arranging a bribe (Section 296), and accepting a bribe (Section 294), and the corresponding offences relating to gratuities: giving gratuities, arranging gratuities and accepting gratuities (Sections 297, 295 and 293 respectively). As described below, the offences related to gratuities carry lower sanctions than the offences related to bribes. As both offences of giving bribes and giving gratuities are covered by Article 1 of the Convention, the report will assess these two offences (the "active bribery offences").

7. The concept of "mirror offences": The active bribery offences do not include a definition of bribery; Sections 297 and 298 simply refer to "giving or promising a gratuity" and "giving or promising a bribe" and set forth the applicable sanction. The Penal Code defines only the passive offences (Sections 294 and 293). In 2002, the Estonian authorities explained this apparent omission by citing the well-established general principle of "mirror offences" in Estonian penal law, as established by the Supreme Court.[6] Pursuant to this principle all the corruption-related offences are interrelated. Thus, in assessing the elements of the offences of active bribery, the Estonian authorities refer to the provisions dealing with passive corruption. For instance, sections on active bribery do not specify who receives the bribe or offer, whereas sections on passive bribery indicate that the bribe is accepted by an "official". This term is defined in Section 288 (see point 1.1.6).

8. Defences: The Penal Code does not include any defence specific to bribery offences. However, the Code of Criminal Procedure provides for a power of the prosecutor to terminate criminal proceedings, including in certain cases where the accused cooperates with the prosecution. (See below point 5)

9. The general part of the Penal Code (Sections 28 to 39) sets forth the general circumstances that exonerate a person from criminal liability or responsibility, including for the offence of bribery (*e.g.*, self-defence, state of necessity, mistake of facts, being under 14 years old, mental incapacity).

1.1 The Elements of the offence

1.1.1 any person

10. Sections 297 and 298 of the Penal Code do not specify who can be the offender. The Estonian authorities indicate that the offences apply to all natural persons.

11. The Estonian Constitution nevertheless provides immunity from prosecution to a range of persons, which can be lifted upon the proposition and consent of relevant bodies. Immunity from prosecution is enjoyed by the following persons, as long as they are in post: Members of Parliament (*Riigikogu*), the President of the Republic, members of the government, the Auditor General, the Chief Justice and justices of the Supreme Court,[7] judges,[8] and the Chancellor of Justice.[9] So far, the immunity of judges has been lifted 4 times in Estonia, and no request for lifting immunity has been rejected.

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6 For instance, in a 2005 decision, the Supreme Court stated that " According to the gist of the Section 298(1) and the definition of bribe in Section 294(1), the fulfillment of the elements of the offence of promising the bribe presumes that (…)" (decision number 3-1-1-37-05).

7 Sections 76, 85, 101, 138 and 153(2): "Criminal charges may be brought … only on the proposal of the Chancellor of Justice, and with the consent of the majority of the membership of the Riigikogu."

1.1.2 intentionally

12. In accordance with Section 15 of the Penal Code, intent is required for bribery of a (foreign) public official to be perpetrated.[10] The intention may be deliberate,[11] direct[12] or indirect (*dolus eventualis*) (Section 16). The latter covers the person who "foresees the occurrence of circumstances which constitute the necessary elements of an offence and tacitly accepts that such circumstance may occur". In a recent decision in a domestic bribery case, the Supreme Court of Estonia stated that a briber must aim to influence the official to act or omit to act unlawfully.[13]According to the Estonian authorities, in the case where a company representative directs an intermediary to obtain a contract from a foreign government through "any means" without expressly directing him/her to bribe, the proof of intent would imply that the representative at least thought it possible that the intermediary would give a bribe, and agreed to that. Similarly, according to the Estonian authorities a person would be liable when he/she instructs another to bribe a foreign public official but does not specify the particular individual to be bribed.

13. The same Supreme Court decision also clarifies that active bribery is completed when the briber makes an offer that he/she does not intend to implement, as well as when the briber makes an offer although he/she knows that he/she will not be able to meet it, as long as the intention of the briber is to induce an official to act or omit to act unlawfully.

1.1.3 to offer, promise or give

14. Sections 297 and 298 refer to the acts of "giving or promising" a gratuity or a bribe.

15. An offer to bribe is not explicitly included in the offences. However, the Estonian authorities indicate that the Estonian word "*lubama*" covers both offers and promises.[14] According to the Estonian authorities, in the case where the public official is unaware of the promise or offer (*i.e.* where the offer, promise or gift does not reach the official), the acts are criminalised as attempted bribery.

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8 Section 153(1): "Criminal charges may be brought against a judge during his or her term of office only on the proposal of the Supreme Court, and with the consent of the President of the Republic."

9 Section 145: "Criminal charges may be brought … only on the proposal of the President of the Republic, and with the consent of the majority of the membership of the Riigikogu."

10 Negligence is not covered: Section 15(1) provides that "Only intentional acts shall be punishable as criminal offences unless a punishment for a negligent act is provided by this Code" and Sections 293 to 298 do not mention it.

11 Section 16(2): "A person is deemed to have committed an act with deliberate intent if the aim of the person is to create circumstances which belong to the necessary elements of an offence and is aware that such circumstances occur or if he or she at least foresees the occurrence of such circumstances. A person is also deemed to have committed an act with deliberate intent if the person assumes that the circumstances which constitute the necessary elements of an offence are an essential prerequisite for the achievement of the aim."

12 Section 16(3): "A person is deemed to have committed an act with direct intent if the person knowingly creates circumstances which belong to the necessary elements of an offence and wants or at least tacitly accepts the creation of the circumstances."

13 Supreme Court decision, 26 May 2005, case number 3-1-1-37-05

14 In addition, a 2005 Supreme Court decision states: "the promising of a bribe does not presume transferring the property or other benefit to the official, but only making such an offer to the official. It is not important whether an official is ready to accept the bribe" (Supreme Court decision, 26 May 2005, case number 3-1-1-37-05)

16. Sections 297 and 298 do not specify that they apply irrespective of whether the briber promises or gives a bribe or gratuity in response to a solicitation by the foreign public official. On the contrary, the provisions on passive bribery specifically distinguish the two situations, which entail different sanctions. The Estonian authorities nevertheless specify that Sections 297 and 298 apply irrespectively of the solicitation, as the Penal Code does not make any exceptions.

1.1.4 any undue pecuniary or other advantage

17. Section 297 refers to "a gratuity" and Section 298 refers to "a bribe". The two terms are also used in the offences of accepting gratuities and accepting bribes. The Estonian authorities explain that the law uses different words to differentiate the different types of crimes, *i.e.* whether the official commits a lawful or unlawful act, but that both cover "property or other benefits". The Estonian authorities explain that "property" means all objects, including money, and property rights. They add that "other benefits" include all other advantages which are or are not monetarily appraisable. For instance, the admission of a public official's child to a school where he/she has not met the academic criteria could be considered as "property or other benefits". According to the Estonian doctrinal commentary of the Penal Code, "small favours" (such as writing a letter of reference) are excluded but there is no case law on the issue.[15]

18. The Estonian authorities indicate that bribery of an official is an offence irrespective of all the factors mentioned in Commentary 7 to the Convention.[16]

1.1.5 whether directly or through intermediaries

19. Neither Sections 297 and 298 on active bribery, nor Sections 293 and 294 on passive bribery refer to bribery through intermediaries as set forth in Article 1 of the Convention. Concerns existed insofar as the previous Penal Code (in force until 2002) expressly applied to bribery through intermediaries, at least in the passive offence (*e.g.*, where the official "personally or through an intermediary" received a bribe). However, the Estonian authorities state that the persons who bribe through intermediaries are still punishable under Estonian law. They quote the preparatory works to the Penal Code, which specifically indicates that the benefit could be given directly or through intermediaries. In addition, the Estonian authorities highlight that if the text of the Penal Code does not specify that the bribe can be given through an intermediary, it does not specify that the bribe has to be given directly neither: giving a bribe (by any means) is criminalised. Finally, the Estonian authorities indicate that there is currently a prosecution in train against both an alleged briber and an alleged intermediary.

1.1.6 to a foreign public official

20. Sections 297 and 298 do not specify who the briber seeks to bribe. On the contrary, the mirror passive bribery offences specify that they apply to an "official". The definition of an "official" is provided by Section 288 of the Penal Code:

> *(1) For the purposes of the Special Part of the Penal Code, "an official" means a person who holds an official position in a state or local government agency or body, or in a legal person in*

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15 The Estonian authorities indicate that this is a widely used commented edition of the Estonian Penal Code, benefiting from the participation of the drafters of the Penal Code (P.Pikamäe, J. Sootak). Karistusseadustiku kommenteeritud väljaanne [Penal Code. Commented edition] Tallinn: Juura, 2005). However it is not binding on the investigators, prosecutors or judges.

16 Commentary 7: "[The conduct described in Article 1 of the Convention] is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage."

public or private law, and to whom administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets, or functions of a representative of state authority have been assigned.
(2) The definition of an official provided for in subsection (1) of this section also extends to officials working in foreign states or international organisations.

21. Coverage of foreign public officials and autonomy of definition: Subsection 1 relates to Estonian officials and subsection 2 extends the definition of Estonian officials to officials working in foreign countries or international organisations. The explanatory note to the 2004 law states that "the changes [in Section 288] are connected to joining the European Union and improving the measures of anti-corruption fight".[17] The doctrinal commentary to the Penal Code also states that the changes were made to comply with the EU Convention and OECD Convention (Section 288, comm. 6).

22. The definition in subsection 2 is an extension of the definition in subsection 1. Therefore, it would appear that in the event of bribery of a foreign public official, courts would have to determine whether the person corrupted, if he/she had been Estonian, would have conformed to the definition of an Estonian public official. According to the Estonian authorities, if the person works in a foreign public agency that has no equivalence in Estonia, the authorities would have to establish whether such official fulfils public functions by referring the law of the foreign country. Such an approach is not in conformity with the principle of an autonomous definition set out in Article 1 of the Convention as well as with the objectives of the Convention.

23. The term "foreign state" is not defined in the Penal Code or in other legislation, and has not yet been subject to interpretation by the courts. However, the preparatory works to the law on the approval of the Convention make clear that this term extends to organised foreign entities, such as an autonomous territory or a separate customs territory (see Commentary 18 to the Convention).

24. Definition of Estonian officials: the definition of officials set in subsection 1 requires that the person meets both an "official position" and a "function" criteria. The Estonian authorities refer to definitions set in other Estonian laws to explain the coverage of the terms used in Section 288. Therefore, it seems that the court, when determining whether a person is a foreign public official, will also have to refer to these definitions. The courts use cross-references between three laws, *i.e.* the Penal Code, the Anti-Corruption Act and the Public Service Act. This approach may prove to be complex when dealing with cases of transnational bribery, due to the non-autonomous definition set in subsection 2.

25. First, the person must hold an official position in a state or local government agency or body, or in a legal person in public or private law. The term "official position" is defined in the Anti-Corruption Act as "the competence of an official arising from the office to adopt decisions binding to other persons, perform acts, and participate in making decisions concerning privatisation, transfer or grant of use of municipal property and the obligation to fulfil his/her official duties honestly and lawfully". An office is in turn defined as "a place of employment or service to which a person has been elected, appointed, or hired under an employment contract".

26. State and local government agencies are defined and listed in the Public Service Act. The state agencies include constitutional institutions, courts and agencies of executive power, and local government agencies include offices of rural municipalities or city councils, and city government executive agencies.

[17] See the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

27. The Estonian authorities indicate that the definition of a body is functional. In the sense of the Administrative Procedure Act, a body means any "administrative authority" which is authorised to perform public administration duties by an act, a regulation issued on the basis of an act or a contract under public law (Administrative Procedure Act Section 8(1)). It can be an agency, its structural unit, its collegial body[18] or an official himself (*e.g.* a minister or a director general). The concepts of state agency and body can therefore overlap. The Estonian authorities explain that the concept of "official position" includes also the persons outside the formal structure of state or local agencies, if they are given public functions (*e.g.* by a contract). Pursuant to the Anti-Corruption Act, the following persons are also deemed to be officials, covered by the concept of a body: members of the Parliament, the President of the Republic, members of the Government, county governors, judges, members of local assemblies, members of the management boards and supervisory boards of companies with the participation of the state, a local government or a legal person in public law, etc. In addition, the term "body" would cover a sub-contractor of a local government in charge of managing a construction project, etc. as long as that sub-contractor is authorised to perform public administration duties.

28. A recent case has demonstrated that "*de facto*" officials are covered. In this case, an advisor to a Minister came within the definition of official for the purpose of the bribery offence because the person was trusted as an expert and had an influence on the decision-making process. (see Commentary 16 to the Convention).

29. Officials, who hold office in a legal person in public or private law, are also included in the definition of Section 288. The Estonian authorities therefore explain that bribery of officials of public enterprises is covered by Sections 297-298. Moreover, they highlight that the definition of an official is extended also to persons working in the private sector, so the corruption offences committed towards *e.g.* managers of a private company are also covered, including bribery of a foreign official.

30. Second, the person must fulfil specific functions: "administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets, or functions of a representative of state authority".

31. The doctrinal commentary to the Penal Code specifies that supervisory functions cover auditors, comptrollers, and inspectors; managerial functions cover organising work, delegating functions, hiring, planning, organisation of movement of assets; and functions of a representative of state authority cover officials, who have authority outside their own organisation, *i.e.* a member of government, an agent of a law enforcement agency or a member of Parliament. The Estonian authorities indicate that administrative functions means administering or managing the property of other persons or state assets as well as other types of administrative functions; generally, those functions are combined with other types of functions specific to the official position, such as managerial functions.

32. It appears that the criterion of "function" in the Estonian law is narrower than the definition set in Article 1.4.a of the Convention,[19] given that it seems to limit the scope of the definition of officials to persons of a certain rank. For instance, it is not clear whether a member of a commission deliberating on construction permits would be covered, as this person could not take a decision on his/her own. According

[18] Decision of the Supreme Court, 5 May 2004, administrative case number 3-3-1-15-04. The "body" was a commission designated to decide on questions related to returning the nationalised land (by the Soviet Union) to their rightful owners.

[19] Article 1.4.a: "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

to the Estonian authorities, this person would also be considered a public official, since he/she participates in making a decision.

1.1.7 for that official or for a third party

33. Neither Sections 297 and 298 on active bribery, nor Sections 293 and 294 on passive bribery stipulate that the bribe may be intended for a third party as set forth in Article 1.1 of the Convention. The Estonian authorities state that it is not important whether the bribe or gratuity is promised or given to the official or to a third party. If the official is aware of this and consents to such situation, agreeing to perform in return a certain act or to refrain from acting, it can be considered that a bribe has been given to the official within the meaning of the Sections 293-298. Convictions have been obtained in domestic bribery cases when the bribe benefited a member of the family of the public official. Although this has yet to be established by case law, the Estonian authorities are confident that if the foreign public official directs that a payment goes to a charity, a political party or any other legal person so that he/she cannot be considered to have received any benefit, this still constitutes foreign bribery.

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

34. The offences explicitly cover both acts and omissions of a foreign public official. Sections 297 and 298 establish two bribery offences, depending on the act or omission of the public official sought by the briber.

35. Lawful vs. unlawful act or omission: In case of giving a gratuity (Section 297), the bribe is given to the official "in return for a lawful act which he/she has committed or which there is reason to believe that he/she will commit, or for a lawful omission which he/she has committed or which there is reason to believe that he/she will commit and, in so doing, takes advantage of his/her official position" (bribery for a lawful act). The Estonian authorities explain that giving a gratuity implies that the act of the official is in itself lawful (*i.e.* a person acts within his/her competence), and give as an example the granting of a permit, when all the necessary conditions are fulfilled. Another example is the exercise of discretionary powers, since the act is legal (permitted). According to the Estonian authorities, there is no exception for small facilitation payments.

36. In case of giving a bribe (Section 298), the bribe is granted to the official "in return for an unlawful act which he/she has committed or which there is reason to believe he/she will commit, or for an unlawful omission which he/she has committed or which there is reason to believe that he/she will commit and, in so doing, takes advantage of his/her official position" (bribery for an unlawful act). The Estonian authorities provide as an example the granting of a contract when the conditions of tender are not satisfied.

37. The Estonian authorities explain that, for the act or omission of the public official to be unlawful, it is not necessary that it comprises the elements of an offence prescribed by law and be punishable in itself; it only has to be an act not allowed by the law governing this official. The Estonian authorities specify that in practice, it has to be proved that the act that an Estonian official committed, was allowed or forbidden by the law governing this official. Transposed to transnational bribery, this would imply that, in order to determine whether the offence is giving a bribe or a gratuity, the courts will have to consult foreign law to determine whether the act committed by, or expected from, the foreign official was allowed or forbidden. This could be difficult and time consuming.

38. The active bribery offences apply to ex-post bribery, as they apply to bribes given both before and after the official's action or omission.[20]

39. The official must take advantage of his/her official position: the standard of the Convention provides under Article 1.4.c that the offence has to include "any use of the public official's position, whether or not within the official's authorised competence".

40. The Estonian authorities explain that this condition is fulfilled when an official acts within his/her competence, abuses his/her authority or omits to fulfil his/her duties; the act has to be connected to the official's competence. The Estonian authorities affirm that the link is usually interpreted broadly but the duties that the official has breached have to be established derived from his/her office. The conformity of the Estonian offence with Article 1 of the Convention is therefore questionable, as the Convention simply requires that the public official act "in relation to the performance of official duties", be it or not within the official's authorised competence.

41. It would appear that, contrary to Commentary 19, neither Section 297 nor Section 298 cover the case of an executive of a company giving a bribe to a senior official of a government, in order that the official use his/her office--though acting outside his/her competence--to make another official award a contract to that company. A Bill criminalising trading in influence is under Parliament's consideration at the time of the Phase 1 examination. This new offence could cover the cases contemplated in Commentary 19.

42. The Estonian authorities confirm that courts will have to refer to the documents establishing the duties of the foreign officials, such as foreign laws, instructions, description of the position, etc. to determine whether the foreign public official took advantage of his/her official position, *i.e.* depending on the legal or regulatory provisions defining the rights and obligations of the official. This is not in conformity with the principle of the autonomy of definition set in Article 1 of the Convention.

1.1.9/10 in order to obtain or retain business or other improper advantage/in the conduct of international business

43. Sections 297 and 298 do not limit the offence to bribes made in order to obtain or retain business or other improper advantage in the conduct of international business.

1.2 Complicity

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

45. In Estonia, the Penal Code distinguishes between abettors and aiders (Section 22). An abettor is "a person who intentionally induces another person to commit an intentional unlawful act". An aider is "a person who intentionally provides physical, material or moral assistance to an intentional unlawful act of another person". The Penal Code does not appear to cover authorisation; however, according to the Estonian authorities this concept can be covered by abetting (incitement), aiding or even committing the crime through another person, depending on the circumstances. Abettors and aiders are punishable as principal offenders. The court may apply mitigating circumstances to aiders.

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[20] The provisions on passive bribery refer to "an [unlawful/lawful] [act/omission], which the official has committed, or which there is reason to believe that he/she will commit".

46. The Estonian authorities explain that when an intermediary is used, he/she can be sanctioned through the offences of serving as an intermediary ("arranging") for a gratuity or a bribe, provided for in Sections 295 and 296. These sections, which have so far never been interpreted by courts, do not define what is meant by serving as an intermediary and simply set out the applicable sanctions.[21] Section 295 specifies that it applies to "arranging a gratuity".

1.3 Attempt and conspiracy

Attempt

47. Article 1.2 of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

48. Section 25 of the Penal Code provides that "an attempt is an intentional act the purpose of which is to commit an offence". Criminal attempt "is deemed to have commenced at the moment when the person, according to the person's understanding of the act, directly commences the commission of the offence". In the case of an attempt, "the court may apply the provisions of Section 60 of this Code", *i.e.* mitigation of punishment. There is no sanction in cases of voluntary abandonment of attempt.

49. The coverage of attempt in the case of bribery is not clear. The Estonian authorities have not provided case law on attempts to bribe, but explain that the stage of the attempt to bribe lasts until the official realises he/she is being offered a bribe, *e.g.* when a briber gives a bribe to the intermediary or starts offering the bribe to the official.

Conspiracy

50. Conspiracy as such is not an offence in Estonia. It is taken into consideration only in a limited list of offences, including terrorism and organised crime. For the other offences, the acts are punishable if they reach the stage of attempt.

2. ARTICLE 2: RESPONSIBILITY OF LEGAL PERSONS

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

52. The general rules for the liability of legal persons are foreseen in Section 14 of the Penal Code:

(1) In the cases provided by law, a legal person shall be held responsible for an act which is committed by a body or senior official thereof in the interest of the legal person.

(2) Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence.

(3) The provisions of this Act do not apply to the state, local governments or to legal persons in public law.

53. Subsections (3) and (4) of Sections 297 and 298 expressly provide for the liability of legal persons for the offences of active bribery.[22] Legal persons are also liable for the offence of money

[21] "Arranging a gratuity is punishable by …" (Section 295) and "Arranging a bribe is punishable by …" (Section 296).

[22] An act provided for in Section 297(1) or (2) or in Section 298(1) or (2), "if committed by a legal person, is punishable by…".

laundering (Section 293). The liability of legal persons was introduced in the penal system in 2002, and a judgement relating to corruption has been pronounced.

Legal entities subject to liability

54. The entities subject to liability are "legal persons". The Penal Code does not define these terms. The Estonian authorities indicate that the General Part of the Civil Code Act states that "a legal person is a subject of law founded pursuant to the law" (Section 24). Legal persons in private law include general partnerships, limited partnerships, private limited companies, public limited companies, commercial associations, foundations and non-profit associations. The definition excludes *de facto* entities. The Estonian authorities indicate that both Estonian and foreign legal persons are covered (with the application of the general rules on jurisdiction).

55. Section 14(3) of the Penal Code expressly excludes the state, local governments and legal persons in public law. Legal persons in public law cover for instance the Estonian Health Insurance Fund, the Unemployment Insurance Fund and the Academy of Science. They are founded in the public interest pursuant to a law which regulates their scope of activities, and they fulfil public duties. The Estonian authorities consider that public enterprises are not legal persons in public law but private legal persons founded by the state or a local government, and can therefore be prosecuted. This is supported by case law: in 2004, misdemeanour proceedings were initiated against a company providing railway services, of which 34% of the shares belong to the Estonian state.[23]

Standard of liability

56. The grounds for the responsibility of legal persons are given in Section 14(1): "a legal person shall be held responsible for an act which is committed by a body or senior official thereof in the interest of the legal person". The two main criteria are the interest of the legal person and the involvement of a senior official. They are not defined in the Penal Code but by the jurisprudence and other laws.

57. First, a recent case law reaffirms that the prosecutor has to establish that the offence has been committed in the interest of the legal person. This case however does not define the coverage and limits of the interest of the legal person, which have to be determined on a case-by-case basis.[24] According to the Estonian authorities, it is not necessary that the legal person has received a benefit, as long as the person acted with the benefit of the company in mind. They add that the act does not have to be strictly connected to the area of the legal business of the legal person.

58. Second, Section 14 requires that the offence be committed by a "body or a senior official". The definition of these terms is crucial, as the higher the threshold, the harder it is to trigger the liability of the legal person.

59. The Estonian authorities refer to the definition of "body" set in Section 31 of the Civil Code Act: the bodies of a legal person in private law are the general meeting and the management board unless

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23 Supreme Court decision, 23 March 2005, case number 3-1-1-9-05. Proceedings were eventually terminated because other elements of the offence were not fulfilled.

24 Supreme Court decision, case number 3-1-1-137-04: "When all the elements of the offence are established in the behavior of natural person, but it has not been ascertained that he has committed the offence in the interests of legal person, the question of responsibility of legal person does not arise… If, however, in the pre-trial stage the body, conducting the proceedings, reaches an understanding that the leading official or the member of the body of a legal person has committed an offence and the act has been committed in the interests of a legal person, there is reason to include a new participant in the criminal proceedings – the legal person."

otherwise provided by law. The exceptions can be found in different laws; the most common example is the supervisory board. If the offence was not committed by the "general meeting" or the "management board" but by one of the sections, departments, offices, representations, etc. of that legal person, a senior (or leading) person must be identified, for instance the executive responsible for the department.

60. The Estonian authorities indicate that the concept of senior (or leading) official is not defined by law but given instead to the judges to interpret. Whether a natural person is a senior official of a specific company depends on his/her authority and position within the legal person; the natural person must have some sort of regulating or decision-making power within the company that identifies him/her with the legal person and its course of action. This includes *e.g.* executive directors, accountants, etc. In one case the court has pointed out that it is understandable that "in case of major enterprises the top leaders do not deal with everyday issues, but in specific areas the responsibility is delegated. From this follows that leading officials can be also executives, who have a right to make independent decisions in specific areas and by that direct the will of the legal person."[25] In the absence of case law, it is uncertain whether persons who have a power of representation of the legal person can be considered as leading persons. On the contrary, the Estonian authorities consider that a person who has a power of control over the legal person but does not work for the company could not trigger its liability. That would be the case, for instance, of bribery committed by a major stockholder of the company.

61. The types of involvement of the leading person are also very important. In the case of Estonia, only the acts of the "body or senior official" can trigger the liability of a legal person and not their omission of an obligation of supervision over employees, which is covered in many countries. Therefore, the leading person must have acted directly, through an intermediary, or instigated[26] the perpetration of the offence. The Estonian authorities specify that at the very least the leading person has to have an indirect intention to bribe a foreign public official (*dolus eventualis)*. This approach is restrictive since in practice persons subordinated to leading persons could bribe foreign public officials thanks to the lack of supervision of the bodies or leading persons of the company, especially in large companies. Finally, the Estonian authorities indicate that the liability of the legal person cannot be triggered in the case where the general policy of the legal person permits bribes but no leading person can be identified.

62. The scope of application of the liability of legal persons is narrow: first, only high level persons or bodies can trigger the liability of the legal person, and second, their involvement in the offence has to be direct. Indeed, in practice, a legal person has already been acquitted of the offence committed by one of its agents. The Estonian authorities have recognised, during the accession process in 2004, that Section 14 may be drafted too narrowly to be fully effective. The Ministry of Justice of Estonia informed the Working Group that it may suggest amendments to the Parliament, based on a thorough analysis of these issues, including case law.

63. Concerning the possible liability of an Estonian parent company for the acts of its foreign subsidiary abroad, the Estonian authorities would need to further consider this issue before being able to indicate in which cases the liability of the parent company could be triggered, in the absence of factual experience.

Proceedings against legal persons

64. The prosecutions of the legal person and the natural person having committed the offence can be cumulative, as "Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence" (Section 14(2)). In practice, courts have already convicted both a legal person and

[25] Supreme Court, decision number 3-1-1-9-05

[26] The Estonian authorities indicate that when a leading person is an abettor, the legal person would be also considered and punished as an abettor.

its manager of a same offence. The Estonian authorities specify that proceedings against the legal person are as a rule initiated and carried out together with the proceedings against the perpetrator for the same criminal offence and for the same charge, pursuant to the principle of derived responsibility. The provisions of the Code of Criminal Procedures apply to legal persons.[27]

65. The conviction of legal persons depends on a culpable act by a person being either a member of a body or a leading person of the legal person. The Estonian authorities nevertheless clarified that this condition does not necessarily entail the condition of conviction of that natural person: the Supreme Court has specified that when the proceedings against a natural person are discontinued for reasons of expediency or because of the death of the accused, there should be no obstacles for continuing the proceedings against the legal person, if a punishable act has been identified.[28]

66. Pursuant to an opinion of the Supreme Court, the identification of the guilty leading person is not systematically required: an exception can be made in case there has been a secret voting by the body and it is not possible to prove who voted for or against the decision.[29]

3. ARTICLE 3: SANCTIONS

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

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

68. The principal and supplementary penalties for bribery of a domestic and a foreign public official are identical.

69. The principal penalty applicable to natural persons for the offence of bribing a domestic or foreign public official is imprisonment up to 3 years or a pecuniary punishment in case of a gratuity; and imprisonment between 1 and 5 years in case of a bribe.[30] Confiscation of the bribe and proceeds is discretionary (see below 3.6).

70. Aggravated penalties are foreseen in case of recidivism: The same acts, if committed at least twice, are punishable by up to 5 years imprisonment in case of a gratuity; and by 2 to 10 years

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27 Section 36 of the Code of Criminal Procedures provides: "A suspect or accused who is a legal person shall participate in the criminal proceeding through a member of the management board or the body substituting for the management board of the legal person and such member has all the rights of a suspect or accused, including the right to give testimony in the name of the legal person."

28 Supreme Court decision, 6 May 2005, case number 3-1-1-137-04

29 Supreme Court decision, case number 3-1-1-82-04

30 The minimum term of imprisonment is 30 days (Section 45 of the Penal Code).

imprisonment in case of a bribe. The penalties are lower for arranging a gratuity or a bribe: a pecuniary punishment or up to one year imprisonment[31] (Sections 295 and 296).

71. The courts can also take into account the mitigating and aggravating circumstances provided for in Sections 57 and 58 of the Penal Code within the limits of the sanctions set in Sections 297-298. Mitigating circumstances include: prevention of harmful consequences of the offence; voluntary compensation for damage; appearance for voluntary confession, sincere remorse, or active assistance in detection of the offence; commission of the offence under threat or duress, or due to service, financial or family-related dependent relationship; and commission of the offence in a highly provoked state caused by unlawful behaviour. The Estonian authorities indicate that mitigating circumstances have rarely been applied in bribery cases so far. In addition, they explain that the circumstance that the offence was committed "in a highly provoked state caused by unlawful behaviour" could not cover the case where the public official strongly and repeatedly solicited the bribe.

72. Pecuniary punishment is prescribed only in case of giving a gratuity as an alternative to imprisonment. However, pecuniary punishment could still be applied in addition to imprisonment in other active bribery cases, as a supplementary punishment, pursuant to Section 44(6) of the Penal Code (unless imprisonment has been substituted by community service). The application of a supplementary pecuniary punishment is discretionary and so far it has never been pronounced against a briber in a case of domestic bribery.

73. The limits on the pecuniary punishment are regulated in the general part of the Penal Code (Section 44). The pecuniary punishment for natural persons depends on their average daily income and can be between 30 to 500 daily rates, *i.e.* from 1 to 18 months income.[32] The court may reduce the daily rate due to special circumstances, or increase the rate on the basis of the standard of living of the convicted offender. The daily rate applied shall not be less than the minimum daily rate – EEK 50 (Estonian krooni, EUR 3.20). On the other hand, the Penal Code does not set any absolute maximum to the pecuniary punishment that could be imposed.

74. "Occupational ban" can also be imposed on natural persons as a supplementary punishment. "A court may deprive a convicted offender of the right to work in a certain position or operate in a certain area of activity for up to 3 years if the person is convicted of a criminal offence relating to abuse of professional or official status or violation of official duties" (Section 49).[33] Finally, in cases of aggravated giving of bribe, the court may impose expulsion with prohibition on entry into the Estonian territory during 10 years as a supplementary punishment on citizens of foreign states (Section 54).

75. The principal penalty applicable to legal persons is a pecuniary punishment. In case of aggravated giving of bribe, the legal person is punishable by a pecuniary punishment or compulsory dissolution.

76. As in the case of natural persons, the limits on the pecuniary punishment are regulated in the general part of the Penal Code, and not directly in Sections 297 and 298. Pursuant to Section 44(8) of the Penal Code the court may impose a pecuniary punishment of EEK 50 000 to 250 million (EUR 782 500 to

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31 Aggravated penalties are foreseen: acts committed at least twice or by taking advantage of an official position are punishable by a pecuniary punishment or imprisonment up to 3 years.

32 The "daily rate" is equal to the daily taxable income of the convicted offender from the preceding year.

33 Occupational ban shall extend to the whole term of the principal punishment and additionally to the term determined by the court judgment. (Section 55)

15 974 441) on the legal person. Finally, a pecuniary punishment may be imposed on a legal person also as a supplementary punishment together with compulsory dissolution.

77. Determination of the sentence: General rules on sentencing are set out in the General Part of the Penal Code. In imposing a punishment, a court shall take into consideration the mitigating and aggravating circumstances, the possibility to influence the offender not to commit offences in the future, and the interests of the protection of public order (Section 56).

3.3 Penalties and Mutual Legal Assistance

78. Mutual legal assistance in Estonian law does not depend on the type or degree of penalty.

3.4 Penalties and Extradition

79. Under Estonian law extradition of a person for the purposes of continuation of the criminal proceedings concerning him/her in a foreign state is permitted if the person is suspected or accused of a criminal offence which is punishable by at least one year of imprisonment pursuant to both the penal law of the requesting state and the Penal Code of Estonia. The Estonian provisions on bribery meet this condition. Extradition of a person for the purposes of execution of a judgment of conviction made is permitted under the same condition, and if at least four months of the sentence of imprisonment have not yet been served (Section 439 of the Code of Criminal Procedure).

3.5 Seizure and Confiscation

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

Provisional Seizure

81. Pursuant to Section 142 of the Code of Criminal Procedure (CCP), the objective of seizure of property is to secure a civil action, confiscation or fine to the extent of assets.[34] Property is seized at the request of a Prosecutor's Office on the basis of an order of a preliminary investigation judge or of a court ruling. The decision of the prosecutor or preliminary investigation judge to perform such procedural acts is discretionary. Seized property are taken away or deposited into storage with liability. The Estonian authorities indicate that property/objects that are needed for the purpose of evidence can also be seized. The criminal police are not required to conduct a formal financial investigation in order to identify the proceeds and trace the suspect's assets in offences of bribery, but can do it in the framework of the criminal investigations.

Confiscation

82. In Estonia, confiscation is discretionary and is considered a non-punitive measure, decided together with conviction, but not to be taken into account in the determination of the punishment. The confiscation of the bribe and the proceeds is provided for in Section 83 of the Penal Code: "A court may apply confiscation of the object used to commit an intentional offence and of the assets acquired through the offence". This clearly covers both the bribe given and the advantages received through giving of the

[34] "Seizure of property" means recording the property of a suspect, accused or civil defendant or the property which is the object of money laundering and preventing the transfer of the property.

bribe. According to the Estonian authorities, this covers the bribe promised or offered but not yet given; the same applies for attempted bribery.

83. Confiscation first applies to the offender, be it a natural or legal person: the instrument and proceeds may be confiscated only "if they belong to the offender at the time of the making of the judgment". As an exception, a court may apply confiscation to a third person if the person (to whom the objects belong at the time of the making of the judgment) has, at least through recklessness, aided in the use of the object for the commission or preparation of the offence; or has acquired the device, object or assets knowingly in order to avoid confiscation. In addition, according to the Estonian authorities, confiscation is possible when the instrument or proceeds are the property of the offender, but are in possession of a third person.

84. When the proceeds have been transferred, consumed or the confiscation thereof is impossible for another reason, the court may order the offender to pay an amount which corresponds to the value of the assets subject to confiscation (Section 84). According to the Estonian authorities, Section 84 is applicable to cases where the proceeds have been transferred to a bona fide third party, *i.e.* an equivalent value is confiscated from the offender.

85. Monetary sanctions of comparable effect are not available if the confiscation of the bribe is unavailable. In cases of bribery of foreign public officials, it will often be the case that the bribe is transferred to the public official outside of Estonia and therefore is not available for confiscation except where the foreign country provides mutual legal assistance in the form of confiscation. In addition, as confiscation is a non-punitive measure, the impossibility to confiscate the bribe cannot be compensated through the imposition of a fine.

86. In the case of bribery, the court can also apply "confiscation of an object which was the direct object of the commission of an intentional offence, and of the object used for preparation of the offence if these belong to the offender" (Section 301 of Penal Code). The Estonian authorities indicate that this could cover the property which the briber obtained through giving a bribe such as a document or a piece of land.

87. Section 85 provides for the treatment of confiscated assets. Confiscation is applied primarily to the benefit of the state, but the assets are returned in cases provided for by an international agreement. The rights to compensation of third persons are protected.

3.6/3.7 Additional Civil and Administrative Sanctions

88. The Estonian authorities indicate that a possible sanction against legal persons is the revocation of authorisation to act in specific area (*e.g.* banking). This is a discretionary decision of specific administrative agencies with supervisory functions and such possibility is foreseen in individual laws. For instance, the Financial Supervision Authority may revoke the authorisation of a credit institution if it has repeatedly or severely violated the rules regulating its activity, or if the credit institution or its manager have been punished for an offence relating to the office, an economic offence, an offence against the property or an offence against the public trust, and the data has not been deleted from the Punishment Register Act (Credit Institutions Act, Section 17(2)(5)). The Estonian authorities confirm that bribery is an offence that may trigger such a revocation. In practice, criminal convictions are not automatically transmitted to the supervisory authorities such as the Financial Supervision Authority, but these authorities can consult the punishment register.

4. ARTICLE 4: JURISDICTION

4.1 Territorial Jurisdiction

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

90. Pursuant to Section 6 of the Penal Code, the penal law of Estonia applies to the acts committed within the territory of Estonia.[35] Section 11 specifies that an act is deemed to be committed at the place where the person acted; where the person was legally required to act; where the consequence which constitutes a necessary element of the offence occurred, or, according to the assumption of the person, where the consequence which constitutes a necessary element of the offence should have occurred. The Estonian authorities explain that in the case of bribery, the offence is completed with the offer, promise or giving, and no further consequence is needed.

91. According to the Estonian authorities, territorial jurisdiction may be established, for instance, when a phone-call or e-mail emanates from Estonia and conveys an offer or promise of a bribe. The Penal Code does not elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction, but the Estonian authorities confirmed that territoriality may be established when the bribery offence is committed in whole or in part in the Estonian territory.

4.2 Nationality Jurisdiction/Extraterritorial Jurisdiction

92. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official".

93. Section 7 of the Penal Code sets forth the principle of nationality jurisdiction for all offences, including bribery of foreign public officials. Dual criminality is required to exercise nationality jurisdiction.[36] This requirement is understood broadly as meaning that the perpetrator's conduct must constitute a criminal offence in the country where it was committed, and not specifically the offence of bribing a foreign public official. The Estonian authorities specify that to exercise nationality-based jurisdiction, it is not necessary that the offender be apprehended in or extradited to Estonia.

94. Cases of bribery by an Estonian national of a public official of country A in country B, where country B does not criminalise bribery of foreign public officials or cannot cover the acts through another offence would not be covered (unless Section 8 on universal jurisdiction applies, see below), even if the bribery of domestic officials is punishable in these countries.

95. Nationality jurisdiction is not applicable to legal persons, as it applies to Estonian "citizens" and only natural persons can be citizens. A legal person can be convicted of acts of bribery committed abroad only if they have been committed by an Estonian manager.

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[35] In addition, offences perpetrated on board ships or aircraft registered in Estonia are subject to Estonian jurisdiction.

[36] Nationality based jurisdiction applies if the offender is a citizen of Estonia at the time of commission of the act or becomes a citizen of Estonia after the commission of the act, or if the offender is an alien who has been detained in Estonia and is not extradited. Dual criminality is not required if the offender is a member of the Defence Forces performing his/her duties (Section 7(2)).

96. The Estonian legal system also provides for “passive” nationality jurisdiction to prosecute natural persons as well as legal persons, *i.e.* jurisdiction based on the Estonian nationality of the victim (Section 7 of the Penal Code). However, the Estonian authorities indicate that, generally, bribery cannot be understood to be committed "against somebody"; so the passive nationality jurisdiction cannot be applied.

97. Finally, Section 8 of the Penal Code foresees universal jurisdiction over acts against internationally protected legal rights if the punishability of the act arises from an international agreement binding on Estonia.[37] The Estonian authorities explain that traditionally, the universal jurisdiction was understood to apply to so-called international crimes such as genocide and war crimes. However, lately, other types of crimes are being recognised by the international community as serious crimes with “universal nature”, including *e.g.* terrorism or human trafficking. Section 8 has never been applied in Estonia yet, but the Estonian authorities consider that the wording of Section 8 does not exclude its application to the cases of international corruption and they consider that the integrity of business transactions and fair competition could be considered internationally protected legal rights.

4.3 Consultation Procedures

98. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

99. The Estonian authorities indicate that consultation procedures are not in place in Estonia, for the moment. They nevertheless consider that such consultations could be arranged with the Ministry of Justice. In addition, they consider that the issue may be covered by the European Convention on Mutual Legal Assistance in Criminal Matters (Section 21 on laying information in connection with proceedings) to which Estonia and several other Parties to the Convention are Parties.

4.4 Review of Basis of Jurisdiction

100. The Estonian authorities consider that the current basis for jurisdiction is sufficient.

5. ARTICLE 5: ENFORCEMENT

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

5.1 Rules and Principles Regarding Investigations and Prosecutions

102. In Estonia, rules and principles regarding investigation and prosecution are currently contained in the new Code of Criminal Procedure (CCP) and the Public Prosecutor’s Act which respectively entered into force in July 2004 and May 1998.

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37 Applicability of penal law to acts against internationally protected legal rights: “Regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to an act committed outside the territory of Estonia if the punishability of the act arises from an international agreement binding on Estonia”.

103. Pursuant to the CCP, Estonia's criminal system is based on the principle of mandatory criminal proceedings. Section 6 requires that once the elements of a criminal offence have been reported and ascertained, investigative bodies and Prosecutors' Offices commence criminal proceedings and take the measures prescribed by law to establish that a criminal act has taken place, and to identify the person who committed the criminal offence.

104. The circumstances, which preclude criminal procedure, are provided in Section 199 of the Code (no grounds for proceedings, limitation period expired, amnesty, death or dissolution of accused, *non bis in idem*). In addition, Sections 202-205 allow prosecutors to terminate proceedings under certain circumstances, including for bribery of a foreign public official, *i.e.* i) where there is a lack of public interest in the proceedings and negligible guilt of the person suspected or accused (Section 202); ii) where there is a "lack of proportionality of punishment" (except for aggravated giving of a bribe, Section 203); iii) in certain cases involving criminal offences committed by foreign citizens or in foreign states (Section 204, see point 5.2 below); or iv) against a person suspected or accused, who has cooperated with the authorities by significantly facilitating "the ascertainment of facts relating to a subject of proof of a criminal offence which is important from the point of view of public interest" and where detection of the offence and the collection of evidence would have been precluded or especially complicated in the absence of the accused person's assistance (Section 205). Sections 202 and 203 have been applied in several instances to cases of domestic bribery. When Section 202 is applied, the court or the prosecutor can still impose a monetary obligation over the defendant.

105. Investigation of corruption-related offences is exercised under the control and supervision of a Prosecutor's Office and is mainly divided between the Police Board and the Security Police Board, the latter having a general jurisdiction over corruption cases and dealing with offences involving higher state officials.[38]

Investigation by the police

106. Under the former CCP, the Police was generally responsible for the investigation and decided on the direction of the investigation and performance of investigative activities independently unless the permission or order from a prosecutor or permission from a court is legally required. With the entry into force of the new CCP in 2004 (CCP Sections 32, 212 and 213), this has largely been reorganised with the Prosecutor's Office directing the criminal proceedings and the Police performing the investigations under its control,[39] unless the law specifically permits the Police to act on its own initiative, notably in cases of urgency. However, according to the legislation in force (Section 222 CCP), the Police remain responsible for preparing a summary of charges although the prosecutor has naturally the right to review it to some extent (pursuant to Section 222(2)).

107. In 2004, only the Security Police had a structural unit specialising in proceedings regarding corruption offences and it was recommended in a parliamentary report, called "The Honest State" Strategy,[40] that units dealing with proceedings regarding corruption offences at the local level be trained in this area and that a network consisting of at least 50 specialised preliminary investigators and prosecutors be set up under the district prosecutors to carry out systematic investigations of possible cases of corruption. According to the Estonian authorities, there are now altogether 29 policemen specialised in

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38 See Section 31 CCP for the complete list of investigative bodies (and footnote 43 below).

39 *E.g.* a search is conducted on the basis of an order of a prosecutor's office (Section 91(2)).

40 A document approved in December 2003 by the Ministerial Anti-Corruption Committee which had been set up by the Government of Estonia to prepare an anti-corruption strategy and to organise its implementation.

investigating corruption, including bribery of foreign public officials. 9 of them work for the Central Criminal Police, and 5 specialised policemen work in each police prefecture district (North, South, West and Viru). Prosecutors and policemen who are working in the same districts (*e.g.* Northern Circuit Prosecutors Office and Northern Police Prefecture) form a network – they work together, share information and analyse corruption cases.

108. Amongst other investigative means, an investigative body[41] has the right to submit written requests for assistance to other pre-trial investigation authorities. These requests are binding on other authorities. Compliance with the orders of a preliminary investigator is mandatory for all enterprises, agencies, organisations, officials and persons.

109. With the entry into force of the Code of Criminal Procedure, only the Police Board and the Security Police Board may now undertake surveillance activities on their own initiative or at the request of another investigative body (See Sections 112 to 122 CCP). Surveillance activities include a wide range of measures such as covert collection of information and comparative samples but also covert entry into dwellings, databases and vehicles, wire tapping and staging of criminal offences for which the permission of a preliminary investigation judge is required.[42] The option to undertake surveillance activities is also limited to offences for which the prescribed punishment is imprisonment of at least three years (*e.g.* bribes or gratuities).

Role of the Prosecutor's Office

110. Prosecutor's Offices direct pre-trial proceedings and ensure their legality and efficiency (Section 213 CCP). They also represent public prosecutions in courts. The Prosecutor's office is divided between the State Prosecutor's Office and District Prosecutor's Offices which are subordinate to it. Pursuant to Section 30 CCP, a prosecutor shall exercise his/her authority in criminal proceedings independently, in the name of the Prosecutor's Office, and is governed only by law and its "conscience" (Section 2 of the Prosecutor's Office Act). However, the Chief Prosecutor has the power to give general instructions to Prosecutor's Offices and Investigative bodies and a higher ranking prosecutor may, by his/her order, revoke an unlawful or unjustified ruling, order or demand of a prosecutor.

111. In 2001, the Greco representatives noted that in practice it seemed that the prosecutor had not a very active part in the pre-trial investigations and that statutory rights of preliminary investigators were impressive. Since the entry into force of the new CCP in 2004, cooperation between the police and prosecutors appears to have improved considerably. Prosecutor's offices are now responsible for the overall conduct of the investigation, the prosecution regarding all corruption offences and for ensuring that results are obtained.

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[41] Investigative bodies are defined in Section 31 of the CCP: "(1) The Police Board, Central Criminal Police, Security Police Board, Tax and Customs Board, Border Guard Administration, Competition Board and the Headquarters of the Defence Forces are investigative bodies within the limits of their competence. … (2) In addition, urgent procedural acts are also performed by the Environmental Inspectorate, Rescue Board, Technical Inspectorate, Labour Inspectorate, the captains of sea-going vessels and aircraft during voyages and the Prisons Department of the Ministry of Justice and prisons. (3) Detention of a suspect, inspection, search, interrogation of a suspect, hearing of a witness or victim are urgent procedural acts. (4) The bodies listed in subsection (2) of this section are required to submit the materials of a criminal matter immediately to a competent body specified in subsection (1) of this section in accordance with investigative jurisdiction.

[42] Certain types of surveillance activities, *i.e.* "covert surveillance and covert examination and replacement of object" and "Collection of information concerning messages" (respectively foreseen in Sections 115 and 117 CCP) can also be conducted by the Tax and Customs Board and Boarder Guard Administration with the permission of a prosecutor.

112. The supervision over the legality and efficiency of criminal proceedings and the preliminary investigation exercised by Prosecutor's offices include the right to declare pre-trial proceedings completed, terminate or resume criminal proceedings but also to require explanations and criminal files, to annul or amend orders of investigative bodies, to return a file for further investigation, to remove an official from an investigative body from a matter and to refer the matter to another investigator. They can also form investigative teams, perform procedural acts, order a search (and sanction those undertaken in case of emergency) or other surveillance activities (with the exception of the activities requiring the permission of a judge pursuant to Section 21 of the Penal Code, *e.g.* for certain types of searches provided in Section 91(2)), give instructions or orders to investigative bodies, which are mandatory but can be challenged by a preliminary investigator by submission of a complaint to a higher-ranking prosecutor.

113. "The Honest State" Strategy report (mentioned above) suggested that in the future, it will mainly be the district prosecutor's offices which deal with proceedings regarding corruption offences, although cases of transnational offences and proceedings which could lead to a significant legal precedent will be taken up by the Northern Prosecutor's Office. The report also recommends strengthening again the role of the State Prosecutor's Office, *i.e.* to include in its responsibilities coordinating proceedings regarding corruption offences including forming special task forces in the working districts of the new Police Prefectures and district Prosecutor's Offices or leading plans for the detection of such offences. So far, informal networking of the police and prosecutors has been put in place.

114. The Estonian authorities indicate that in addition to prosecutors responsible for economic crime cases, there are now altogether 6 prosecutors in Estonia fully specialised in corruption offences,[43] including one in the State Prosecutor's Office. Furthermore, they indicate that they have created a task force (a roundtable) of prosecutors specialised in corruption, whose task is to find solutions to the problems stemming from surveillance and investigation. Their aim is also to harmonise criminal procedure as regards corruption. The State Prosecutor's Office also participates in drafting laws and regulations. According to the Estonian authorities, the State Prosecutor's Office would more specifically deal with those cases of bribery of a foreign public official notably because it would immediately be notified of those criminal offences which are committed abroad and would be in charge of initiating the criminal proceedings. The other reason stated by the Estonian authorities is that, pursuant to the Statutes of the Prosecutor's Office, the State Prosecutor's Office would represent State prosecution in the cross-border criminal cases and in the cases of corruption and economic crime, when there is a public interest. However, it is unclear whether the offence of bribing a foreign public official should come under the meaning of the public interest of Estonia.

115. In 2003, according to the data base of court decisions and statistics, 1 person was convicted for giving a gratuity (Section 297); 5 persons for giving bribes (Section 298), 1 person for accepting a gratuity (Section 293), 7 persons for accepting bribes (Section 294). In 2004, 7 persons were convicted for giving gratuities, 2 for giving bribes, 2 for accepting gratuities and 2 for accepting bribes. In 2003 and 2004, there were no convictions on arranging bribes or gratuities. In 2005, at the time this report was drafted, nobody was convicted for giving a gratuity (out of two cases sent to court), 1 person was convicted for giving bribes (out of 11 cases), nobody was convicted for accepting a gratuity (out of 2 cases), 2 persons were convicted for accepting bribes (out of 50 cases) and 2 persons were convicted for arranging bribe.

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[43] Besides, there are 6 prosecutors who are partly prosecuting corruption cases. Estonian prosecutor offices are divided between four districts, where the specialisation of prosecutors is as follows: North (2 fully specialised + 2 partly specialised), South (1+1), West (1+1), and Viru (1+2). The Prosecutor's Office consists of two levels: the State Prosecutor's Office as the superior prosecutor's office and four District Prosecutor's Offices. The work area of the State Prosecutor's Office covers the whole territory of Estonia and the work areas of the district offices coincide with the work areas of the police prefectures.

5.2 Considerations such as National Economic Interest

116. According to the Estonian authorities, the investigation of offences are not influenced by the considerations of national economic interest, and do not depend upon relations with another state or the identity of the natural or legal persons involved.

117. However Section 204 CCP provides that a Prosecutor's Office can terminate the proceedings concerning criminal offences committed by foreign citizens or in foreign states notably in cases where a criminal offence was committed in a foreign state but the consequences of it occurred in the territory of the Republic of Estonia and the proceedings may result in serious consequences for the Republic of Estonia or are in conflict with other public interests. The Estonian authorities indicate that Section 204 has been used in 4 cases related to physical abuse, larceny, and fraud. This could be given an application in the context of the bribery of a foreign public official and would therefore enter in conflict with Article 5 of the Convention. The Estonian authorities indicate that an instruction of the Prosecutor General gives guidance as for the scope of "public interest", which may show a need for clarification of this notion.

6. ARTICLE 6: STATUTE OF LIMITATIONS

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

119. In Estonia, the statute of limitations applicable to natural and legal persons for the bribery offences is 5 years, unless aggravating circumstances exist, in which case the statute of limitations is 10 years (Section 81 of the Penal Code).[44] The period starts to run at the time of the commission of the offence and stops with the entry into force of the definitive judgement. According to the Estonian authorities, the starting point would be the date when the person offered or gave a bribe.

120. The limitation period can be interrupted (in which case a new 5 years period commences) and/or suspended (in which case it resumes when the cause for suspension disappears). If a procedural act is performed with regard to the person, the limitation period is interrupted but the criminal prosecution is absolutely barred when a period of five additional years has elapsed, *i.e.* after 10 years in total. If the person commits new offences, the limitation period is interrupted and restarts from the beginning for each new offence. If the person who committed the criminal offence absconds, the limitation period is suspended, but the criminal prosecution is absolutely barred after 15 years.

121. The statute of limitations for the execution of a judgement or decision is 3 years, unless aggravating circumstances exist, in which case the statute of limitations is 5 years. It starts running the day of the entry into force of the judgement, and is suspended if the convicted person evades the punishment or is in a foreign state from which he/she cannot be extradited, or in case of postponement of the punishment or probation.

7. ARTICLE 7: MONEY LAUNDERING

122. Article 7 of the Convention provides that, if a Party has made bribery of its own public official a predicate offence for the purpose of its money laundering legislation, it shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

[44] The length of the limitation period depends on the maximum imprisonment punishment. See Sections 81 and 4 of the Penal Code.

Money Laundering Offence

123. In Estonia, both bribery of a domestic and a foreign public official are predicate offences for money laundering (all criminal offences, including corruption, are predicate offences in Estonia). The Estonian authorities specify that it is not necessary to have a prior conviction for the predicate offence to undertake prosecution for money laundering, as long as it is possible to establish the predicate offence in the same criminal proceedings as the money laundering offence.

124. The Estonian authorities believe that, though it is not expressly stated in the law, they can exercise jurisdiction for money laundering where the predicate offence is committed abroad (*i.e.* the offence may be punished without regard to the place where the bribery occurred); however there is no case law confirming this interpretation yet.[45]

125. The Penal Code provides for the sanction of money laundering but not for its definition.[46] The offence of money laundering is defined in Section 2 of Estonian Money Laundering and Terrorist Financing Prevention Act[47] (MLTFPA), which entered into force on 1 January 2004 (and was last amended on 9 February 2005): money laundering is "the acquisition, possession, use, conversion or transfer of, or the performance of transactions or operations with, property acquired as a result of a criminal offence or in return for participation in such an offence, the purpose or consequence of which is the concealment of the actual owner and the illicit origin of the property". Although the Penal Code does not refer to the MLTFPA, the courts have relied on this definition in the two cases that Estonia has had.[48] The Estonian authorities explain that the Estonian penal law is based on the principle that when there is no definition of a legal concept in the penal law, the definition has to be derived from other laws (uniformity of legal order principle), here the MLTFPA.

126. Section 2 of MLTFPA covers the laundering of the proceeds of offences but not the laundering of instruments. The sanction applicable to money laundering is foreseen in Section 394 of the Penal Code which provides for a pecuniary punishment or imprisonment of up to 5 years (2 to 10 years if certain aggravated circumstances exist). As already noted in the 2004 accession report, the offence does not appear to extend to negligent money laundering.

127. Criminal liability of legal persons for money laundering is available pursuant to Section 394(3) and (4) of the Penal Code. A pecuniary punishment is imposed (with, in addition, possible compulsory dissolution for the aggravated offence).

128. Section 394(2) of the Penal Code provides for aggravated sanctions, *i.e.* two to ten years imprisonment, for the laundering of proceeds committed (1) by a group; (2) at least twice; (3) on a large scale basis; or (4) by a criminal organisation. Self-laundering (*i.e.* the laundering of the proceeds by the person who committed the predicate offence) is not contemplated in the Penal Code.

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45 European Committee on Crime Problems, Select Committee of Experts on the valuation of Anti-money Laundering Measures, First Mutual Evaluation Report on Estonia, 9 June 2000, [PC-R-EV(00)9Summ.].

46 Section 394(1): "Money laundering is punishable by a pecuniary punishment or up to 5 years' imprisonment."

47 It amended the Money Laundering Prevention Act, originally adopted in 1999. These amendments mainly concern the conditions imposed on the financial or credit institutions for opening an account for a client and for creating or maintaining a relationship with a foreign credit institution.

48 Supreme Court decision 3-1-1-34-05 p. 24

129. Confiscation of the proceeds and instruments of money laundering may be decided by a court pursuant to Section 83 of the Penal Code. In addition, confiscation of "an object which was the direct object of the commission of an offence" of money laundering is available under Section 394(5) of the Penal Code, *i.e.* the money that is being laundered.

Money Laundering Reporting

130. The MLTFPA applies to credit and financial institutions, investment firms or operator of the regulated market, savings and loan association but also to providers of currency exchange services, providers of cash transfer services, organisers of gambling or lotteries, persons who carry out or act as intermediaries in transactions with real estate, persons who act as intermediaries in transactions involving precious metals, precious stones, works of artistic value or other valuable goods and who receive a fee exceeding EEK 100 000 (Estonian krooni, EUR 6 310). The MLTFPA extended the categories of persons subject to the Act to include, in certain circumstances, auditors, lawyers, notaries (MLTFPA, Section 5). However, the notification obligation does not apply to them when evaluating their client's legal position (MLTFPA, Section 15(4)).

131. The MLTFPA establishes, *inter alia,* the obligations of the credit and financial institutions and other listed persons to identify all persons who open an account and carry out transactions above a certain sum (EEK 200 000 (EUR 12 780) for non-cash transactions and EEK 100 000 (EUR 6 390) for cash transactions) or below these thresholds if the institutions suspect that the money is derived from criminal activities (MLTFPA, Section 6(1) and 6(2)). These identification obligations were even strengthened with the last amendment of the MLTFPA on 9 February 2005. These obligations are complemented by requirements to register and preserve data (Section 11).

132. In the event of justified suspicion of money laundering, the Financial Intelligence Unit ("FIU"[49]) may issue a precept to suspend a transaction or to impose restrictions on the use of an account of up to two working days as of receiving notification regarding a suspicion of money laundering.

133. Several internal security measures are also contemplated under Chapter 4 of the MLTFPA which notably provides that the head of a credit or financial institution must appoint a person to act as the contact person for the FIU and establish a code of conduct for employees. These entities are also obliged to provide professional training for all their employees performing duties under the Act. These institutions also have the obligation to notify the FIU of any situation which might be an indication of money laundering, as well as of all suspicious transactions.[50]

134. Sections 395 and 396 of the Penal Code set forth punishments for defined natural persons who fail to comply with the identification and notification requirements in the MLTFPA.[51] In addition, Sections

[49] The FIU is an independent unit of the Central Criminal Police.

[50] The FIU functions are to collect, register, process and analyse information received, to conduct investigations into money laundering, improve prevention and detection of money laundering and inform the public thereof, and to co-operate with credit and financial institutions, undertakings and police authorities in the prevention of money laundering (Section 19).

[51] Penal Code, Section 395: "Failure to comply with identification requirement: Failure by an employee of a credit or financial institution to comply with the identification requirement provided for in the Money Laundering Prevention Act is punishable by a pecuniary punishment". Section 396: "Failure to report suspicious transaction, submission of incorrect information: The head or a contact person of a credit or financial institution, or an undertaking, who fails to report a suspicious transaction or submits incorrect information to the Financial Intelligence Unit shall be punished by a pecuniary punishment or up to one year of imprisonment."

26-1 to 26-7 of the MLTFPA define a series of misdemeanours for natural persons, and in some cases legal persons, arising from failure to comply with the preventive requirements of the MLTFPA.

135. The FIU can request additional information concerning a suspicious transaction from the notifying entity if there is good reason to suspect money laundering (MLTFPA, Section 22(1)). The FIU can share significant information received from financial institutions with the law enforcement authorities on its own initiative or upon request, including on corruption offences. There are no specific rules on the sharing of information with the tax authorities: if the officials of the Tax and Custom Board investigate a tax crime related to money laundering, they can receive the information in their capacity of investigative authority in the cases of tax fraud (and offences involving the violation of custom rules).

136. Section 21 of the MLTFPA allows the FIU to forward information to a preliminary investigation authority, the prosecutor or a court in connection with a court proceeding on the basis of a written request from them. It can forward information to these entities on its own initiative only "if the information is significant for the prevention, establishment or investigation of money laundering or a criminal offence related thereto."

137. The FIU has the right to exchange information with foreign authorised institutions whose responsibilities are similar (MLTFPA, Section 24). Apart from this, there is no general provision, in the framework of the MLTFPA, on the exchange of information with other foreign investigative authorities. The general rules of mutual legal assistance in criminal matters under Criminal Procedure Code apply.

8. ARTICLE 8: ACCOUNTING

138. Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, each Party prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

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

Books and Records/Accounting Standards

139. In Estonia the organisation of accounting and its supervision is regulated foremost by the Accounting Act, Authorised Public Accountants Act, Auditing Guidelines, Commercial Code, Commercial Associations Act, Non-profit Associations Act, Foundations Act and tax laws. All legal persons in private or public law registered in Estonia are obliged to respect the following rules as accounting entities.

140. The Estonian authorities indicate that each of the fraudulent accounting activities listed in Article 8 of the Convention are prohibited by the Accounting Act: The establishment of off-the-books accounts, the entry of liabilities with incorrect identification of their object and the use of false documents are prohibited by Sections 4(1) and 16; the making of off-the-books or inadequately identified transactions is prohibited by Sections 4(2), 4(3), 6 and 16; and the recording of non-existent expenditures is prohibited by Sections 6(4) and 16.

141. Section 4 of the Accounting Act on the general requirements for organisation of accounting provides that an accounting entity is required: (1) to organise its accounts in accordance with one of the

accounting frameworks specified in Section 17 [*i.e.* accounting principles generally accepted in Estonia[52] or international financial reporting standards (IFRS)] in such a way as to ensure the provision of up-to-date, relevant, objective and comparable information concerning the financial position, economic performance and cash flows of the accounting entity; (2) to document all its business transactions; (3) on the basis of source documents or summary documents, to post and record all its business transactions in accounting ledgers and journals; (4) to prepare and submit annual reports and other financial statements; (5) to preserve accounting documents. Section 6 on documenting and recording business transactions further prescribes that "an accounting entity is required to document and record all its business transactions in journals and ledgers" and that "all accounting entries shall be supported by source documents certifying the corresponding business transactions or by summary documents prepared on the basis of source documents". Section 16 deals with the basic principles for the preparation of annual accounts.

External Auditing Requirements

142. The Estonian authorities indicate that the specific procedure for auditing and requirements for the auditors are regulated in the Auditing Guidelines and Authorised Public Accountants Act.[53] The Auditing Guidelines regulate the operating of the audit, ethical rules and rules on independence of auditors; they provide that audits should be conducted in accordance with the standards issued by the International Federation of Accountants (technical standards); the Estonian standards are based on the IFRS.

143. A private limited company shall have an external auditor if its share capital is greater than EEK 400 000 (circa EUR 25 560) or if prescribed by law or the articles of association (Section 190 of the Commercial Code). The public limited company shall always have an external auditor. Companies in which the state possesses at least a required interest[54] and foundations founded by the state are also subject to external audit.

144. The infringement of ethical and independence rules can be punished in disciplinary proceedings under section 45 of the Authorised Public Accountants Act.

Reporting of offences

145. The Estonian authorities indicate that auditors have a special obligation to report their suspicions of acts of money laundering to the FIU.[55] A similar obligation does not exist when an auditor suspects acts of bribery. However, the Estonian authorities indicate that auditors who discover any indication of an illegal act have to include it in their annual report.

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[52] "accounting principles generally accepted in Estonia" are an accounting framework based on internationally accepted accounting and reporting principles, as prescribed by this Act and supplemented by guidelines of the Accounting Standards Board and, in the case of the state and the state accounting entities, by requirements provided for in the general rules for state accounting.

[53] The Public Accountants Act determines the requirements for auditors, the bases for passing the examination of professional competence, the legal bases for the professional activities of auditors and the organisation of the Board of Auditors.

[54] Section 3 clause 4: "A required interest is the position arising from holding the stocks or share representing the requisite number of votes for the adoption of resolutions not specified in clause 3 of this section [*i.e.* majority interest] at the general meeting of a company."

[55] Pursuant to Section 5(1)(6) of MLTFPA in the cases provided by this Act, requirements for the prevention of money laundering which are equivalent to the requirements set for credit and financial institutions for such purposes (including obligation to report the suspicion of money laundering to the FIU) shall also apply to the auditors and persons who provide consulting services in the field of accounting and taxation.

146. Pursuant to Section 38(2) of the Authorised Public Accountants Act on the Maintenance of professional secrets, "disclosure of information is deemed not to be a violation of professional secrecy if such information is disclosed: … 3) to a court on the basis of a court ruling or court judgment; 4) to a preliminary investigation authority in connection with a criminal proceeding; 5) to the State Audit Office for the performance of its duties."[56] The Estonian authorities clarify that external auditors may disclose information if they are requested to do so by law enforcement authorities, as well as on their own initiative, for instance in cases where they suspect that bribe payments are hidden in the accounts of an audited company.

8.3 Penalties

147. The violation of accounting laws is not directly regulated by the Accounting Act.

148. Those violations of accounting standards that result in an incorrect basis for a tax calculation are penalised pursuant to the Taxation Act (see below Tax deductibility).

149. In addition, the Penal Code provides for the offences of incorrect presentation of financial status[57] and of submission of incorrect information to an auditor or a person conducting a special audit.[58] However, these offences have never been applied and their scope of application seems to be narrower than the scope of application of Article 8.3 of the Convention. The first offence applies to "financial status" without giving the definition of these terms and the second offence applies only to information that has to be submitted to an auditor. The Estonian authorities indicate that the financial information included in journals and ledgers should be covered by the scope of the offences. These offences apply only to natural persons.

150. The Penal Code also includes the offences of counterfeiting of documents, seals or blank document forms, and of use of such documents (both for natural and legal persons, Sections 344-345). Information on whether these offences have already been applied in cases of bribery is not available.

9. ARTICLE 9: MUTUAL LEGAL ASSISTANCE

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

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

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[56] See also Section 5 of the Auditing Guidelines: "The auditor should respect the confidentiality of information acquired during the course of performing professional services and should not use or disclose any such information without proper and specific authority unless there is a legal or professional right or duty to disclose".

[57] Section 381: "Failure to submit information or submission of incorrect information to shareholders, auditors, persons conducting a special audit or to the public concerning the financial status of a company is punishable by a pecuniary punishment or up to 3 years' imprisonment."

[58] Section 382: "A founder of or a shareholder of a company, who fails to submit information or submits incorrect information to an auditor or a person conducting a special audit, if such information does not concern the financial status of the company, shall be punished by a pecuniary punishment or up to one year of imprisonment."

152. International legal assistance in criminal matters is governed by the Code of Criminal Procedure, unless provided otherwise by international agreements (principle of subsidiarity) or the generally recognised principles of international law (Section 433(2)).

153. Estonia has ratified several international agreements: the 1959 European Convention on Mutual Assistance in Criminal Matters and its Additional Protocol (entry into force on 27 July 1997) and the 1970 European Convention on International Validity of Penal Judgments (entry into force on 26 July 2001). Estonia has also concluded mutual legal assistance agreements with Latvia, Lithuania, Ukraine, Poland, Finland, Russia and the United States. Estonia also ratified the 1972 European Convention on the Transfer of Proceedings in Criminal Matters and the 1983 Convention on the Transfer of Sentenced Persons.

9.1.1. Criminal Matters

154. Requests for MLA must be sent to the central authority – the Ministry of Justice. Once it is satisfied that the request meets formal requirements (Section 460 CCP), it sends it to the State Prosecutor's Office, which verifies whether compliance with the request is admissible and factually possible and in turn forwards the request to the competent judicial authority for execution. In case of application of the Estonian Penal Code to criminal offences committed outside the territory of Estonia (which would often correspond to a case of corruption of a foreign public official), the State Prosecutor's Office shall be immediately informed (Section 435(3) CCP).[59] The materials received as a result of compliance with a request from a foreign state shall be sent to the Ministry of Justice through the State Prosecutor's Office and the Ministry of Justice shall forward the materials to the requesting state (Section 463(2)).

155. A request is not admissible, and the Republic of Estonia refuses to engage in international co-operation if (1) it may endanger the security, public order or other essential interests of the Republic of Estonia; (2) it is in conflict with the general principles of Estonian law; (3) there is reason to believe that the assistance is requested for the purpose of bringing charges against or punishing a person on account of his or her race, nationality or religious or political beliefs, or if the situation of the person may deteriorate for any of such reasons (Section 436(1) CCP).

156. The Estonian authorities indicate that there has been only one known request for mutual legal assistance concerning corruption, which was presented to them at the beginning of 2001. They further indicate that the request was admissible, but no information was provided on whether Estonia was able to answer the request.

157. The Code of Criminal Procedure (Section 463(1)) regulates the coercive and non-coercive measures that Estonia can undertake to respond to an MLA request. Assistance is provided in the stage of preliminary investigation and judicial proceeding of criminal matters, in the form of performance of particular procedural acts, procurement of evidence, seizing of property, forwarding of writs of summons, etc. on the basis of requests. Estonia will only execute letters rogatory for search or seizure of property where execution is consistent with Estonian law.[60] Measures specific to MLA are developed under Sections 460 to 487.

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[59] Pursuant to Section 435(2), the following entities are also competent to engage in international cooperation: Courts, Prosecutor's Offices, the Police Board, Central Criminal Police, Police Prefectures, the Tax and Customs Boards, Border Guard Administration, Competition Board and the Headquarters of the Defence Forces.

[60] Respectively, reservation and declaration made by Estonia, in the instrument of ratification of the European Convention on Mutual Assistance in Criminal Matters.

158. Sections 465, 466 and 467, in particular, appear to provide an adequate framework for facilitating and encouraging the presence and availability of persons, including persons in custody, who (in line with Commentary 31 to the Convention) "consent to assist in investigations or participate in proceedings". A 2004 amendment to the CCP also introduced the possibility of hearing of persons staying in a foreign state by telephone or video conference (Section 468).

159. The Criminal Procedure Code mentions, amongst the possible acts of international-cooperation in criminal procedure, the execution of the judgments of foreign courts (direct enforcement of foreign court decisions) including with regard to confiscation.

160. Mutual legal assistance with respect to criminal proceedings against legal persons can be provided under the same provisions as for natural persons.

9.1.2 Non-Criminal Matters

161. The Estonian authorities indicate that mutual legal assistance in civil and commercial matters is possible on the basis of an international treaty or "other mutual legal assistance documents between parties".[61]

162. The Estonian authorities consider that Estonia would be able to provide prompt and effective legal assistance to another Party for the purpose of administrative proceedings within the scope of the Convention brought by another Party against a legal person.

9.2 Dual Criminality

163. Under Article 9.2 of the Convention, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence in respect of which assistance is sought is within the scope of the Convention.

164. According to the Estonian authorities, mutual legal assistance does not depend on the fulfilment of a dual criminality requirement.

9.3 Bank Secrecy

165. Pursuant to Article 9.3 of the Convention, a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy.

166. Bank secrecy cannot be invoked as a ground for declining to provide MLA. Pursuant to Section 88(5) of the Credit Institution Act, "in response to a written inquiry, a credit institution shall disclose information subject to banking secrecy to (i) courts, (ii) pre-trial investigation authority and the Prosecutor's Office if a criminal proceeding is commenced, and on the basis of a request for legal assistance received from a foreign state based on an international agreement". The Estonian authorities consider that the Convention would comply with this requirement.

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[61] "Other mutual legal assistance documents between parties" include EU regulations (which apply between EU members): Council Regulation (EC) No 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters; and Council Regulation (EC) No 1206/1201 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

10. ARTICLE 10: EXTRADITION

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

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

168. Extradition is governed by national law under the Code of Criminal Procedure. It is not conditional on the existence of an extradition treaty.

169. Estonia is a Party to the European Convention on Extradition of 13 December 1957 with both additional protocols of 15 October 1975 and 17 March 1978 (entered into force on 27 July 1997). The Estonian authorities indicate that they have bilateral treaties of extradition from the pre-war period with, for instance, Norway and Spain (1930), the United Kingdom (1926) and the United States (1924).

170. The procedure for extradition of a person to a foreign state is divided into the preliminary proceeding in the Ministry of Justice and State Prosecutor's Office; verification of the legal admissibility of the extradition in court; and a decision on extradition by the executive branch.

171. The Ministry of Justice verifies whether the request for extradition complies with the applicable requirements and ensures that all necessary documents have been annexed to it. He is required to send requests that meet the requirement to the State Prosecutor's Office promptly (CCP Section 444). The State Prosecutor's Office reviews the request, before forwarding it to the Tallinn City Court. The Tallinn City Court decides within ten days on the legal admissibility of the extradition,[62] and as appropriate, on any request for provisional arrest (CCP Sections 450-451). Before a decision is taken on a request for extradition, a hearing is held before a judge sitting alone, providing the prosecutor, the person claimed and the defence counsel the opportunity to state their case. If necessary, the judge may grant a term to a requesting state through the Ministry of Justice for submission of additional information. The court cannot order investigative acts to determine if there are sufficient grounds for the extradition. If the judge finds the request admissible, the ultimate extradition decision in the case of a foreigner is taken by the Minister of Justice; in the case of an Estonian national, it is taken by the Government (CCP Section 452). The decision is discretionary.

172. A simplified extradition procedure allows a foreigner to be extradited to the requesting state without verification of the legal admissibility of the extradition, on the basis of the legal consent granted by the foreigner in the presence of his/her counsel.

10.3/10.4 Extradition of Nationals

173. Under the Constitution, no Estonian citizen shall be extradited to a foreign state, except under conditions prescribed by an international treaty and pursuant to procedure provided by such treaty and by law. Estonia indicates that extradition of a national would be possible in cases of bribery committed

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[62] The admissibility of the extradition is decided on the same grounds as for MLA (CCP Section 436, see above), as well as addition requirements: extradition of a person to a foreign state is prohibited if (1) the request for extradition is based on a political offence; (2) the person has been finally convicted or acquitted on the same charges in Estonia; (3) according to the laws of the requesting state or Estonia, the limitation period for the criminal offence has expired or an amnesty precludes application of a punishment (CCP Section 440(1)).

abroad. The Republic of Estonia reserves itself the right to refuse extradition of one of its nationals, if the national has not consented to it.[63] In that case, the Estonian authorities would prosecute their citizen, based on the principle of mandatory prosecution.

10.5 Dual Criminality

174. In Estonia, bribery of a foreign official is considered an extraditable offence, as long as it satisfies the dual criminality requirement. Existence of dual criminality is then a prerequisite for extradition. Pursuant to Section 439 of Code of Criminal Procedure, extradition of a person for the purposes of continuation of the criminal proceedings concerning him or her in a foreign state is permitted if the person is suspected or accused of a criminal offence which is punishable by at least one year of imprisonment pursuant to both the penal law of the requesting state and the Penal Code of Estonia.

175. Dual criminality is not required in cases of surrender under the European Arrest Warrant if an offence of corruption is punishable with at least three years imprisonment in the requesting state.

11. ARTICLE 11: RESPONSIBLE AUTHORITIES

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

177. The Ministry of Justice of Estonia is the central authority in charge of these communications.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. Tax Deductibility

178. Since 1 January 2004, the Estonian Income Tax Act provides for an express disallowance of the deductibility of bribes and gratuities. Section 34(11) of the Act provides that “gratuities and bribes shall not be deducted from business income” of natural persons. Also excluded from deduction are “the cost of gifts or donations” (subsection 8). Costs of entertaining guests are not part of the list of exclusions.

179. Concerning legal persons, a company shall pay income tax on “expenses not related to the business”, among which bribes and gratuities are expressly mentioned (Section 51 of the Act). Pursuant to Section 49, legal persons are as a general rule also compelled to pay income tax on gifts, donations and costs of entertaining guests. There are exceptions that are specifically listed in the law, *e.g.* income tax is not charged on gifts and donations made to a person who owns a hospital, to a state or local government scientific, cultural, educational, sports, law enforcement or social welfare institution, or a manager of a protected area, in a total amount that does not exceed 3% of the amount of the payments subject to social tax.

180. With regard to co-operation and communication between the tax and law enforcement authorities, pursuant to Section 23 of the Anti-Corruption Act, “officials and civil servants are required to notify the head of the agency, the Security Police, the Police or the Prosecutor’s Office of an act of corruption which becomes known to him/her”. In addition, pursuant to the Code of Criminal Procedure, the tax authorities are obliged to give a prosecutor the information he/she requires, and the Taxation Act exempts them from the duty of keeping the tax secrecy in that occasion.

[63] Declaration to the European Convention on Extradition.

181. With regard to co-operation and communication between the Estonian tax authorities and foreign tax authorities, the Taxation Act foresees the possibility to seek and grant international professional assistance on the basis of an international agreement (Section 51).

182. Sanctions are available. First, Section 152 of the Taxation Act prescribes responsibility for the misdemeanour of fraudulent miscalculation of tax.[64] Second, criminal sanctions are foreseen in the Penal Code for the same act, if a punishment for a misdemeanour has been imposed on the offender, or if such act results in a tax underpayment, or tax return, set-off or compensation without legal basis in the amount of EEK 500 000 or more (circa EUR 31 250, Section 389). In addition, Section 390 of the Penal Code prescribes responsibility for the obstruction of activities of the tax authority. These sections also foresee the responsibility of legal persons. The mentioned sanctions are applicable to natural or legal persons who tried to obtain a tax deduction for bribe payments and gratuities.

64 "1) The submission of a tax calculation or false information in a tax return or other document submitted to a tax authority which results in the amount of tax payable being less than the amount of tax to be paid pursuant to an Act concerning a tax or the amount to be refunded, compensated for or set off being greater than the amount to be refunded, compensated for or set off pursuant to an Act is punishable by a fine of up to 300 fine units. 2) The same act, if committed by a legal person, is punishable by a fine of up to EEK 50 000."

EVALUATION OF ESTONIA

General Comments

183. The Working Group commends the Estonian authorities for their co-operation and openness during the examination process.

184. Sections 297 and 298 of the Estonian Penal Code criminalise active bribery and Section 288 defines "officials" as covering both Estonian and foreign public officials. The Working Group considers that overall Estonia's legislation conforms to the standards of the Convention, subject to the issues noted below. In addition, some aspects of the Estonian legislation would benefit from follow-up during the Phase 2 evaluation process.

Specific issues

1. The offence of active bribery of foreign public officials

(i) Definition of foreign public officials

185. Article 1.4 of the Convention provides an autonomous definition of foreign public officials to which national legislation should conform. However, the definition of foreign public officials in Estonian law is not autonomous, as it is necessary to determine whether the foreign public official in question would conform to the definition of an Estonian public official.

186. Several concerns were expressed by the Working Group. First, when applying the Penal Code, courts use cross-references with two other pieces of legislation – the Anti-Corruption Act and the Public Service Act – which may prove to be too complex when dealing with cases of transnational bribery. Second, the person must fulfil specific functions and therefore the scope of the definition of officials seems to be limited to persons of a certain rank: there are uncertainties concerning the coverage of officials who do not hold supervisory or managerial functions, represent the state authority, or manage public funds.

187. The Working Group expressed concern that the approach chosen by Estonia could affect the implementation of the Convention. This issue would benefit from further discussion during Phase 2 of the evaluation process.

(ii) Third parties

188. The offence under Estonian law does not expressly apply where there is a third party beneficiary. The Estonian authorities presented domestic case law that concerned a bribe which benefited a member of the family of the public official. They added that, despite the absence of case law, the case where the bribe benefits a third party, who is not a relative of the official, is covered by the offence. The Working Group recommends that this issue be followed-up in Phase 2.

(iii) In order that the official act/ refrain from acting in relation to the performance of official duties

189. Under Estonian law, the sanctions applicable to bribery of a foreign public official depend on whether the intention is to obtain a lawful or an unlawful act or omission. In addition, the foreign public official must "take advantage of his/her position". The fulfilment of these conditions depends on the legal or regulatory provisions defining the rights and obligations of the official in that particular country.

190. The Estonian authorities explained that proof of the foreign law can be obtained by various means, be it mutual legal assistance or witness testimonies.

191. The Working Group expressed concern that the approach chosen by Estonia could affect the implementation of the Convention and invites the Estonian authorities to consider amending the legislation.

2. Liability of legal persons

192. Article 2 calls on Parties to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official. Estonia provides for criminal liability of legal persons based on acts of a "body or senior official" of the legal person. Therefore a mere omission of supervision by a body or senior official, as well as an act by an employee cannot trigger the liability of the legal person.

193. In addition, nationality jurisdiction is not applicable to legal persons, as it applies to Estonian "citizens" and only natural persons can be citizens. A legal person can be convicted of acts of bribery committed abroad only if they have been committed by an Estonian manager.

194. The Estonian authorities acknowledge that these issues raise problems in Estonia, and informed the Working Group that the Estonian Ministry of Justice may suggest amendments to its Parliament, based on a thorough analysis of the issues.

195. The Working Group welcomes the statement made by the Estonian authorities and encourages them to make the appropriate amendments to answer the concerns of the Working Group and meet the standard of other Parties to the Convention.

3. Jurisdiction

196. The Estonian legislation includes both territorial and nationality-based jurisdiction. It fulfils the requirements of Article 4.2 of the Convention. Under Estonian law, in determining whether the requirement of dual criminality is satisfied for the purpose of establishing nationality jurisdiction where there is no territorial connection to Estonia, the offence in question must also be punishable under the law of the place of the commission. The Estonian authorities explain that this means that Estonia would not have nationality jurisdiction in the following case: an Estonian national bribes a foreign public official from country "B" abroad, in country "A", and in country "A" bribery of a foreign public official is not an offence. They nevertheless consider that they might establish universal jurisdiction, based on Section 8 of the Penal Code, although this section has never been applied.

197. The Working Group recommends that, in light of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue be reviewed on a horizontal basis in Phase 2.

4. Enforcement

198. Sections 202 to 205 of the Code of Criminal Procedure give the Prosecutor's Office various possibilities to terminate criminal proceedings, including proceedings related to bribery of a foreign public official. Criminal proceedings on domestic bribery have actually been terminated on the basis of a lack of public interest in the proceedings and negligible guilt of the person suspected or accused.

199. The Estonian authorities explain that the application of these sections is framed by detailed internal instructions of the Prosecutor General. Although their application is excluded in cases of bribery of a law enforcement official or of a high level official, the Estonian authorities cannot however guarantee that a decision to terminate proceedings would not be taken in any case within the scope of the Convention.

200. The Working Group express concerns that foreign bribery cases could be terminated under section 202 to 205 and recommends that this issue be carefully followed-up in Phase 2.