



# **PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ESTONIA**

**June 2014**

This Phase 3 Report on Estonia by the OECD Working Group on Bribery evaluates and makes recommendations on Estonia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 5 June 2014.

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## EXECUTIVE SUMMARY

The Phase 3 Report on Estonia by the OECD Working Group on Bribery evaluates and makes recommendations on Estonia's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Report considers key Group-wide (horizontal) issues, particularly enforcement. The Report also focuses on country-specific (vertical) issues arising from changes in Estonia's legislative and institutional framework, as well as progress made since Estonia's Phase 2 evaluation in 2008 and Written Follow-Up in 2010.

While the Working Group welcomes certain efforts of Estonia to implement the Convention, it is concerned about the lack of enforcement of the foreign bribery offence. Since becoming a Party to the Convention in 2005, Estonia has not investigated or prosecuted any foreign bribery cases, despite available information of allegations of bribery of foreign public officials committed by Estonian individuals or companies. Estonia needs to ensure that foreign bribery allegations are thoroughly investigated by gathering information from diverse sources, including foreign authorities.

Taking due consideration of the size and increasing openness of Estonia's economy and the efforts undertaken by Estonia to enhance the competitiveness of its companies abroad, the Working Group notes with heightened concern that lack of awareness of foreign bribery risks prevails among Estonian public officials and the private sector alike. This may in turn affect the proper detection and reporting of this crime in Estonia. Estonia should adopt a whole-of-government approach involving public authorities and the private sector to better identify red flags for the detection of foreign bribery and raise awareness of the legal risks in Estonia of bribing public officials abroad.

Enforcement of the foreign bribery offence could also be improved once amendments to the law, currently still before Parliament, are adopted and the offence is streamlined. The Working Group further recommends that Estonia take measures to improve the efficiency of its corporate liability regime, in particular by ensuring that companies can be held liable in practice for foreign bribery even when proceedings against an individual are not possible. Estonia needs to provide training for its law enforcement officials, who play a central role in enforcing the foreign bribery offence, on the proper detection, investigation, prosecution and sanctioning of foreign bribery and related offences. Proactive detection of foreign bribery could also be enhanced if Estonia were to amend its legislation or otherwise clarify the application of whistleblower protection to private sector employees, and carry out a number of the awareness-raising activities on foreign bribery planned as part of the grant from the European Commission received in May 2014.

The Report also highlights a number of positive features of Estonia's efforts to fight foreign bribery, such as the adoption of the Anti-Corruption Act 2012 and its provisions on whistleblower protection for employees in the public sector. Since Phase 2, Estonia has amended its Penal Code and Code of Criminal Procedure several times in order to bring its legislation more in line with the requirements of the Convention. Estonia has also put in place an effective mechanism for responding to mutual legal assistance requests, and has undertaken significant efforts to develop a robust anti-money laundering legislation and reporting system. The Report also notes the recent efforts by Estonia to associate the private sector to its anti-corruption strategy; although not targeted towards foreign bribery, such efforts could nevertheless further contribute to the detection of foreign bribery cases.

The Report and its recommendations reflect findings of experts from Bulgaria and Poland and were adopted by the OECD Working Group on Bribery on 6 June 2014. The Report is based on the

laws, regulations and other materials supplied by Estonia, and information obtained by the evaluation team during its three-day on-site visit to Tallinn on 21-23 January 2014, during which the team met representatives of Estonia's public administration, law enforcement, private sector and civil society. Within one year of the Group's approval of the report, Estonia will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report within two years (i.e. June 2016).

## A. INTRODUCTION

### 1. The on-site visit

1. On 21–23 January 2014, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (the Working Group) visited Tallinn as part of the Phase 3 evaluation of Estonia’s implementation of the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (the Convention) and related anti-bribery instruments. The evaluation team was composed of lead examiners from Bulgaria and Poland as well as members of the OECD Secretariat.<sup>1</sup>

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

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

4. The evaluation team held several meetings with various stakeholders during the three-day visit, including key government ministries and agencies, law enforcement authorities, the private sector and civil society.<sup>3</sup> All participants met with at the on-site were open and forthcoming and Estonian authorities made their best efforts to provide follow-up information after the on-site visit. Lead examiners agreed that overall the on-site discussions were productive and that Estonia should be commended on its efforts in organising the on-site visit and extending every effort to assist the evaluation team. The information provided at every stage was thorough and thoughtful. The evaluation

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<sup>1</sup> Bulgaria was represented by **Mr. Florian Florov**, Senior Expert, Ministry of Justice and **Ms. Karamfila Todorova**, Criminal Judge, Sofia Appellate Court. Poland was represented by **Mr. Adam Ożarowski**, Chief Specialist, Ministry of Justice; **Mr. Jacek Łazarowicz**, Bureau for Organized Crime and Corruption, Office of the Prosecutor General; and **Ms. Renata Lapińska**, Chief Specialist in the Anti-Corruption Division, Ministry of Finance. The OECD Secretariat was represented by **Ms. Kathleen Kao**, Legal Analyst, Anti-Corruption Division; **Ms. Sophie Wernert**, Legal Analyst, Anti-Corruption Division; and **Mr. Julio Bacio Terracino**, Legal Analyst, Anti-Corruption Division. **Ms. France Chain**, Senior Legal Analyst, Anti-Corruption Division joined the evaluation team after the on-site visit and coordinated this evaluation.

<sup>2</sup> The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments can be found at: [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

<sup>3</sup> See Annex 2 for a list of participants.

team expresses its appreciation to the participants for their openness during the discussions, and to Estonia for its co-operation throughout the evaluation.

## **2. Summary of monitoring steps prior to Phase 3**

5. Estonia has already undergone a number of monitoring steps leading up to Phase 3, according to the regular monitoring procedure that applies to all Parties to the Convention as follows: Phase 1 (January 2006), Phase 2 (June 2008) and Phase 2 Written Follow-up Report (October 2010).<sup>4</sup>

## **3. Outline of the Report**

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

## **4. Economic background**

7. Estonia has a small, but open economy. In terms of size, in 2012, Estonia was ranked 40<sup>th</sup> of the 41 Working Group members, making it the second smallest economy in the Working Group.<sup>5</sup> In 2012, exports of goods and services comprised 90.6% of GDP and imports comprised 90.3%.<sup>6</sup> Estonian firms mainly export low and medium technological goods to a small number of partners (Economic Survey for Estonia, 2012). Estonia's primary export products are machinery and equipment, mineral products, metals and metal products, timber and wood products and agricultural produce.<sup>7</sup> Main export destinations in 2013 were Sweden (16.8%), Finland (16.4%), Russia (11.1%), Latvia (10%), Lithuania (5.9%), Germany (4.5%), Norway (3.7%), the United States of America (2.9%), the Netherlands (2.4 %) and the United Kingdom (2.3%).<sup>8</sup> Main fields of economic activity in Estonia are manufacturing, wholesale and retail trade, and real estate activities. The GDP of Estonia is supplied mainly by the service sector, although slightly less so than on average across OECD countries.<sup>9</sup>

8. Foreign direct investment (FDI) outflows in 2013 were USD 952 million.<sup>10</sup> The top five investment destinations were Cyprus,<sup>11</sup> Lithuania, Latvia, Ukraine and Russia.<sup>13</sup> The majority of FDI

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<sup>4</sup> Estonia Phase 1 Report: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36211984.pdf>; Estonia Phase 2 Report: <http://www.oecd.org/estonia/40953976.pdf>; Estonia Phase 2 Follow-Up: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/46155745.pdf>

<sup>5</sup> International Monetary Fund. World Economic Outlook Database (October 2013).

<sup>6</sup> OECD (2013) Country statistical profile: Estonia.

<sup>7</sup> See [www.eesti.ee/eng/topics/business/enterprise\\_in\\_estonia/primary\\_economic\\_sectors\\_and\\_export](http://www.eesti.ee/eng/topics/business/enterprise_in_estonia/primary_economic_sectors_and_export)

<sup>8</sup> Estonia responses to Phase 3 Questionnaire, S.Q.1.4.

<sup>9</sup> Estonian Investment Agency (<http://www.investinestonia.com/en/>); OECD Economic Surveys: Estonia 2012.

<sup>10</sup> OECD (2013) Country statistical profile: Estonia.

<sup>11</sup> Footnote by Turkey



outflows in 2012 were made to the services section (namely in transport, financial, manufacturing and real estate). FDI inflows into Estonia were USD 1 517 million, with Sweden, Finland and Denmark as leading foreign investors.

9. Commentators routinely recognise Estonia's commitment to export-led growth although in 2013, exports performed less strongly than in prior recent years.<sup>14</sup> Estonian exports grew 22% in 2010 and 25% in 2011<sup>15</sup>, but only by 1.8% in 2013. In 2012, Bloomberg noted that Estonian economic growth was the second fastest in the European Union, fuelled by construction and communications output. However, Estonian growth slowed in 2013 when growth in Estonia's main trading partners weakened considerably.<sup>16</sup> Additionally, although Estonian panellists still generally viewed the Estonian economy as largely insulated, businesses and businesses association acknowledged that Estonian companies, including SMEs, are increasingly doing business abroad, particularly in neighbouring countries at high risk of corruption.

10. In terms of domestic bribery, Estonia is widely perceived as one of the least corrupt countries of the former Soviet Union, ranking 28 out of 177 countries in the 2013 Transparency International Corruption Perception Index. The World Bank's *Doing Business* index ranking overall ease of doing business in a country based on regulatory environment listed Estonia 22 out of 189 economies (dropping one place from 2013).<sup>17</sup>

## 5. Cases involving the bribery of foreign public officials

11. Since 2005 and the entry into force of the Convention, Estonia has not investigated nor detected any cases of bribery of foreign public officials. Since the Phase 2 evaluation of Estonia, two foreign bribery allegations have come to light, but neither has led to any proceedings.

12. *Case #1 – Construction Case:* In 2011, an Estonian national was involved in bribing Latvian officials in Latvia to gain permission to undertake a construction project in Riga. Estonia informed lead examiners that this case has been investigated and tried in Latvia where the Estonian national was convicted and sanctioned.

13. *Case #2 – Real Estate Case:* During the on-site visit, civil society panellists informed lead examiners of a recent case in which an Estonian company, along with other foreign nationals, was

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The information in this document with reference to « Cyprus » relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

<sup>12</sup> Footnote by all the European Union Member States of the OECD and the European Union  
The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus."

<sup>13</sup> Estonia responses to Phase 3 Questionnaire, S.Q.1.4.

<sup>14</sup> Kulkarni, Kishore, "Estonia's Export-led Path to Prosperity: Since Independence" (2013).

<sup>15</sup> Parts, Juhan, "Estonia and the European Debt Crisis" (2013).

<sup>16</sup> The Baltic Course, "Eesti Pank lowers Estonia's economic growth forecast to 1% for 2013" (12 December 2013).

<sup>17</sup> International Finance Corporation and World Bank *Doing Business 2014* index.

implicated in a fraudulent real estate scheme, which took place in 2007, involving a State not Party to the Convention. Testimony given during the trial in 2013 for the fraud charges alleged that the developers paid bribes to officials in the foreign jurisdiction in furtherance of the fraudulent scheme. At the on-site visit, Estonian officials explained that two MLA requests (unrelated to foreign bribery) had been sent to the foreign State requesting information, but neither had been answered. At the time of pre-trial investigation, Estonia had no evidence of bribery being involved so the MLA requests did not address the issue. The Office of the Prosecutor determined that there was insufficient evidence to pursue a case on foreign bribery. Following the on-site visit, the Prosecutors' Office provided further details: the MLA request to the State in question concerned the nature of the criminal proceedings in the State, as well as information relating to the natural and legal persons involved. The Prosecutors' Office received notice that the foreign State had received and decided to implement Estonia's rogatory letter. After receiving no information for three years, the Prosecutors' Office sent a follow-up request, which has also gone unanswered. Estonia maintains that the testimony of a single person made six years after the event and not corroborated by any other evidence is not sufficient to proceed with an investigation. Consequently, Estonia did not pursue the matter. However, Estonia did not attempt to verify the foreign bribery allegations with the foreign State, which was deemed uncooperative.

### **Commentary**

*The lead examiners regret that no foreign bribery cases have been investigated or prosecuted in Estonia since the entry into force of its implementing legislation in 2005. The lead examiners note that only two allegations of foreign bribery have surfaced since the Phase 2 evaluation of Estonia in 2008. They hold the view that further efforts could be made to more proactively detect foreign bribery, for instance by engaging with stakeholders involved in anti-money laundering, accounting and auditing, by offering protection to private-sector whistleblowers, and by otherwise raising awareness in the private sector. In particular, the lead examiners would encourage Estonia to follow-up with the foreign state in Case #2 to determine whether the allegations of foreign bribery should be pursued.*

## **6. Legislative and policy reforms since Phase 2**

14. Estonia has recently amended its Penal Code twice, once in 2008 shortly after the adoption of the Phase 2 report and again in 2013 after its two year written follow-up. New draft legislation amending the Penal Code and Code of Criminal Procedure is currently before Parliament and is anticipated to be finalised in 2014.

15. Following the on-site visit, Estonia informed the evaluation team of draft law No.SE295 initiated in the Estonian Parliament (Riigikogu) in October 2012 that, if passed, would significantly curtail Estonia's enforcement abilities. The draft law proposes, *inter alia*, to restrict the use of special investigative techniques to offences in the first degree (i.e. offences punishable by more than five years of imprisonment), impose a general limitation of two months on all investigations and abolish prosecutors' right of appeal in cases of acquittal. Estonia reported that since the draft law passed the first reading in Parliament in March 2013 it has been "sleeping" and has resulted in no further Parliamentary actions; however, the draft law could be "reactivated" at any time (see section 5(b) for more information).

16. A new anti-corruption law was adopted on 6 June 2012 and entered into force on 1 April 2013. This law is largely focused on the prevention of corruption in relation to acts of Estonian public officials. The law provides for *inter alia*, revised obligations for public officials and some protection for whistleblowers (see section B.10 below). Estonia also adopted a new Anti-Corruption Strategy

covering the period 2013–2020. The main objectives of the new Anti-Corruption Strategy are: (i) promotion of corruption awareness; (ii) improvement of transparency of decisions and actions; and (iii) development of investigative capabilities of investigative bodies and prevention of corruption that could jeopardise national security. Although the previous Anti-Corruption Strategy for 2008-2012 did not specifically cover foreign bribery, it addressed the prevalence of domestic bribery among Estonian entrepreneurs and specifically mentioned the Convention by name. The new Anti-Corruption Strategy, on the other hand, does not mention foreign bribery at all although Estonia indicated that foreign bribery is mentioned in the implementation document and will form part of future anti-corruption activities.

## **B. IMPLEMENTATION AND APPLICATION BY ESTONIA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

17. This part of the report considers the approach of Estonia to key cross-cutting issues identified by the Working Group for the evaluation of all Parties subject to Phase 3. Where applicable, consideration is also given to vertical (country-specific) issues arising from progress made by Estonia on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Estonia.

### **1. The foreign bribery offence**

18. Following amendments made in 2008, Estonia’s foreign bribery offence now largely adheres to the requirements of the Convention.<sup>18</sup> The bribery offence – which includes bribery of a foreign public official – is contained in two separate provisions in the Penal Code. The offence of *granting<sup>19</sup> a gratuity* (section 297) covers bribes paid in exchange for a *lawful* act or omission by the official, and the offence of *giving a bribe* (section 298) covers bribes paid in exchange for an *unlawful* act or omission.<sup>20</sup> Prosecutors at the on-site explained that, as the act undertaken by the public official must be proven to be unlawful in cases pursued under section 298, the offence of “giving a bribe” creates an additional evidential burden for the prosecution. By default, an offender is usually charged with granting a gratuity unless the prosecution can prove that the action (or omission) taken by the official was unlawful. Moreover, Estonian lawmakers, including Parliamentarians, stated that the distinction between a gratuity and a bribe serves no practical purpose in the enforcement of foreign bribery. Estonia has therefore decided to abolish this distinction in the most recent draft amendment to the Penal Code before Riigikogu at the time of this review.

19. Although not explicitly stipulated in the provisions for giving a bribe and granting a gratuity, sections 297 and 298 draw from the language used in section 294 (governing the acceptance of a bribe) and which states that an advantage may be “property or other benefits” transmitted to the official directly, or to “third persons”. A bribe may also be given directly or “through any possible channel”<sup>21</sup>, such as through an intermediary.<sup>22</sup> Various Estonian authorities also independently confirmed that sections 297 and 298 cover advantages of both a pecuniary and non-pecuniary nature.

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<sup>18</sup> Phase 2 Written Follow-Up of Estonia.

<sup>19</sup> Estonia notes that the translation for sections 297 and 298 refer to the granting or promising a gratuity and giving or promising a bribe, respectively, but Estonian authorities clarified that in Estonian one single word (*lubama*) signifies both offer and promise. See Annex 4 for excerpts.

<sup>20</sup> Estonia Phase 1 Report, § 6.

<sup>21</sup> Estonia responses to Phase 3 Questionnaire, 2.1(i).

(a) ***Definition of foreign public official***

20. In Phase 2, the Working Group expressed concern that Estonia’s definition of foreign public official required cross-referencing to other statutes and did not definitively cover officials performing legislative functions.<sup>23</sup> Penal Code amendments in 2008 cured these deficiencies and the Working Group considered Recommendations 8(a) and (b) fully implemented at the time of the written follow-up. The offence is now autonomous and expressly covers officials performing legislative functions. The new section 288(3) of the Penal Code provides that a foreign official is considered to be an official for the purpose of the Penal Code corruption provisions, and is defined as “a nominated or elected person who has legislative, executive or judicial functions in a foreign country or in an administrative unit of any level thereof, or who performs a public task for a foreign country, an administrative unit thereof, a public agency, or a public enterprise<sup>24</sup>; or an employee or a representative of an organisation of public international law, including a member of an international assembly or court”.<sup>25</sup>

21. In Phase 2, the Working Group also issued recommendations relating to the wording of the offence. At the time of the Phase 2 evaluation, an assessment of whether an official had “take[n] advantage of his or her official position” could be undertaken only with reference to the law of the country of the foreign public official. Further, the offence did not cover acts outside of an official’s authorised competencies.<sup>26</sup> In the 2008 amendments to the Penal Code, Estonia added to the Penal Code section 288(4), which provides that “taking advantage of his or her official position by a foreign public official is deemed to include commission of an act or omission thereof” by the official regardless of whether the act (or omission) is in the competence of the official, fully implementing Recommendations 8 (c).<sup>27</sup> Moreover, during the on-site visit, Estonian authorities confirmed that Estonian law would be used to assess whether an official is carrying out public functions (and should be deemed a public official) although foreign law may still be referenced to make the factual determination of the official’s status. In the absence of any concrete examples, it is not clear whether the reference to foreign law would still impact an Estonian court’s *legal* determination of whether the person in question would qualify as a public official under Estonian law. Another amendment to the Penal Code is being prepared, however, proposing to change the wording of the offence from “taking advantage of [...] official position” to “use of official position”.

***Commentary***

***The lead examiners welcome the draft amendments to eliminate the distinction between giving a bribe and granting a gratuity, as it appears Estonia would benefit from a more straightforward and streamlined offence. The lead examiners recommend that the Working Group follow-up on the passing of this legislation.***

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<sup>22</sup> See also Phase 1 Report of Estonia, § 19.

<sup>23</sup> Estonia Phase 2 Report, § 127 and recommendations 8(a) and (b).

<sup>24</sup> The Competition Act defines a public undertaking as “an undertaking over which the state or a local government exercises a dominant influence either directly or indirectly by virtue of right of ownership or financial participation, on the basis of the legislation applicable to the person or in any other manner.”

<sup>25</sup> See Annex 4 for the relevant excerpt of Penal Code section 288(3).

<sup>26</sup> Estonia Phase 2 Report, §§ 123-125.

<sup>27</sup> Estonia Phase 2 Written Follow-Up, § 12.

*The lead examiners further recommend that the Working Group follow-up on the application of the foreign bribery offence in practice to ensure that reliance on the law of the foreign public official is not the only factor taken into account in establishing the foreign public official's position. Finally, the lead examiners also recommend that the Working Group follow-up on the passing of the legislation relating to the "use of official position" and subsequent judicial interpretation of this language in bribery cases, to ensure that the definition of foreign public official remains autonomous and not reliant on the legislation of the foreign country.*

**(b) Arranging a bribe or gratuity**

22. In Estonia, an intermediary in a bribery scheme may be liable as a principal for the offence of arranging a gratuity or bribe (Penal Code sections 295 and 296) or as an aider and abettor (sections 20 and 22).<sup>28</sup> As it currently stands, Estonian legislation does not clearly delineate in which circumstances the arranging offences, versus aiding and abetting, would be applicable. In its answers to the Phase 3 questionnaire, Estonia explained that an arranging offence is applicable where the intention of the arranger can be demonstrated, but the act of bribing, for whatever reason, was not carried out or cannot be proven due to lack of evidence. Prosecution representatives at the on-site, however, were unable to draw a clear distinction between the two offences and stated that almost all cases involving intermediaries were prosecuted as aiding and abetting.

23. Although arranging a bribe or gratuity is a principal form of liability, sanctions for aiding and abetting are higher. Arranging a bribe or gratuity, in the absence of aggravating circumstances, is punishable only by a fine or up to one year of imprisonment. Under certain aggravating circumstances, arranging a bribe or gratuity could result in a term of imprisonment of up to three years. In contrast, under section 22 (accomplice liability), "a punishment shall be imposed on an accomplice pursuant to the same provision of law which prescribes the liability of the principle offender", which in the case of giving a bribe, could result in a term of imprisonment of up to five years (see below section 3(a) on sanctions). As Estonian law allows the use of special investigative techniques only in the investigation of offences bearing a maximum punishment of at least three years<sup>29</sup>, these are available for cases of aiding and abetting bribery, but not for non-aggravated arranging of bribes or gratuities.

24. Estonian authorities have sought to address the incongruities of the arranging offence. While initial thought had been given to abolishing the aggravated arranging offences, as well as the offence of arranging gratuities, Estonian authorities believe there is a compelling argument for keeping a separate offence of arranging a bribe or gratuity (under principle and not accomplice liability). It has thus been decided to increase sanctions for the arranging offences and to make available the use of special investigative techniques. Estonian authorities hope that amendments of this nature will improve the utility of the arranging offenses and increase the use of sections 295 and 296. As of yet, proposed amendments to the Penal Code to this effect are still in draft form.

**Commentary**

*The lead examiners believe the draft amendments to the Penal Code increasing the sanctions for the offences of arranging a bribe or gratuity and allowing for the use of special investigative techniques to be a positive step in enhancing the efficacy of Estonia's foreign bribery offence. The lead examiners recommend that, once this becomes law,*

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<sup>28</sup> See discussion of this topic in the Phase 2 Report of Estonia, §§ 139-140.

<sup>29</sup> Estonian Criminal Procedure Code, sections 110-122. *See also* Estonia Phase 2 Report, § 112.

*Estonia provide appropriate guidance to the relevant authorities on the difference between arranging a bribe or gratuity and aiding and abetting, in particular when one offence should be applied over the other. The lead examiners further recommend that the Working Group follow up on the draft amendments and their application in practice once they have entered into force.*

## **2. Liability of legal persons**

25. In Estonia, legal persons committing foreign bribery are subject to criminal responsibility under section 14 of the Penal Code. In Phase 2, the Working Group identified a number of “shortcomings” in Estonia’s corporate liability framework as continuing from Phase 1, including the requirement that a natural person responsible for the criminal act be identified – if not convicted – as a prerequisite to the prosecution of a legal person, reliance on the identification theory of corporate liability (whereby the corporation is liable only for the acts and intents of one or more of the natural persons constituting the company’s “directing mind”), and the requirement that a “body or senior official” act in the interest of the legal person.<sup>30</sup> Some of these areas of concern have been addressed by Estonia in new legislation, but others remain problematic and new issues have emerged. To reflect Estonia’s progress, the Working Group deemed that collectively, developments in this area fully implemented Recommendation 9(a), but maintained that the corporate liability regime as a whole needed to be further assessed.<sup>31</sup> This section reviews amendments to Estonia’s corporate liability legislation against Article 2 of the Convention and the 2009 Anti-Bribery Recommendation, including Annex I, sections B and C.

### **(a) Legal entities subject to liability**

26. According to section 25(1) of the General Part of the Civil Code Act, all companies founded in private interests are considered legal persons in private law and are subject to criminal liability. Estonia excludes from liability state and local governments and a narrow category of “legal persons in public law”, which do not exist primarily to conduct economic activities. Authorities clarified at the on-site that “legal persons in public law” refers to a certain class of legal persons (such as public libraries or national radio stations) that have been founded under special legislation. Specifically, according to Estonia, state-owned and state-controlled enterprises would not qualify under this exclusion if they exist primarily to perform economic activities.

### **(b) Standard of liability**

27. In Phase 2, the Working Group recommended that Estonia amend its Penal Code to broaden the criteria for the liability of legal persons to make prosecution of legal persons more likely and more effective. Accordingly, Estonia amended its legislation broadening the list of agents that may trigger corporate liability. Moreover, court practice at the time of the two-year written follow-up showed promise in a broad interpretation of the criteria required under the Penal Code.

#### **(i) Persons whose acts may trigger liability**

28. The Estonian approach to corporate liability is akin to the first concept envisaged in the 2009 Anti-Bribery Recommendation.<sup>32</sup> The 2008 amendment to section 14(1) of Estonia’s Penal Code

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<sup>30</sup> Estonia Phase 2 Report, §§ 142-156.

<sup>31</sup> Estonia Phase 2 Written Follow-Up, § 13.

<sup>32</sup> See section B, paragraph 2.a. of Annex I to the 2009 Anti-Bribery Recommendation.

added to the list of agents whose actions may trigger corporate liability a company's competent (or authorised) representative. While addressing one of the Working Group's concerns in Phase 2, the 2008 amendment created a new ambiguity as to the interpretation of a "competent representative", a term not defined in the new legislation and yet to be construed by case law.

29. In its answers to the Phase 3 questionnaire, Estonia stated that a competent representative refers to an employee, agent or other representative who is competent to act directly or indirectly in the interests of the legal person. An explanatory note to the draft amendment, which entered into force in 2008, explains that the term is intended to refer to a broad spectrum of persons, but under the umbrella of some concrete authority to represent the legal person.<sup>33</sup> The note clarifies that the competent representative is not required to have an employment contract with the legal person (nor would all employees be considered competent representatives), but that acts exceeding the representative's authority cannot be imputed to the legal person. Although Estonian authorities contend that the definition of competent representative is clearly established under Estonian law and accompanying explanatory memoranda, the evaluation team encountered differing opinions from various panellists. One judge put forth two approaches to the analysis of competent representative: (i) a representation that the legal person is aware of and tolerates, and (ii) a representation that can be presumed, but which must then be related to the representative's competencies. In a recent article on the subject, another judge, the Chair of the Supreme Court, Judge Priit Pikamae, concluded that a "competent representative" should trigger corporate liability only when the representative has acted under the orders of a person or body expressing the will of the legal person,<sup>34</sup> an interpretation which, if issued as a formal judgment, may fall short of the criteria laid out in the 2009 Anti-Bribery Recommendation. Given these disparate views, further clarification on the issue appears necessary.

30. Further, representatives of the judiciary told examiners that, in the absence of explanatory language in the Penal Code, they have drawn from the Civil Code for interpretive guidance, but lead examiners were not entirely convinced of the efficacy of this approach. One obvious potential problem with legislative gap-filling from the Civil Code is that civil law arises from and creates a distinct set of rights and obligations that may not adhere to the standards set out in Annex I to the 2009 Anti-Bribery Recommendation. For example, under Civil Code Chapter 8, a right of representation may be granted by a transaction or it may arise from law.<sup>35</sup> In civil law, the notion that a right of representation may "arise from law" is solidly rooted in the existence of certain fiduciary duties (such as that a Director may have towards a company's shareholders). However, the provision does little to demonstrate that Estonia's legal liability regime is functionally equivalent to the approach described in Annex I, which envisions flexibility in the level of authority that may trigger a company's liability. Relying on provisions in the Civil Code may also restrict application of the Convention to only certain circumstances. For instance, the Civil Code states, "if a transaction is entered into by an employee of a [legal] person engaged in economic or professional activity or by any other person for whom the [legal] person engaged in economic or professional activity is responsible, and the transaction is related to such economic or professional activity [emphasis added], the transaction is presumed to be performed on behalf of the [legal] person".<sup>36</sup> Applying this civil law standard in a foreign bribery case may prevent prosecution and conviction of legal persons charged with committing foreign bribery in cases where the bribery scheme fell outside the company's "economic or professional activity". For

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<sup>33</sup> Ginter, Jaan, "Criminal Liability of Legal Persons in Estonia".

<sup>34</sup> Pikamae, Priit, "La Responsabilité des Personnes Morales dans le Droit Pénal Estonien : ses Fondement et le Principe de Faute", *Droit Étranger et Comparé Droit Estonien*, n.2 (avril-juin 2013).

<sup>35</sup> Estonia Civil Code, Chapter 8, §117.

<sup>36</sup> *Ibid.*, Chapter 8, §116(2).

instance, a bribe by a construction or pharmaceutical company to acquire commercial property in a foreign country to set up and do business could be considered to fall outside the company's area of business, since the company's "economic or professional activity" is unrelated to real estate. In the absence of case law and any other interpretive materials, it is unclear from a plain reading of Chapter 8 of the Civil Code when and under what circumstances a legal person would be deemed responsible for its representative.

(ii) *In the interest of a legal person*

31. The Working Group noted in Phase 2 the absence of case law in Estonia defining the criteria of "in the interest of a legal person".<sup>37</sup> In the Phase 3 evaluation, Estonia brought to the attention of the lead examiners a case in which the Criminal Chamber of the Supreme Court held that an act "in the interest" of a legal person does not exclusively refer to a company's financial benefit and should not be restricted to the legal person's field of activity.<sup>38</sup> In that case, the Criminal Chamber disagreed with the appellant, who tried to argue that only an act committed within the legal person's field of activity may be considered in the legal person's interest. The court stated that "a legal person's interest can undoubtedly be wider than just attaining proprietary gain and may be related to fields outside its principle activity". The interest of a legal person should be interpreted as the legal person's "enrichment". For example, in determining whether playing music in a store could be considered to be "in the interest" of the store, the Supreme Court decided that the music was sufficiently connected to the store's basic operation to consider the act committed in the store's interest.<sup>39</sup> In another case, the Criminal Chamber held that a loan contract entered into by a political party's Management Board member satisfied the requirement of "in the interest of" the company as the funds were received in the company's account and used for purpose of the party's statutory activity.<sup>40</sup> The same Chamber clarified that acts of a personal nature, however, cannot be attributed to the legal person. Loopholes identified in Phase 2 appear to remain, however. For instance, a company in a business conglomerate bribing for the benefit of another company would result in neither company being punished since the act and the benefit cannot be attributed to the same legal person. Estonian authorities theorize that such a situation could be covered as bribery through an intermediary, but, in the absence of case law, such assertions remain speculation. Situations where companies bribe in order to obtain a loss-making contract, such as where they are seeking to enter a major new market, also may not be covered. Estonia maintains that such a situation would be considered to be "in a company's interest", although no case law exists in support of this as of this time.

(iii) *Liability for acts committed by intermediaries, including related legal persons*

32. Annex I to the 2009 Anti-Bribery Recommendation requires member countries to ensure that legal persons cannot avoid liability by using intermediaries, including related legal persons. Estonia indicated that under certain circumstances, Estonian penal law may also extend to the actions of the subsidiary of an Estonian company, although Estonian authorities did not specify the circumstances under which this would be possible. Estonia asserts that if an act of bribery has been committed by a subsidiary of an Estonian company under the company's authorization or order, or to which the company provided resources for the bribe, the Estonian company could be liable for aiding and

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<sup>37</sup> Estonia Phase 2 Report, §§ 155-156.

<sup>38</sup> Judgment of 23.03.2005 Nr 3-1-1-9-05.

<sup>39</sup> Ginter, Jaan, "Criminal Liability of Legal Persons in Estonia" citing CLCSCd, 3-1-1-137-04.

<sup>40</sup> Judgment of 24.09.2009 Nr 3-1-1-67-09.



abetting at the very least.<sup>41</sup> The new amendments are clearly intended to further bring Estonia's enforcement framework in line with the Convention's requirements, but, in the absence of case law, lead examiners cannot ascertain whether courts will apply this provision as broadly as they should interpret the elements of the offence. For instance, it also remains to be seen whether an Estonian court would exercise jurisdiction over an Estonian company that merely *offered* or *promised* a bribe abroad.

### ***Commentary***

*The lead examiners welcome efforts by Estonia to enhance its corporate liability framework, in particular, the latest 2008 amendments to the Penal Code based on recommendations issued by the Working Group in Estonia's Phase 2 evaluation. However, lead examiners believe that given the many competing views (even within the judiciary itself) on the meaning of the term "competent representatives", the prosecution service and judiciary, as well as Estonian practitioners, would benefit from clarification on this subject.*

*The lead examiners also consider that the criterion of "in the interest of" the legal person has not been modified since Phase 2, and reiterate the concerns raised at the time by the Working Group. In its current state, and in the absence of case law to the contrary, it could create a substantial loophole that companies would be able to exploit by directing payments or contracts to affiliates or other third party beneficiaries. In some circumstances, such as cases involving complicated accounting or a loss-making contract, this requirement could constitute a serious obstacle for the prosecution.*

*The lead examiners therefore recommend that Estonia take all necessary steps to clarify the terminology on "competent representatives" and "in the interest of the legal person", whether by issuing an interpretive note to the draft amendment or through other means as appropriate under Estonian law, with a view to ensuring that interpretation of these provisions is harmonized and in conformity with the Convention and 2009 Anti-Bribery Recommendation.*

*Finally, the lead examiners recommend that the Working Group follow-up on the application in practice of the liability of legal persons for acts committed by intermediaries, including related legal persons.*

### **(c) *Proceedings against legal persons***

33. Under the Working Group's instruction to examine Estonia's corporate liability framework in its entirety, the lead examiners identified additional areas of concern that were either raised, but not discussed in depth in Phase 2, or had not yet been brought to light, relating to Estonia's procedural framework for prosecuting legal persons.

#### **(i) *Identification of natural person***

34. The 2009 Anti-Bribery Recommendation specifies that prosecution of a legal person should not depend on the prosecution or conviction of the natural person. One potential procedural deficiency under the Estonian law is the requirement of the identification of a culpable natural person in

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<sup>41</sup> Estonia responses to Phase 3 Questionnaire, 4.1.

proceedings against legal persons. Estonian courts have interpreted section 12 of the Penal Code<sup>42</sup> as requiring, prior to the prosecution of the legal person, a natural person to be identified and all elements of the offence (mens rea and actus reus) satisfied with respect to the natural person, even if proceedings against the natural person ultimately do not result in criminal charges or are terminated.<sup>43</sup> In a 2008 ruling, the Supreme Court held that “even if the fact has been established that an act had been committed in the interests of a legal person, it is necessary to identify the natural person who committed the offence and all the elements of the offence, unlawfulness and guilt”.<sup>44</sup> If any of the elements of offence are missing with respect to the natural person, a legal person could not be held liable for the same offence.<sup>45</sup> In fact, the subjective and objective elements of the offence (i.e., deliberate intent of the natural actor) must be established prior to the determination of the legal person’s culpability.<sup>46</sup> Legal experts interviewed during the on-site characterised the case against the legal person as ancillary to the case against the natural person; the prosecutor must prove the case against the natural person in proceedings against the legal person. If no evidence can be provided against a natural actor, a judge may dismiss the case against the legal person. As a slight improvement of the situation from Phase 2, Estonia has indicated that recent practice and a new commentary to the Penal Code demonstrate that indirect intent of the natural actor may now serve to impute liability to the legal person. Thus a company may now be held liable in cases where the natural person foresaw the occurrence of circumstances constituting the necessary elements of an offence and tacitly accepts that such circumstances will occur.<sup>47</sup> At the on-site, Estonian authorities confirmed that proceedings against legal persons are linked to those of a natural person; law enforcement authorities may investigate a legal person where there is sufficient evidence to suspect that a natural person capable of triggering corporate liability has committed a crime in the interests of the legal person. Estonian law does not require the indictment or prosecution of a natural person for proceedings to be initiated against a legal person, but authorities broadly agreed that an investigation into a legal person is dependent on the identification of a natural person. The two investigations (into the natural and legal persons) may occur concurrently if the implication of the legal person is evident from the facts of the crime.

35. Although the 2009 Anti-Bribery Recommendation does not explicitly prohibit basing proceedings against a legal person upon the identification of the natural person, such a requirement under Estonian law may, in practice, equate to requiring a concurrent or prior prosecution of the natural person. Proceedings against the legal person may continue after the termination of proceedings against the natural person, but they may not commence in the absence of any proceedings against a natural person. Representatives of the investigative bodies explained that, generally, investigations are opened into specific incidents or events rather than individuals or entities, and thus natural and legal persons are likely to be investigated together. However, for the purpose of investigating a legal person’s involvement in the commission of a crime, a natural person must be first or concurrently investigated. Further, statements by prosecution authorities suggest that the indictment against a legal person must name a natural person. When asked whether court proceedings against a legal person would be interrupted if the investigators identified a different natural person than the one originally

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<sup>42</sup> Section 12 of the Penal Code is entitled “Necessary elements of the offence” and defines the subjective and objective elements necessary to constitute an offence.

<sup>43</sup> Estonia responses to Phase 3 Questionnaire, S.Q.4.1.2.

<sup>44</sup> Judgment of 20.10.2008, Nr 3-1-152-08.

<sup>45</sup> Judgment of 09.09.2005, Nr 3-1-1-64-05.

<sup>46</sup> Judgment of 24.09.2009, Nr 3-1-1-67-09.

<sup>47</sup> Estonia Phase 2 Written Follow-Up, Recommendation 9(a).

named in the indictment, investigators and prosecution authorities answered that the indictment could be amended. Judicial representatives, however, were of a different opinion. In the absence of actual practice on this issue, they conjectured that the indictment could not be rectified and the legal person would thus have to be acquitted in that particular case; the principle of “ne bis in idem” (or double jeopardy) would then prevent the prosecution from bringing the case against the legal person for a second time with a different natural actor. Further, according to Estonian authorities, theoretically, the unavailability of a natural person (for instance, in case of death), would not preclude proceedings against the legal person. However, in practice, given the evidentiary link of the case against the legal person to the culpability of the natural person, lead examiners question whether such a situation would in practice impede effective prosecution of the legal person. It is also unclear from Estonian legislation whether jurisdiction could be exercised over the legal person if the scenario involved a natural person over whom Estonia could not exercise jurisdiction (see also section 2(d) on jurisdiction over legal persons below).

36. Prosecution and investigation representatives were reluctant to acknowledge the possibility of a situation in which a legal person could be demonstrated to be guilty of an act, but no natural person was identified in the pre-trial investigation. Estonian authorities stated that in the absence of a natural person, theoretically, they could begin looking into a company without opening a formal investigation, although this situation has not yet arisen. When posed with the hypothetical scenario where allegations in the media against a company led to an investigation that uncovered clear evidence of the transfer of illicit funds, which could not be linked to any natural person, panellists surmised that in such a case, they could initiate an investigation into the legal person in order to identify the natural actor.

(ii) *Ways of delaying or escaping liability*

37. During the on-site visit, lead examiners were made aware of two potential loopholes in Estonia’s corporate liability framework allowing companies to either delay proceedings by replacing the designated company representative in court or to potentially avoid liability altogether by dividing the company or merging with another entity. Section 36 of the Criminal Procedure Code (CPC) requires a legal person to be represented in criminal proceeding by a member of the management board or the body substituting for the management board. The judge interviewed at the on-site informed lead examiners of instances where a company relied on dilatory tactics to unduly postpone and delay trial proceedings, by repeatedly designating a representative who would then be unavailable and would need to be replaced. Further, although the designated representative officially stands in for the legal entity in trial, the company has no obligation to provide any contact information or information as to the representative’s whereabouts to the court, which creates an additional difficulty for the court. Judges have also complained to legislators about serious loophole in Estonia’s corporate liability legal framework, which does not consider a situation in which a legal person divides or merges with another entity to avoid liability. Panellists generally agreed that a court could execute the judgment against the old company, but not the new entity. This opinion is not unanimous, however; in an article published in 2009, two Estonian practitioners argued that entities created as a result of a merger or reorganisation would be subject to liability. The article did agree with panellists at the on-site that Estonian law does not cover the division of a company and whether either resulting entity (or both) should inherit the liability of the former company.<sup>48</sup>

*Commentary*

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<sup>48</sup> Marko Kairjak and Ramon Rask, “Division of a Company as Means of Corporate Rescue” (2009).

*Lead examiners are concerned that the requirement that a natural person be identified and, further, be shown to satisfy the necessary elements of the offence before a legal person can be prosecuted, will prove to be an impediment to effective prosecution of foreign bribery cases. Although Estonia assures the evaluation team that no prosecution of a natural person is required in principle, the lead examiners are concerned, given the various evidentiary and procedural barriers posed by the lack of proceedings against a natural person, that prosecution of a natural person will be required in practice. Thus the lead examiners recommend that the Working Group follow up on the application of Estonia's corporate liability regime to ensure that, in practice, prosecution of a natural person is not a prerequisite to proceeding against a legal person involved in a foreign bribery scheme.*

*The lead examiners also recommend, as a matter of urgency, that Estonia address the potential loopholes described by representatives of the judiciary relating to the ways in which a company might delay proceedings or avoid liability.*

**(d) Jurisdiction over legal persons**

38. At the time of Phase 2, Estonia was not able to exercise nationality jurisdiction over legal persons (for jurisdiction of natural persons, see section 5(d)) and the Working Group observed that this could present a significant loophole.<sup>49</sup> The Working Group thus recommended that Estonia establish nationality jurisdiction to prosecute legal persons for foreign bribery. The 2008 amendments to the Penal Code extended nationality jurisdiction to legal, as well as natural, persons thereby fully implementing Recommendation 9(b).<sup>50</sup> Section 7(2) of the Penal Code now stipulates that the penal law of Estonia applies “to grant[ing], arranging receipt or acceptance of gratuities or bribes or influence peddling committed outside the territory of Estonia if such act was committed by an Estonian citizen, Estonian official or a legal person registered in Estonia, or an alien who has been detained in Estonia and who is not extradited.” Based on the language in section 7(2) and in the absence of case law, it is uncertain whether nationality jurisdiction would extend to situations where the Estonian legal person merely offered or promised a bribe.

39. Estonia stated in the answers to the Phase 3 questionnaire that if a natural person committed the offence in the interest of a legal person and is subject to either territorial or extraterritorial jurisdiction, the legal person in question is also subject to Estonian penal law even if lacking Estonian nationality. This provision would allow Estonia to exercise jurisdiction over foreign companies where the natural person committing the offence was Estonian. However, where Estonia is not able to exercise its nationality or territorial jurisdiction over the natural person committing the foreign bribery, it may not be able to proceed against the Estonian legal person involved.

**Commentary**

*Lead examiners welcome the amendments to the Penal Code extending nationality jurisdiction to legal persons, but as there has not yet been any case law demonstrating the application of these jurisdictional principles, the lead examiners recommend that the Working Group follow up the application of this new provision as practice develops, with particular focus on the following:*

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<sup>49</sup> Estonia Phase 2 Report, § 159.

<sup>50</sup> Estonia Phase 2 Written Follow-Up, § 13.

- (i) *The applicability of nationality jurisdiction over an Estonian legal person that only offered or promised to bribe abroad; and,*
- (ii) *The applicability of nationality jurisdiction over an Estonian legal person where Estonia does not have jurisdiction over the natural person.*

(e) ***Responsibility of legal persons in practice***

40. Estonia provided statistics on the number of legal persons investigated for all types of criminal offences in the period 2010-2012: 158 in 2010, 179 in 2011 and 121 in 2012. As to court proceedings initiated against legal persons, 72 legal persons in 2010, 40 in 2011 and 58 in 2012 were prosecuted. None of these cases involved instances of foreign bribery. For domestic bribery offences, 20 legal persons were investigated in 2010, 3 in 2011 and 11 in 2012.

### **3. Sanctions**

41. In Phase 2, the Working Group deemed the maximum sanctions for the offences of giving a bribe and granting a gratuity to be adequate, but recommended that Estonia take steps to ensure that sanctions for arranging a bribe or gratuity are effective, proportionate and dissuasive (Recommendation 13(a)). At the time of the Phase 2 Written Follow-Up, the level of sanctions for the arranging offences had not changed and this recommendation was deemed not implemented.<sup>51</sup> The Working Group also recommended that Estonia maintain more consistent statistics on sanctions, including confiscation (Phase 2 Recommendation 14(a)). At the time of the two-year written follow-up, this recommendation was deemed partially implemented, as some databases had already been put in place but the new statistics system was yet to be implemented.<sup>52</sup> The Working Group further recommended that sanctions in foreign bribery cases in Estonia be monitored as practice developed.

(a) ***Sanctions against natural persons for foreign bribery***

42. Under Estonian law, granting a gratuity is punishable under section 297 by a fine of between 30 to 500 daily rates (calculated based on the average daily income of the offender, but with a minimum of EUR 96 to 1 600),<sup>53</sup> or up to three years of imprisonment, and under aggravating circumstances, up to 5 years imprisonment. Giving a bribe is punishable under section 298 by one to five years of imprisonment (without imposition of a pecuniary punishment), and under aggravating circumstances, by two to ten years of imprisonment. When lead examiners observed that the range of pecuniary penalties for natural persons appeared to be rather low, Estonian authorities explained that a court may also impose a supplemental fine or other punishment in the form of other restriction of behaviour (for instance, a “prohibition to engage in enterprise” for one to five years). The sanctions for bribery are comparable to those of other economic offences.

43. Arranging receipt of a gratuity or a bribe, under sections 295 and 296 respectively, is punishable by a fine or a term of imprisonment of up to one year – a situation unchanged since Phase 2. Under aggravating circumstances (e.g. being a repeat offender or taking advantage of a public position), arranging a bribe or gratuity is punishable by a fine or up to three years imprisonment, which would mean that section 53 would not be available as a means of supplemental punishment for the arranging offences as they currently stand. Furthermore, the low level of sanctions for arranging a

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<sup>51</sup> Ibid. § 16.

<sup>52</sup> Ibid. § 17.

<sup>53</sup> At the time of the Phase 3 on-site, the minimum daily rate is EUR 3.40, but the draft amendment to section 44 of the Penal Code proposes to raise the daily minimum to EUR 10.

bribe may also impede Estonia's ability to extradite its nationals (see section 9(b) below). A draft amendment to the Penal Code is currently before Riigikogu, which will increase the maximum sanction for arranging a bribe or gratuity to a term of five years of imprisonment (see also section 1(b) above on arranging a bribe or gratuity).

**(b) Sanctions against legal persons for foreign bribery**

44. In Phase 2, the Working Group did not identify any issues with Estonia's sanctions regime as it relates to legal persons. Fines for legal persons range from EUR 3 200 to EUR 16 000 000,<sup>54</sup> although a draft amendment to the Penal Code seeks to increase the minimum fine to EUR 4 000.

45. Currently, a court may also order the compulsory dissolution of a legal person if the criminal offence has become a part of the legal person's activities, but draft amendments to the Penal Code seek to abolish compulsory dissolution as one of the penalties against legal persons. At the on-site visit, Estonian policy-makers reasoned that, as the establishment of a corporation under Estonian law is relatively simple, compulsory dissolution does not have significant dissuasive character. Furthermore, panellists were not certain that this penalty had ever been applied in practice.

46. In the absence of convictions for foreign bribery, lead examiners considered statistics on sanctions for domestic bribery convictions in the period 2010-2012. In 2010, four legal persons were sanctioned under section 298 (giving bribe); in 2011, one legal person was sanctioned under section 293 (accepting of gratuities), and two legal persons under section 297 (granting of gratuities); in 2012, one legal person was sanctioned under section 296 (arranging a bribe) and three legal persons under section 297 (granting of gratuities).<sup>55</sup> Additionally, in 2011, two legal persons were sanctioned for a violation of duty to maintain accurate accounting records and eight legal persons were sanctioned for money laundering. The sanctions imposed on legal persons in 2010-2012 for corruption offences ranged from EUR 3 195 to 16 617 for giving a bribe, EUR 3 200 to 5 550 for granting gratuities, EUR 10 000 for arranging a bribe and EUR 5 500 for accepting gratuities.<sup>56</sup> In the absence of information concerning the amount of the bribe payments and/or benefits incurred, as well as foreign bribery cases, and in light of the concerns expressed by the Working Group at the time of the Phase 2,<sup>57</sup> it is difficult to evaluate whether sanctions imposed in practice were sufficiently effective, proportionate and dissuasive. No special guidelines relating to the calculation of a fine for a legal person exist; Estonian courts rely on past practice and the individual circumstances of each case in determining the appropriate penalty.

**(c) Other sanctions**

47. Estonian law permits the imposition of administrative sanctions for bribery. The Public Procurement Act provides that a contracting authority will not award a public contract to a natural person or legal person and will exclude from a procurement procedure a tenderer or candidate, who has been convicted of bribery or related offences, including money laundering or tax offences. Estonia indicated that, as of 2011, no legal person had been excluded from public procurement for any of these offences (earlier data not available). The Registry of Convictions Act would provide the necessary information (see section 11 below on Public advantages and reference to the Registry in practice).

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<sup>54</sup> Penal Code section 44.

<sup>55</sup> Estonia responses to Phase 3 Questionnaire, S.Q.5.1.1.

<sup>56</sup> Ibid. S.Q.5.1.1.

<sup>57</sup> Estonia Phase 2 Report, § 192.

## *Commentary*

*The lead examiners welcome the proposed draft amendment to the Penal Code, which would increase the sanctions for arranging a bribe or gratuity. Lead examiners recommend that the Working Group follow up on the adoption of the draft amendment and its application in practice after its entry into force.*

*Furthermore, given the absence of case law for foreign bribery and the relatively low level of sanctions imposed in domestic bribery cases, the lead examiners recommend that the Working Group follow up on the sanctions imposed in practice in foreign bribery cases to ensure they are effective, proportionate and dissuasive.*

## **4. Confiscation**

48. In Phase 2, the Working Group recommended that Estonia maintain detailed statistics on sanctions, including confiscation, imposed on natural and legal persons for foreign bribery and related offences. At the time of its two-year written follow-up, Recommendation 14(a) was deemed partially implemented (see section 3 above on Sanctions).

49. Estonia's framework for confiscation has not changed since Phase 2.<sup>58</sup> The Penal Code allows for confiscation of a bribe and the proceeds of the bribe; confiscation of the bribe is discretionary, but confiscation of the proceeds of bribery is mandatory.<sup>59</sup> <sup>60</sup> In 2008, the Penal Code was amended to also allow for confiscation of the proprietary rights arising from a contract that was based on an object used to commit an intentional offence (or that was the direct object of an offence). Bribes or bribe proceeds in the hands of third parties may be confiscated if the third party acquired it as a gift, at considerably below market value, or if that third party had knowledge that the object of the transfer was to frustrate confiscation. Monetary sanctions in an amount corresponding to the value of the assets subject to confiscation may be imposed if the assets in question have been transferred or consumed, or if confiscation is impossible for any other reason.<sup>61</sup>

50. Section 83-2 also allows for extended confiscation. A new amendment, which entered into force in March 2014, states that if a court convicts a person of a criminal offence and imposes imprisonment for a term of at least one year or life imprisonment, the court shall confiscate a part or all of the criminal offender's assets belonging to the offender at the time of judgment if the nature of the criminal offence, the legal income, or the difference between the financial situation and the standard of living of the person, or another fact gives reason to presume that the person has acquired the assets through commission of the criminal offence. If a court convicts a legal person of a criminal offence, the court may confiscate part or all of the assets belonging to the legal person at the time of the judgment, if the nature of the criminal offence gives reason to presume that the principal activity of the legal person is aimed at committing offences and the assets have been acquired through commission of the criminal offence. Extended confiscation against third parties is also possible.

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<sup>58</sup> Ibid. §§ 181-185.

<sup>59</sup> A court may decline to confiscate where it would be "unreasonably burdensome" or if the value of the assets is disproportionately small compared to the cost of confiscation.

<sup>60</sup> Penal Code, sections 83 and 83-1.

<sup>61</sup> Ibid. section 84.

51. The Code of Criminal Procedure enables pre-trial seizure with the permission of the preliminary investigation judge<sup>62</sup> to secure confiscation or its substitution.<sup>63</sup> Property may be seized at the request of a Prosecutor's Office and on the basis of an order of a preliminary investigation judge or on the basis of a court ruling. In cases of urgency, property, except property that is the object of money laundering, may be seized without the permission of a preliminary investigation judge.

52. In terms of confiscation in practice, Estonia reported that confiscation of the object of active bribery (i.e. the bribe) occurred four times in 2010 out of eight cases, twice in 2011 out of nine cases and twice in 2012 out of ten cases. As concerns the 2012 cases, the bribe payments were confiscated from the legal persons sanctioned: in one instance, Estonian authorities confiscated assets in the amount of EUR 4 018,4 acquired by the legal person as a third party beneficiary in a case of domestic passive bribery; and in the second case, an Estonian court imposed a monetary sanction of EUR 1 000 against a legal person in place of confiscation. With respect to proceeds of bribery, Estonian authorities explained at the on-site that crimes are often detected so early that proceeds have not yet been generated. Total confiscation figures for bribery-related cases (both passive and active) are: EUR 37 807,7 in 2010, EUR 45 399,99 in 2011, and EUR 218 141,9 in 2012, demonstrating a significant increase.<sup>64</sup>

### *Commentary*

*Given the relatively low number of confiscation in 2011 and 2012, lead examiners recommend that Estonia take steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely consider confiscation in foreign bribery cases. They further recommend that the Working Group follow up on the application of confiscation measures in practice in foreign bribery cases. To assist the Working Group in this task, Estonia should pursue its efforts to maintain comprehensive statistics on the application of confiscation measures imposed against both natural and legal persons in cases of domestic and foreign bribery, false accounting and money laundering.*

## **5. Investigation and prosecution of the foreign bribery offence**

53. This section will examine the legal and institutional infrastructure in place to enforce Estonia's foreign bribery offence. To date, no foreign bribery cases have been detected or prosecuted in Estonia.

### **(a) *Relevant bodies responsible for investigation and prosecution of foreign bribery***

54. Since Phase 2, developments in the organization of bodies responsible for the enforcement of the foreign bribery offence have taken place. Additionally, Estonia has clarified some elements of the structure previously described in Phase 2.<sup>65</sup> As such, a new summary of the relevant bodies is provided below.

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<sup>62</sup> Criminal Procedure Code, section 142.

<sup>63</sup> Estonia responses to Phase 3 Questionnaire, 2.1(iii).

<sup>64</sup> Ibid. S.Q.6.1.1.

<sup>65</sup> Estonia Phase 2 Report, §§ 75-80.



(i) *Role and organization of the Prosecutor's Office*

55. In Estonia, the prosecutor plays a central role in both the investigation and prosecution of foreign bribery. Pursuant to section 30 of the CPC, the central or regional Prosecutor's Office is responsible for directing pre-trial proceedings (including determining when sufficient evidence has been collected to file charges) and ensuring the legality and efficiency of such proceedings, and may, under the CPC, commence or terminate criminal proceedings, alter the investigative jurisdiction in a particular criminal matter, issue orders to investigative bodies, remove an official of an investigative body from a criminal proceeding, annul and amend orders of investigative bodies or demand written explanations of investigative bodies.

56. The Prosecutor's Office Act (POA), which entered into force in 2004, established the Prosecutor's Office as a body under the Ministry of Justice and divides the Prosecutor's Office into the Office of the Prosecutor General (OPG) and four subordinate District Prosecutor Offices (DPOs).<sup>66</sup> The OPG is headed by the Prosecutor General and the DPOs are each headed by a Chief Prosecutor.<sup>67</sup> Under the POA, the OPG (and DPOs) may – with the approval of the Minister of Justice – be divided into departments. Although no special units for foreign bribery exist in the Prosecutor's Office, both the OPG and DPOs have special departments for corruption and complex economic crimes. The tasks and responsibilities of the department and the Chief Prosecutor are laid out in a task distribution plan, which determines the departmental affiliation of prosecutors, their tasks, as well as the general principles of the OPG and regional prosecution offices.

57. In terms of prosecution of foreign bribery cases, the OPG would be the most relevant body as it is responsible for handling complex, high priority cases, or cases with an international element. The DPOs are responsible for the remaining cases based in the district in which the offence occurs. As such, the DPOs generally work with the regional police authorities and the OPG works primarily with the Central Criminal Police, which would handle the majority of foreign bribery investigations (see section below on role and organization of the police). With respect to the assignment of cases, authorities at the on-site explained that a case originating from the police generally goes directly to the prosecutor who will decide how to assign it. Theoretically, regional prosecutors should hand over to the Chief Prosecutor any cases falling within the purview of the OPG, but, to the knowledge of participants at the on-site, this situation has not yet arisen. However, the OPG has taken over a case from a DPO based on information received from police authorities. Additionally, Estonia has a central database of open cases, but prosecutors at the on-site admitted that they do not routinely check it. Panellists stated that since Estonia is such a small country, prosecutors are always aware of the cases that have arisen.

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<sup>66</sup> In the Phase 1 and Phase 2 reports, as well as in the Prosecutor's Office Act, the Office of the Prosecutor General is referred to as the Public Prosecutor's Office (PPO), but in the Phase 3 evaluation, Estonia advised that the latest translations of the relevant legislation, as well as the prosecution service's website, are currently using "Office of the Prosecutor General." The Prosecutor's Office is used to refer to the prosecution services as a whole. In Estonian, the terminology has remained the same.

<sup>67</sup> In Phase 1 and Phase 2, as well as the Prosecutor's Office Act, the head of the Office of the Prosecutor General (*e.g.* the PPO) was the Chief Public Prosecutor (CPP) and the supervisory prosecutors heading each of the DPOs were the leading prosecutors. However, the latest translations refer to the CPP as the Prosecutor General and the leading prosecutors as Chief Prosecutors (not to be confused with the previously-named CPP). This is also reflected on the prosecution service's website <http://www.prokuratuur.ee/en>. In Estonian, the terminology has remained the same.

58. As of June 2014, Estonia reports that the prosecution service has 169 prosecutors, including 76 assistant prosecutors. The budget for the prosecution service in 2013 was EUR 9,798,246. In 2012, the budget was EUR 9,256,322 and in 2011, it was 9,266,983.<sup>68</sup>

(ii) *Role and organization of the Police*

59. The two main investigative bodies relevant to foreign bribery and corruption cases in Estonia are the Police and Border Guard Board (commonly called the Police Board) and the Internal Security Service (Kaitsepolitseiamet, or KAPO), a government agency operating within the area of the Ministry of Internal Affairs, formerly referred to as the Security Police Board. Both KAPO and the Police Board come under the supervision of the Ministry of the Interior. KAPO is responsible for offences relating to higher-ranking Estonian officials or matters involving national security and the Police Board is in charge of all other matters. The Corruption Crimes Bureau (CCB), within the Central Criminal Police Department of the Police Board, would likely be the one investigating any foreign bribery allegations.

Police and Border Guard Board – The Corruption Crimes Bureau

60. The Police Board, as it currently exists, was formed on 1 January 2010 by merging the previously independent bodies of the Police Board, Central Criminal Police, Public Order Police, Border Guard Board, and Citizenship and Migration Board. In 2012, four territorial prefectures coming under the authority of the Police Board were formed. At the time of the on-site, there were no specialized units targeting foreign bribery. Estonian authorities explained that, “theoretically, foreign bribery cases would be treated like other corruption cases” and would be investigated by the Central Criminal Police, the body responsible for investigating international offences of great national or public relevance.<sup>69</sup> At the time of the Phase 2 evaluation, the Central Criminal Police did not have a specialized corruption unit, but in September 2011, the Corruption Crimes Bureau, a specialized department for the investigation of corruption cases (both domestic and foreign), was established. The CCB has four divisions in Tallinn, Tartu, Jõhvi and Pärnu. In 2012, the CCB was centralized, uniting all of the formerly independent Corruption Crimes Services in each of the four Police Prefectures into one central body, subject to the head of the CCB and no longer to the chain of command in the local offices. Estonia reports that the main tasks of the CCB under the Central Criminal Police statute are performing surveillance activities and pre-trial investigations and conducting extra-judicial misdemeanour proceedings, as provided for in the Anti-Corruption Act.

61. The Police Board is one of Estonia’s biggest authorities in Estonia with more than 5,000 staff. Estonia reported that in the beginning of 2012, the CCB had 21 officers specializing in corruption. At the on-site, authorities informed lead examiners that the CCB has 35 officers and is expected by the Ministry of the Interior to grow to 50 investigative specialists by 2017.<sup>70</sup> In Phase 2, some level of concern was expressed as the numbers of specialized officers had decreased. Estonia asserted then that such a decrease was commensurate with the corruption caseload at the time. According to the International Association of Anti-Corruption Authorities, the workload of the Estonian Police appears to have increased in recent years, particularly due to efforts to effectively

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<sup>68</sup> Estonia responses to Phase 3 Questionnaire, Part 1(B), 2.1(c).

<sup>69</sup> [http://polis.osce.org/countries/details?item\\_id=16](http://polis.osce.org/countries/details?item_id=16)

<sup>70</sup> Estonia responses to Phase 3 Questionnaire, SQ.3.2.1.

address local corruption.<sup>71</sup> When asked about resources, panellists acknowledged that the amount of resources was “small”, but that they have “managed”.

### The KAPO

62. A broader function of KAPO as a security authority is the maintenance of national security through the collection of information and implementation of preventive measures as well as investigation of offences falling within its purview. KAPO has been assigned the task of proceeding corruption offences committed by state agencies, politicians and higher state and local government officials, such as, *inter alia*, the President of the Republic, a member of the Parliament, a member of the Government of the Republic, judges, prosecutors or high-ranking police officers.<sup>72</sup> Investigative authorities at the on-site explained that KAPO would be competent to investigate foreign bribery only in cases implicating national security or containing a security risk. Otherwise, the CCB in the Central Criminal Police would be the appropriate investigative body for a foreign bribery case, particularly if such a case had a significant international aspect. KAPO has four district departments subject to a central command, as well as a specialized unit, which deals, *inter alia*, with corruption cases. Information on the number of officers handling corruption cases and the formal structure of KAPO is not available.

### Division of competence between the Police Board and KAPO

63. The division of competence between the Police Board and KAPO is laid out in the section 212 of the CPC and a Regulation entitled “Division of investigative jurisdiction between the Police and Border Guard Board and the KAPO”. However, the OPG may also decide which is the appropriate investigative body in a given case. In cases of ambiguous jurisdiction, the investigative authorities shall defer to the OPG’s determination. At the on-site, investigative and prosecution representatives observed that in corruption cases, the investigative authorities routinely consult with the OPG before commencing with an investigation. As for the assignment of cases within each agency, no internal guidelines exist in either agency; cases are assigned on a case-by-case basis. Authorities explained that the system for assigning cases is left intentionally vague to provide flexibility in light of limited resources.

### ***Commentary***

***The lead examiners consider the increased specialization in the police a positive development, and welcome the creation of the Corruption Crimes Bureau (CCB) in the Central Criminal Police. The recent centralization of the CCB under a central chain of command is an additional positive development. However, given the recent reorganisation in 2012 of the CCB and that no clear written procedures exist for the assigning of foreign bribery cases, the lead examiners recommend that the Working Group follow-up on the flow of information to the relevant investigative authorities to ensure that foreign bribery allegations are effectively investigated.***

***The lead examiners would also recommend that the Working Group follow-up on the level of resources allocated to Estonia’s law enforcement authorities to ensure it allows for effective investigation and prosecution of foreign bribery cases.***

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<sup>71</sup> <http://www.iaaca.org/AntiCorruptionAuthorities/ByCountriesandRegions/E/Estoniaajigou/>

<sup>72</sup> <https://www.kapo.ee/eng/areas-of-activity/corruption/how-to-combat-corruption>

(iii) *Training and awareness of law enforcement*

64. The Working Group recommended in Phase 2 that Estonia train new and existing prosecutors, judges and law enforcement authorities on the offence of foreign bribery and investigation of legal persons (Recommendation 7(a)). At the time of the Phase 2 written follow-up, Estonia had provided only some training on investigation and prosecution of foreign bribery, primarily on domestic corruption or economic crime generally, but not specifically on foreign bribery. Prosecutors had received training on corporate liability in 2009. Recommendation 7(a) was therefore deemed only partially implemented. During the on-site visit, prosecutors reported that training seminars on corruption and white collar crimes take place twice a year and training specifically on foreign bribery had just taken place in January 2014. Similarly, at the time of the on-site visit, investigators had undergone one training on foreign bribery. Judges also reported having received one training on foreign bribery in 2014 organized by the Ministry of Justice.

*Commentary*

*In light of the lack of detection of foreign bribery allegations and the dearth of cases, the lead examiners recommend that Estonia enhance training of law enforcement, judicial and prosecution authorities on the specific aspects of foreign bribery.*

(b) *Conduct of investigations and prosecutions*

65. Estonia follows a mandatory system of prosecution. Under the legality principle enshrined in section 6 of the CPC, investigative bodies and Prosecutors' Offices are "required to conduct criminal proceedings when facts referring to a criminal offence become evident", unless there exist certain circumstances as enumerated in section 199 of the CPC. Consent by the government, Minister or any other executive authority is not required for initiating, terminating or continuing a criminal proceeding, nor is there any duty to inform the executive branch before a procedural step is taken by a prosecutor.

66. As mentioned in section 6 of the introduction, after the on-site visit, Estonian authorities informed the evaluation team of a draft law that, if passed, would seriously impact the conduct of foreign bribery investigations. Draft law No.SE 295 seeks to limit the time Estonian authorities have to investigate any case to two months, which may be prolonged by a prosecutor by one month if a suspect has been identified. Only in exceptional circumstances and upon permission by a court could the investigation be further extended. Draft law SE 295 further proposes to prohibit prosecutors from appealing court decisions on grounds of misvaluation of evidence. Although this draft legislation appears dormant as of the time of this report, these amendments, if passed, would seriously undermine Estonia's capacity to effectively investigate and prosecute foreign bribery.

(i) *Termination of cases*

67. Relevant bases for termination of criminal proceedings include lack of public interest and negligible guilt where the offence was committed abroad (or where the consequences of the offence occur outside of Estonia) and co-operating offenders. In Phase 2, the Working Group was concerned that some of the bases for termination could potentially impact foreign bribery investigations.<sup>73</sup>

Article 5 considerations

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<sup>73</sup> Estonia Phase 2 Report, § 95.

68. Under section 202 of the CPC, if certain other factors exist, and “*there is no public interest in the continuation of the criminal proceedings*”, the Prosecutor’s Office may request termination of the proceedings. Although foreign bribery is not explicitly mentioned in the provision itself, Estonia contended in Phase 2 that the guidelines to the Prosecutor’s Office precluded prosecutors from applying this provision to foreign bribery cases. The Working Group was not satisfied with this argument as the wording of the guideline refers to a public official, not a bribe-giver; thus prosecution of the briber would not necessarily involve an offender that would automatically give rise to the existence of public interest.<sup>74</sup> Consequently, in 2008, Estonia amended the Guidelines to the Prosecutor to add a criminal offence relating to a foreign official as one in which public interest is deemed to exist. Estonia also amended the CPC to explicitly prohibit termination of criminal proceedings based on economic interests, interests in the field of foreign policy or other considerations not permitted by an international convention to which Estonia is a party (CPC section 204(3)).<sup>75</sup> In its Written Follow-Up to Phase 2, the Working Group noted that the 2008 amendments, if “rigorously applied”, would address its concerns in this area.<sup>76</sup>

#### The “reasonable time” criteria

69. In 2011, Estonia amended the CPC to allow for termination in cases where it becomes evident in pre-trial procedure that a criminal matter cannot be adjudicated within a “reasonable time” (CPC section 205-2),<sup>77</sup> which does not necessarily coincide with the relevant statutory period. Prosecution authorities at the on-site explained that this basis for termination was conceived to protect the rights of the accused. Section 205 is only applicable when a case has undergone a long period of inactivity, outside of any procedural step (such as waiting for MLA). Guidelines to the Prosecutor’s Office on the subject state that criminal matters reaching 2 years of inactivity should be reviewed by a Senior Prosecutor, those reaching three years of inactivity should be reviewed by a Chief Prosecutor and those reaching four years of inactivity should be inspected by the Supervision Department, and potentially terminated, taking into account factors, such as the reasons for inactivity or delay, the actions taken by the authorities, the severity of the offence, the complexity of the case and the legal rights at stake.

#### (ii) *Co-operating offenders*

70. Section 205 of the CPC allows the OPG to terminate criminal proceedings relating to co-operating offenders. A court order or approval is not needed. As already noted in Phase 2, there are no guidelines on the application of this provision. The essential issue is whether section 205 could be used to terminate proceedings against an Estonian briber who cooperates with foreign authorities in the prosecution of the foreign public official.<sup>78</sup> In Phase 2, the Working Group had recommended that Estonia take steps to ensure that the provision of immunity to cooperating offenders did not impede the effective enforcement of the foreign bribery offence.<sup>79</sup>

71. Estonia maintains that section 205 is not an issue, as illustrated by statistics from recent years. In 2012, no criminal proceedings were terminated under section 205 of the CPC for offences

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<sup>74</sup> Ibid. § 99.

<sup>75</sup> See Annex 4 for relevant excerpts.

<sup>76</sup> Estonia Phase 2 Written Follow-Up, § 10.

<sup>77</sup> CPC, section 205(2) – See Annex 4 for relevant excerpts.

<sup>78</sup> Estonia Phase 2 Report, §§ 100-102.

<sup>79</sup> Ibid, Recommendation 7(b)(iii). This Recommendation also refers to the use of plea bargaining.

falling under sections 293-298 of the Penal Code; in 2011, one case was terminated under the section 205 procedure in respect of four persons (two natural persons and one legal person). It remains to be seen whether and how this provision might be applied in foreign bribery cases.

(iii) *Plea-bargaining*

72. Under section 239 of the CPC, plea-bargaining (or “settlement agreements”) may be used to resolve foreign bribery cases. The Phase 2 report observed that plea-bargaining had been used quite frequently, resolving up to 90% of criminal proceedings in some regions, and noted there was little control on how plea bargaining operates.<sup>80</sup> The CPC contains no guidance on plea negotiations, although the Supreme Court has listed some factors relating to the personal circumstances of the accused that may be taken into consideration. At the time of the Phase 2 evaluation, the OPG had issued guidelines on plea-bargaining only with respect to drug cases. Prosecutors retain wide discretion over the terms of the settlement agreement and the amount by which the penalty should be reduced. Settlement agreements are sanctioned by court verdicts and are equivalent to a conviction. The verdicts are publicly available and include information on the circumstances of the crime, the identity of the natural or legal persons convicted, the sanctions agreed upon and the terms of the agreement. Given the high reliance on settlement proceedings, the Working Group was concerned about the absence of guidance to prosecutors on, inter alia, factors to be taken into account when considering whether to enter into settlement agreements, and the degree of mitigation of sanctions. Recommendation 7(b) thus asked Estonia to address this issue. This part of Recommendation 7(b) was considered not implemented at the time of Estonia’s Written Follow-Up to Phase 2.

73. During the on-site visit, prosecution authorities informed the examiners that plea-bargaining is used to resolve a high number of proceedings. With respect to domestic bribery, Estonia reports that plea-bargaining was used to settle 58 of 67 cases in 2010 (87%), 40 of 46 cases in 2011 (87%), and 33 of 40 cases in 2012 (83%).<sup>81</sup>

(iv) *Investigative Techniques*

74. In Phase 2, the Working Group asked Estonia in Recommendation 7(c) to amend its legislation to make special investigative techniques available for all cases of foreign bribery where appropriate, including the offences of arranging a bribe or gratuity.<sup>82</sup> At the time of the two-year written follow-up, Estonia had taken no steps towards implementing this recommendation.<sup>83</sup> In 2013, section 126-2 of the CPC was amended to allow investigators to use special investigative techniques in all bribery-related cases, except cases of non-aggravated arranging of bribes or gratuities to natural persons. At the time of its written follow-up, Estonian authorities were considering making special investigative techniques available for the comparable offences of aiding and abetting bribery (see section 1(b) above on aiding and abetting).

75. The Draft law SE 295 mentioned above would limit the use of special investigative techniques to investigations of only offences in the first degree. Such an amendment would effectively exclude the use of special investigative techniques from most investigations into corruption crimes, which are usually sanctioned, under non-aggravated circumstances, with terms of imprisonment of less

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<sup>80</sup> Estonia Phase 2 Report, § 103.

<sup>81</sup> Estonia responses to Phase 3 Questionnaire, S.Q.3.1.4.

<sup>82</sup> Estonia Phase 2 Report, § 113.

<sup>83</sup> Estonia Phase 2 Written Follow-Up, §11.

than five years. This amendment was not mentioned by Parliamentarians in the evaluation team's meeting with Riigikogu.

### *Commentary*

*The lead examiners welcome amendments to the CPC and Prosecutors' Guidelines, which alleviate concerns regarding conformity with Article 5 of the Convention.*

*Regarding co-operating offenders, the lead examiners recommend that the Working Group follow-up on the application of section 205 of the CPC in foreign bribery cases to ensure that its application does not prevent effective prosecution of an Estonian active briber who cooperated with foreign authorities.*

*The lead examiners recognise the value and flexibility provided by settlement agreements under section 239 of the CPC. They note their frequent use in domestic bribery cases, and regret the absence of any guidelines to prosecutors. The lead examiners therefore reiterate the Phase 2 Recommendation that Estonia issue guidance on, inter alia, factors to be taken into account when considering whether to enter into settlement agreements and the degree of mitigation of sanctions, to ensure that plea-bargaining does not impede the effective enforcement of foreign bribery. The lead examiners recommend that the Working Group follow-up on the application of settlement agreements in foreign bribery agreements.*

*The lead examiners are also concerned that the new basis for termination on grounds of exceeding a "reasonable" amount of time could result in the premature termination of foreign bribery cases if they are not given adequate priority. The lead examiners recommend that the Working Group follow up on this issue to ensure that the "reasonable time" criteria does not improperly affect the effective prosecution of foreign bribery cases.*

*The lead examiners note the draft amendments relating to the arranging offences, which are currently before Parliament and recommend that the Working Group follow-up on their status, with a view to ensuring that adequate investigative techniques are also available for investigating such cases.*

*Finally, the lead examiners are very concerned about the possible impact of a law such as draft law No.SE295, which would severely undermine the ability of Estonia to investigate and prosecute foreign bribery. The lead examiners therefore recommend that Estonian ensure that any amendments envisaged to the Code of Criminal Procedure do not affect the effective investigation and prosecution of the foreign bribery offence, in particular as concerns (1) the availability of special investigative techniques for all foreign bribery offences; (2) the time limit set on investigation periods; and (3) the possibility for prosecutors to appeal court decisions on grounds of misvaluation of evidence.*

### (c) *Statute of limitations*

76. Pursuant to section 81 of the Penal Code, the limitation period is ten years in the case of commission of a criminal offence in the first degree (an offence for which the maximum punishment is more than five years imprisonment) and five years in the case of commission of a criminal offence in the second degree (an offence for which the punishment prescribed for which is imprisonment for a term of up to five years or a pecuniary punishment). Accordingly, the limitation period for aggravated

bribery would be ten years, but giving a bribe under normal circumstances and granting a gratuity, even under aggravated circumstances, would have a limitation period of five years.

77. In Phase 2, the Working Group was troubled by the fact that, under Estonian law, the limitation period is interrupted by certain procedural steps, but not by requests for MLA.<sup>84</sup> The situation had not changed at the time of the two-year written follow-up and Recommendation 10 asking Estonia to consider whether the limitation period allows adequate time for the investigation and prosecution of foreign bribery was deemed not implemented.<sup>85</sup> Estonia reasons that the existing limitation periods are sufficient because the procedural steps enumerated above interrupt the limitation period, thus providing for an additional five years (due recommencement from the beginning of the period upon interruption). Estonia also noted in its answers to the Phase 3 questionnaire that the limitation period has not yet posed any problem in even complicated domestic bribery cases. However, lead examiners found Estonia's reasoning to be flawed in two respects. The first is that one cannot assume that a procedural step other than a request for MLA will always take place to provide the additional 5 years. As that cannot be guaranteed, the extra 5 years cannot be relied upon. Secondly, the limitation period would not need to account for MLA requests in *domestic* bribery cases, as they, by their very nature, will not generally require international cooperation.

#### *Commentary*

***Lead examiners continue to be troubled by the fact that MLA will not interrupt or suspend the statutory period and disagree with Estonia that this will not prove to be problematic in the effective prosecution of foreign bribery cases. The lead examiners reiterate the concern expressed in Phase 2 and recommend that Estonia reconsider amending its legislation to allow MLA requests to toll the statute of limitations in foreign bribery cases.***

#### *(d) Jurisdiction over natural persons*

78. Section 6 of the Penal Code governs the exercise of jurisdiction over acts committed within the territory of Estonia and section 7 covers acts committed outside the territory of Estonia by or against an Estonian national or legal person (for more details on jurisdiction over legal persons, see section 2(c) above). In Phase 2, the Working Group did not take issue with Estonia's exercise of territorial jurisdiction, but expressed some concern over the requirement of dual criminality under Estonia's nationality jurisdiction provision, which was flagged as a follow-up issue.<sup>86</sup> Estonia explained in Phase 2 that in theory, universal jurisdiction could apply to cover certain acts not criminalized in the place of their occurrence. However, this basis of jurisdiction had never been applied in practice in corruption cases (although Estonia reports that it has been applied in drug and organized crime cases). Estonia reported in its responses to the Phase 3 questionnaire, however, that a recent amendment in 2013 broadened the application of the universality principle. Section 8 of the Penal Code now provides that "[r]egardless of the law of the place of commission of an act, the penal law of Estonia shall apply [to] any acts committed outside the territory of Estonia if the punishability of the act arises from an international obligations binding on Estonia".<sup>87</sup> Practitioners interviewed during the on-site were of the opinion that although to date Estonia has not seen any practice applying this principle, given Estonia's "favourable" treatment of international instruments, they did not foresee

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<sup>84</sup> Estonia Phase 2 Report, § 165.

<sup>85</sup> Estonia Phase 2 Written Follow-Up, § 14.

<sup>86</sup> Estonia Phase 2 Report, § 160.

<sup>87</sup> Estonia responses to Phase 3 Questionnaire, 2.1(iv).



any problems with this provision. Moreover, the most recent amendments in 2013 also clarified in section 7(2)(2) of the Penal Code that Estonian penal law will apply to the granting, acceptance or arrangement of bribes or gratuities committed outside the territory of Estonia by an Estonian citizen or a legal person registered in Estonia, without requiring dual criminality. However, as with recent amendments extending nationality jurisdiction, in the absence of any case law yet, it remains to be seen whether Estonian courts will broadly exercise jurisdiction over actions of granting, accepting or arranging a bribe or gratuity.

### *Commentary*

*Lead examiners welcome recent amendments removing the requirement for dual criminality and broadening the universality principle. Nevertheless, given the recent entry into force of such provisions, the lead examiners recommend that the Working Group follow-up on the application of these provisions as practice develops.*

#### *(e) Prosecutorial independence*

79. In Phase 2, the Working Group expressed concern that the government may exercise a degree of influence over the Prosecutor's Office, and recommended that Estonia take steps to ensure prosecutorial independence in foreign bribery cases (Recommendation 7(b)(i)).<sup>88</sup> At the time of the its Phase 2 Written Follow-Up, Estonia had not taken any steps to ensure prosecutorial independence as recommended although Estonian authorities maintained that they planned to amend legislation relating to prosecutors' salaries, disciplinary proceedings and reporting obligations to the legislature.<sup>89</sup>

80. The Estonian Government is involved in the organization and, to a much lesser degree, the operation of the prosecution service. The Ministry of Justice, for example, exercises budgetary control and supervisory control of trial-level proceedings, determines the number of prosecutors in each prosecutor's office and is involved in the appointment of prosecutors. In particular, the Government appoints the Prosecutor General based on the proposal of the Minister of Justice (taking into account the opinion of the Legal Affairs Committee of the Riigikogu). The Minister of Justice appoints the Chief State Prosecutors, State Prosecutors and Chief Prosecutors to office on the proposal of the Prosecutor General. The examiners noted in Phase 2, however, that section 9(1) of the POA, articulating the Ministry of Justice's control over the Prosecutor's Office was unclear. In 2011, Estonia amended the POA to clarify that the supervisory control of the Ministry of Justice does not extend to activities related to the "planning of surveillance, pre-trial criminal proceedings and representing the public prosecution in court".

81. Within the prosecution service itself, senior prosecutors exercise control over more junior prosecutors. For instance, the Prosecutor General or a Chief Public Prosecutor may, with good reason, substitute for a subordinate prosecutor in a criminal proceeding.<sup>90</sup> Such decisions cannot be challenged. In Phase 2, the examiners worried that substitution of prosecutors could be used to influence the outcome of foreign bribery cases and recommended that the Working Group follow up on this issue.<sup>91</sup> At the on-site, representatives of the prosecution service contended that substitution was generally used when a prosecutor was temporarily absent or did not wish to carry on with a given

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<sup>88</sup> Estonia Phase 2 Report, §§ 105-109 and recommendation 7(b)(i).

<sup>89</sup> Estonia Phase 2 Written Follow-Up, § 10.

<sup>90</sup> Prosecutor's Office Act, §10.

<sup>91</sup> Estonia Phase 2 Report, §§ 107-108.

case and a senior prosecutor did not think that case should be terminated. When asked about the converse situation (where a junior prosecutor wanted to proceed with a case a senior prosecutor wished to terminate), panellists denied that a substitution had ever occurred under such circumstances.

82. Since its written follow-up in 2010, Estonia has taken some steps towards implementing Recommendation 7(b). The most recent 2011 amendments to the POA provide that all disciplinary decisions may be contested in administrative court. However, these amendments do not extend to decisions to replace prosecutors in court. Estonia conjectures that, theoretically, such decisions are also contestable in administrative court, but cannot provide a legal basis for this. The 2011 amendments also provide that the Prosecutor General has an obligation to submit an annual activity report to the Minister of Justice. The 2011 amendments to the POA also created an additional duty to report to the Constitutional Committee of the Parliament an overview of the performance of duties from the preceding calendar year. According to Estonia, this new reporting duty diminishes the reporting obligation to the Minister of Justice. The Prosecutor General may additionally submit to Riigikogu supplemental reports on significant issues. According to Estonia's explanations, such a "direct channel" to Parliament is intended to allow the Prosecutor General to address "instances where the executive branch may have unduly tried to influence the activities of the prosecution service". Members of Riigikogu confirmed this explanation, but stated that to date they have not received any such reports. Parliamentarians further explained that if such a report were received, they could convene a special investigative committee to look into the matter.

#### ***Commentary***

***Lead examiners recognize efforts made by Estonia to address several of the Working Group's concerns in Phase 2, but believe recommendation 7(b)(i) remains partially implemented. As the most recent amendments have only been in force since 2011, the lead examiners recommend that the Working Group follow-up on their application.***

### **6. Money laundering**

83. Estonia is not a member of the Financial Action Task Force, but is a member of MONEYVAL and has been subject to its monitoring process, the 4<sup>th</sup> round of which will be made available in October 2014. In Phase 2, the WGB issued six recommendations covering money laundering. Recommendations 11(a) and 11(b) (explaining the low number of convictions and clarifying dual criminality regarding money laundering) were considered as fully implemented. Recommendations 14(a) and 14(b) (consistent statistics on investigations, prosecutions, convictions and sanctions on various offences including money laundering) were only considered as partially implemented as the new statistics system had not yet been implemented. Follow-up items 15(g) (number of convictions) and 15(h) (dual criminality) were considered outstanding due to lack of case-law, to be revisited in Phase 3.<sup>92</sup>

#### **(a) *Foreign bribery as a predicate offence to money laundering***

84. Since Phase 2, no changes have been made to the definition of money laundering under section 4 of Estonia's Money Laundering and Terrorist Financing Prevention Act 2007 (MLTFPA) or to the criminal sanctions provided in section 394 of the Penal Code as they relate to foreign bribery.<sup>93</sup>

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<sup>92.</sup> Estonia Phase 2 Written Follow-Up Report, §§ 15, 17 and 18.

<sup>93.</sup> Estonia Phase 2 Report, §§ 64 and 166. Section 4(2) MLTFPA provides in relevant parts that money laundering "means a situation whereby a criminal activity, as a result of which the property used in

Estonia's approach to predicate offences covers all criminal activities including foreign bribery. Estonia explains that since foreign bribery is prosecuted on the basis of active national jurisdiction, bribery committed abroad would constitute a predicate offence in Estonia.<sup>94</sup> During the on-site visit, the Estonian Financial Intelligence Unit (FIU) and the Prosecutor's Office brought to the attention of the lead examiners a recent jurisprudential trend whereby courts required concrete circumstantial evidence of an offence committed abroad, in order to "establish"<sup>95</sup> a "criminal activity" in the sense of section 4 MLTFPA. As a result, acquittals were observed when the predicate offence was not criminalised or insufficiently documented in the country of commission. After the on-site, Estonia provided a decision from the Circuit Court of Tallinn of November 2013 (sustained by the Estonian Supreme Court in February 2014) which clearly ruled that the place where the predicate offence was committed was irrelevant for purposes of the money laundering offence under section 4(2) MLTFPA, and that the law did not preclude simultaneous punishment of a person both for a predicate offence and money laundering.<sup>96</sup> As such, this ruling is in line with Article 7 of the Convention, which requires Parties to make foreign bribery a predicate offence to money laundering "without regard to the place where the bribery occurred".

**(b) Money laundering statistics**

85. Consistent statistics is an outstanding issue from Phase 2.<sup>97</sup> New statistical tools were progressively put in place in Estonia between 2011 and 2013. Before the on-site visit, the MOJ provided statistics on the number of convictions of legal and natural persons for money laundering under section 394 of the Penal Code, as well as the number of offences registered, terminated, prosecuted, and the number of acquittals. Data on sanctions (including confiscation) was sent after the on-site. 39 cases of money laundering were prosecuted in 2011 and 52 in 2012. In 2012, no legal person and 45 individuals were convicted, and 2 individuals acquitted. For the 45 individuals convicted, the average length of the sentence was 31.6 months imprisonment (62% of which were conditional and 18% fully enforced). Confiscations (including assets and property since 2012) amounted to EUR 1 056 436 in 2011 and EUR 127 696 in 2012. While statistics provided by Estonia do not provide information on the predicate offence, Estonia confirmed during the on-site that none of these convictions concerned foreign bribery as a predicate offence.

**(c) Detection of foreign bribery in the FIU through STRs**

86. The institutional capacity highlighted in Phase 2 has not changed.<sup>98</sup> The Financial Intelligence Unit (FIU) is responsible for monitoring compliance with the MLTFPA system as it

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money laundering was acquired, occurred in the territory of another state". See Annex 4 for relevant excerpts.

<sup>94</sup>. Estonia Phase 2 Written Follow-Up Report, § 15 and Annex, p. 19; Estonia responses to the Phase 3 Questionnaire under SQ7.2.3; MONEYVAL (2008), *Third detailed assessment report on Estonia*, § 155.

<sup>95</sup> Estonia's Supreme Court decision No. 3-1-1-41-11 of 2011 [in Financial Intelligence Unit – Estonia (2013), *2012 Annual Report*, p. 23]. As clarified on-site, the requirement that the predicate offence be "established" does not entail a conviction, but has been construed as an evidentiary standard.

<sup>96</sup>. Case No. 1-12-12477 (AS Ateka Resource): Estonia Supreme Court, 25 February 2014 (rejecting cassation); Circuit Court of Tallinn, 8 November 2013, para. 9.4 (dismissing appeal); Harju County Court, 2 September 2013.

<sup>97</sup>. Estonia Phase 2 Recommendations 14(a) and (b), Phase 2 Written Follow-Up Report, § 17.

<sup>98</sup>. Estonia Phase 2 Report, §§ 66 and 68. MLTFPA, Sections 37, 41, and 43.

applies to non-financial businesses and professions, while the Financial Supervision Authority (FSA) does so for credit and financial institutions. The FIU is an independent body within the Central Criminal Police, with a staff of currently 16 (as opposed to 24 in 2008)<sup>99</sup>, including 5 analysts, who receive, analyse and verify suspicious transaction reports (STRs), and forward “significant information” to law enforcement authorities spontaneously or upon request. To assist in this task, the MLTFPA empowers the FIU to obtain information (including when subject to bank secrecy) from a large variety of reporting entities and government agencies. The FIU exchanges information with its foreign counterparts, receiving and sending over 200 requests annually. The FIU is also endowed with extra-judicial prerogatives, for instance over failures to report suspicious transactions.

87. The MLTFPA requires obligated entities to report suspicious money laundering transactions and certain cash transactions over EUR 32 000.<sup>100</sup> The reporting obligations apply to a wide range of entities, including credit and financial intermediaries, and certain non-financial service providers. Due diligence measures cover beneficial owners, and are enhanced for politically exposed persons (PEPs) which include individuals who are or have been entrusted with prominent public functions either in Estonia, in foreign countries or international organisations, as well as their family members and close associates.<sup>101</sup>

88. In practice, as transpiring from the on-site visit, obligated persons, such as accountants and auditors, appear largely aware of their STR and due diligence obligations, and report regularly. In fact, the FIU mentioned no instance of sanctions for failure to report. A high (although slightly decreasing) number of STRs were received by the FIU in 2010-2012 (13 655 in 2010, 12 157 in 2012). Expectedly, the number of STRs forwarded to investigation doubled over that period (376 in 2010, 788 in 2012), with only a small portion leading to the opening of criminal proceedings, namely 41 in 2012 (24 of which for money laundering)<sup>102</sup>, or being used in support of ongoing criminal proceedings, namely 50 in 2012.<sup>103</sup> While STRs are not categorised by offence, the FIU confirmed after the on-site that no investigations in Estonia actually concerned foreign bribery as a predicate offence (computer fraud was involved in the majority of investigations). When seen in the light of the number of convictions for money laundering provided above, the data shows a bottleneck at the investigation level. While the lead examiners are not in a position to assess the quality and relevance of the “significant information” which the FIU transmits to investigative authorities, the difference between the amount of transmitted STRs and the number of investigations raises concerns with respect to the effective detection of foreign bribery through STRs. In terms of feedback, representatives of the FIU indicated that feedback is provided to obligated entities on their STRs. Estonia did not clarify, however, whether the FIU receives any feedback from investigative authorities on the quality of the information transmitted.

89. At the same time, the evaluation team noted the exposure in media reports<sup>104</sup> of money laundering schemes amounting to hundreds of millions of euros, going through Estonia and involving

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<sup>99</sup>. Estonia Phase 2 Report, § 68.

<sup>100</sup>. MLTFPA, Sections 31(1) and (3).

<sup>101</sup>. Ibid. § 64. MLTFPA, Sections 3, and 12-21.

<sup>102</sup>. During the on-site visit, the FIU provided tentative data for 2013 showing a decrease in the number of investigations triggered by STRs, namely 17, 10 of which for money laundering.

<sup>103</sup>. Source: Financial Intelligence Unit – Estonia (2013), *2012 Annual Report*.

<sup>104</sup>. International Institute for Democracy and Electoral Assistance (2013), *Illicit Networks and Politics in the Baltic States*, p. 14: [www.idea.int/publications/illicit-networks-and-politics/](http://www.idea.int/publications/illicit-networks-and-politics/)

neighbouring countries. While some of these schemes were successfully prosecuted in Estonia in recent years and did not concern the predicate offence of foreign bribery, this state of play raises questions about the role of Estonia as a transit country for criminal organisations, including, potentially, for the laundering of foreign bribery proceeds. In this respect, the FIU indicated during the on-site visit a decline in outward cash transactions (a significant indicator in detecting such schemes). Nevertheless, assessments of risk factors and indicators, for example through typologies or case studies, could increase the detection capabilities of foreign bribery schemes.

90. In terms of training, the FIU organised 19 trainings on money laundering in 2012 for obligated entities. However, the evaluation team was informed on-site by private sector representatives that the frequency of these trainings was once every three years. No specific information or training was disseminated on the laundering of proceeds of bribery of foreign or domestic public officials. The FIU has not developed either any typology, risk-assessment study or other type of awareness-raising on foreign bribery as a predicate offence to money laundering, either within the FIU itself or for reporting entities could improve attention to this topic.<sup>105</sup>

### **Commentary**

***The lead examiners acknowledge Estonia's efforts to put in place a robust anti-money laundering framework. However they believe that it could play a stronger role in the detection of foreign bribery cases.***

***The lead examiners note in particular the improvements made to the collection and online dissemination of statistical data by Estonia, and consider that Phase 2 recommendations 14(a) and (b) are now fully implemented with respect to money laundering aspects.***

***With respect to detection through anti-money laundering mechanisms, the lead examiners recommend that Estonia increase awareness concerning mechanisms to detect transactions that could potentially involve the laundering of the proceeds of the bribery of foreign public officials. The lead examiners consider that measures to develop specific training, typologies, case studies or other types of awareness-raising on foreign bribery as a predicate offence to money laundering, both within the FIU itself and for reporting entities, could improve attention to this topic and allow for improved detection capabilities and cooperation between the FIU, obligated entities, and investigation and prosecution authorities.***

***The lead examiners also recommend that Estonia increase its analysis and investigations resources in order to exploit more effectively information collected through STRs.***

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News reports: <http://baltic-review.com/2013/05/the-biggest-money-laundering-scheme-in-estonias-history-discovered/>; <http://euobserver.com/tickers/118850>; [www.journalismfund.eu/workinggrant/money-laundering-estonia](http://www.journalismfund.eu/workinggrant/money-laundering-estonia); <http://newswave.eu/politicians-and-policemen-involved-in-largest-money-laundering-scheme-in-estonias-history/>.

<sup>105</sup>. The FIU's advisory guidelines on money laundering do not currently cover aspects such as foreign bribery and PEPs. The FSA's advisory guidelines on money laundering and terrorism financing do not include a section on foreign bribery, but includes a risk assessment model by category of customer. See: Financial Intelligence Unit – Estonia (2013), *Advisory guidelines of the Financial Intelligence Unit regarding the characteristics of transactions with a money laundering suspicion*; Financial Supervision Authority – Estonia (2013), *Advisory guidelines of the Financial Supervision Authority on Measures for the Prevention of Money Laundering and Terrorist Financing in Credit and Financial Institutions*.

*Furthermore, the lead examiners see an important value in making sure that adequate feedback on the information transmitted is provided not only by the FIU to obligated entities, but also by investigative authorities to the FIU.*

**7. Accounting requirements, external audit, corporate compliance and ethics programmes**

**(a) Accounting standards and false accounting offence**

91. Estonia's false accounting offences are provided under sections 381 and 381-1 of the Penal Code, as described in the Phase 2 Report.<sup>106</sup> At the time of Phase 2, the WGB was of the opinion that these two offences did not fully cover all the activities described under Article 8 of the Convention. Section 381-1 only covers the activities described in Article 8(1) of the Convention if such activities "significantly reduce" the possibility of obtaining an overview of the accounting entity's financial situation. The Convention does not contain such a qualification. Section 381 is relatively narrow as it can only be committed by specified persons (a founder, management board member etc.) and only pertains to information provided to certain people (e.g. auditors). The Working Group also found that sanctions for false accounting were not sufficiently effective, proportionate and dissuasive. Offences under sections 381 and 381-1 are punishable by one year imprisonment or a fine of up to 500 times the average daily taxable income of the offender.<sup>107</sup> Phase 2 Recommendation 12 was considered not implemented at the time of the Written Follow-Up as no legislative developments had occurred, and Estonia acknowledged it needed to analyse the issue further.<sup>108</sup>

92. As of the time of this Phase 3 evaluation, Estonia's Penal Code has not yet been amended with respect to the false accounting offences. Estonia indicates that in 2010-2011 the Ministries of Finance and Justice carried out an analysis of accounting crimes and other financial offences which concluded that the relevant provisions do not need to be amended. Estonia also explains that other provisions complement sections 381 and 381-1 and therefore all situations under Art. 8(1) of the Convention would be covered. Section 344-1 which prohibits counterfeiting a document, seal or blank document form on the basis of which it is possible to obtain rights or release from obligations; and section 345-1 which prohibits the use of a counterfeit document, seal or blank document form with the intention to obtain rights or release from obligations. The first offence is punished by a fine or up to one year of imprisonment; the second offence by a fine or up to three years of imprisonment. However, it is unclear how sections 344-1 and 345-1 would alleviate the concerns expressed by the Working Group at the time of the Phase 2 that the Estonian false accounting offences only cover "material" breaches of accounting standards – a limitation not envisaged under Article 8. Furthermore, in the absence of case law, it is difficult to assess with certainty the extent to which sections 344(1) and 345(1) cover the activities described in Article 8(1) of the Convention. It is also unclear whether there have been any enforcement actions against natural or legal persons involving the concealment of domestic bribery.

93. The Estonian Accounting Act, which has been in force since 2003, with some minor amendments made during recent years to reflect the corresponding changes in International Financial Reporting Standards (IFRS), requires all legal persons in private or public law registered in Estonia, sole proprietors, and branches of foreign companies registered in Estonia to organise their accounting

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<sup>106</sup> Estonia Phase 2 Report, §§ 172-176 and Recommendation 12.

<sup>107</sup> In the absence of an average daily taxable income, the minimum daily rate of EUR 3.2 applies under section 44(2) PC. According to the amendment proposed to the PC the minimum daily rate should reach EUR 10.

<sup>108</sup> Estonia Phase 2 Written Follow-Up, § 14.

and financial reporting in accordance with Estonian Accounting Standards (RTJ, which are simplified versions of the corresponding IASs or IFRSs) or the International Financial Reporting Standards (IFRS). Listed companies and insurance companies are required to follow IFRSs. Reporting must be based on the concept of true and fair representation. As noted in the Phase 2 Report, these accounting standards satisfy Paragraph X.A(ii) of the 2009 Anti-Bribery Recommendation.<sup>109</sup>

### *Commentary*

*The lead examiners are concerned that Estonia has not taken steps to implement the Phase 2 recommendation 12. They therefore reiterate that Estonia (a) amend the Penal Code to ensure that the false accounting offences cover all of the activities described in Article 8(1) of the Convention, and (b) take steps to ensure that sanctions for false accounting are effective, proportionate and dissuasive.*

#### *(b) Detection and reporting of foreign bribery by external auditors*

##### *(i) Awareness and training*

94. During Phase 2 there was no evidence of any efforts by Estonian authorities to raise awareness of the accounting and auditing professions. Auditors had received guidelines and training on anti-money laundering measures, but not on foreign bribery or the Convention.<sup>110</sup> Thus, Recommendation 2(a) sought to raise awareness of the private sector, including the accounting and auditing profession. At the time of the Written Follow-Up, this recommendation was considered unimplemented as it relates to accountants and auditors.<sup>111</sup>

95. In its responses to the Phase 3 questionnaires, Estonia indicated that it had not conducted any special training for auditors concerning foreign bribery. Neither the Ministry of Finance nor the Estonian Board of Auditors, which is a self-governing professional association of auditors, and the Auditing Activities Oversight Board (AAOB) have undertaken foreign bribery-specific guidance or awareness-raising measures for the accounting and auditing professions. Only the large accounting and auditing firms provide their own in-house foreign bribery training. Consequently, the auditors met at the on-site visit did not appear well informed of the role and responsibilities of auditors in preventing and detecting foreign bribery, as envisaged under the Convention and 2009 Anti-Bribery Recommendation.

##### *(ii) Reporting obligations*

96. At the time of the Phase 2 evaluation, the Working Group was concerned that Estonia did not require external auditors to report indications of a possible illegal act of bribery to management and corporate monitoring bodies. The Working Group recommended that Estonia put in place such a requirement, as well as consider requiring auditors to report such suspicions to competent

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<sup>109</sup> Estonia Phase 2 Report, §§ 53-57.

<sup>110</sup> Ibid. §§ 51-52.

<sup>111</sup> At the time of Estonia's Phase 2 Written Follow-Up, the Working Group found Recommendation 2(a) to be partially implemented, but only on the basis of awareness-raising activities targeted at companies. No training focusing on foreign bribery had yet been decided for accountants and auditors. See Estonia Written Follow-Up Report, § 4.

authorities.<sup>112</sup> Recommendation 4(b) was considered fully implemented at the time of the Phase 2 Written Follow-Up.

97. Indeed, the Auditing Act enacted in 2010 entered into force in 2011, introducing a requirement for auditors to report suspicions of bribery to a client company's management or supervisory board. In case of non-reaction by the management or the board, auditors are required to inform the Auditor's Public Oversight Board of the reasons, which then has a duty to notify the law enforcement authorities.

98. The International Standards on Auditing (ISA) are part of good audit practices in Estonia and also form part of the reporting obligations of auditors. Auditors thus apply ISA 240 to detect material misstatements in financial statements due to fraud. As foreign bribery could also involve fraud, risk indicators of foreign bribery are thus also indicative of fraud. To date, no foreign bribery cases have been detected in Estonia through external auditing.

### *Commentary*

*The lead examiners are concerned that Estonia has not taken any steps to raise awareness on foreign bribery among the accounting and auditing profession, and consider that Phase 2 Recommendation 2(a), as it relates to the accounting and auditing profession, remains unimplemented. They therefore reiterate their recommendation that Estonia work with the accounting and auditing profession to raise awareness of the foreign bribery offence and encourage the profession to develop specific training.*

### *(c) Internal controls, ethics and compliance*

99. In Phase 2, the Working Group noted that internal company controls, ethics and compliance measures remained a weak area in Estonia.<sup>113</sup> Since then, the government has taken limited steps (see also section 10(a)(ii) below on awareness-raising for the private sector). The government's Anti-Corruption Strategy 2013-2020 does not address on foreign bribery,<sup>114</sup> and neither has the Estonian Ministry of Justice organised any foreign bribery-related activity for the private sector since 2010. The latest activity was the publication by the Ministry of a special information bulletin for businesses on combating corruption in December 2010, both in Estonian and in English which presents the OECD Anti-Bribery Convention in detail. However, this brochure does not refer in any way to the 2009 Anti-Bribery Recommendation and in particular Annex II on the Good Practice Guidance on Internal Controls, Ethics and Compliance.<sup>115</sup> After the on-site visit, Estonia indicated that a Corporate Social Responsibility Index was put in place in 2007 under the auspices of the Responsible Business Forum. The Forum includes several partner organisations such as the Ministry of Economic Affairs, universities and business schools, and non-governmental organisations active in different fields. The purpose of the Index is to provide feedback and award prizes to companies based on their performance in the field of corporate social responsibility compliance. As of 2014, the Ministry of Justice has joined the Forum, and anti-corruption forms part of the issues considered under the Index. 39 companies were assessed by the Forum in 2014.

<sup>112</sup> Estonia Phase 2 Report, §§ 59-61 and Recommendation 4(b).

<sup>113</sup> Ibid. §§ 20-22.

<sup>114</sup> See <http://www.korruptsioon.ee/orb.aw/class=file/action=preview/id=59029/Estonian+Anti-Corruption+Strategy+2013-2020.pdf>, as well as discussion of the Anti-Corruption Strategy in section A.6 and B.10 of this Phase 3 Report.

<sup>115</sup> See <http://www.korruptsioon.ee/42846>



100. Estonia also indicated that it had requested funding from the European Commission to undertake activities targeting corruption and assessing risks in the private sector. Following the on-site visit, Estonia explained that the grant had been accepted. The project aims to map different forms of corruption within the private sector, including inappropriate activities in relation to domestic and foreign public officials. Methods will be proposed for tackling different forms of corruption, and could also include encouragement of ethics and compliance programmes or measures to prevent and detect foreign bribery.

101. In terms of private sector-led activities, the Estonian Chamber of Commerce and Industry (ECCI) has organised awareness-raising events for entrepreneurs and exporting and non-exporting companies. Yet, besides the Ministry of Economic Affairs' support to the Corporate Sustainability and Responsibility Index (an award to Estonian companies measuring principles of responsible management), Estonia has not indicated any step to encourage the adoption and development of internal controls, ethics and compliance programmes. Listed companies may refer to the 2006 Model Corporate Governance Code<sup>116</sup> which contains standards for internal control and compliance, but no provision on foreign bribery. Following the on-site visit, Estonia indicated that the ECCI would be involved as the key project partner in the EC funded risk mapping project.

102. Indeed, the lack of proactivity by Estonia has resulted in limited compliance, internal control and ethics programmes in the private sector. Most Estonian companies which have introduced internal controls, ethics and compliance programmes or measures are subsidiaries of foreign companies implanted in Estonia. A review of the websites of 20 major Estonian companies operating abroad revealed that only 9 make reference to some form of policy on corruption, but none of them explicitly refer to foreign bribery.

### *Commentary*

*The lead examiners consider that Estonia's efforts to promote internal controls, ethics and compliance programmes to prevent and detect foreign bribery in the private sector have been largely insufficient to date. In this respect, they welcome Estonia's expressed intention to enhance its efforts in raising awareness of the private sector in the context of specific funding from the European Commission. The lead examiners recommend that Estonia make use of this funding notably to promote adoption of ethics and compliance programmes to combat foreign bribery among its companies active in foreign markets, including its SMEs. These efforts should include promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Anti-Bribery Recommendation.*

## **8. Tax measures for combating bribery**

### **(a) Non-tax deductibility of bribes and enforcement**

103. As detailed in Phase 2, Estonia's Income Tax Act expressly denies the tax deductibility of bribes and gratuities since 2004.<sup>117</sup> Estonia reports that this has never been enforced because a case in which a bribe has been deducted from taxes has never been detected by tax authorities. Estonia also indicates that tax authorities do not re-examine, as a matter of policy, the tax returns of taxpayers who have been convicted of (domestic or foreign) bribery to determine whether the bribes had been

<sup>116</sup> See [http://www.ecgi.org/codes/documents/cg\\_recommendations\\_2005\\_en.pdf](http://www.ecgi.org/codes/documents/cg_recommendations_2005_en.pdf)

<sup>117</sup> Estonia Phase 2 Report, § 44.

deducted. As the Working Group has noted in earlier reports, tax authorities should be informed of foreign bribery convictions so that such audits can be systematically performed.

### *Commentary*

*The lead examiners recommend that once foreign bribery case law develops, the Working Group follow-up to ensure that Estonia systematically re-examines the relevant tax returns of taxpayers convicted for foreign bribery to determine whether bribes have been illegally deducted.*

#### *(b) Awareness, training and detection*

104. In terms of awareness-raising and training of tax officials to detect unlawful expenditures that may be associated with foreign bribery, the Phase 2 Report found some guidance had been provided, but recommended that Estonia make additional efforts.<sup>118</sup> Recommendation 6 was found to be only partially implemented at the time of the Phase 2 Written Follow-Up: although questions on foreign bribery had been introduced in the basic qualification test for tax auditors and the OECD Bribery Awareness Handbook for Tax Examiners continues to be available for consultation by tax officials, the Working Group considered that there had not been any proactive effort to encourage use of the Handbook by officials or integrate it in training programmes.<sup>119</sup>

105. Estonia indicates that the situation has not changed since the Written Follow-Up. No awareness raising or training activities for tax authorities have been organised. There have been no special training of tax officials on bribery detection and reporting. Tax examiners have neither received training on the OECD Bribery Awareness Handbook for Tax Examiners, nor has it been decided whether the 2013 version of the Handbook will be translated.

106. The Phase 2 report also stated that there were no systematic procedures to detect bribery.<sup>120</sup> No special effort was made to verify fees paid to agents and tax officials had not detected irregularities associated with transnational bribery. Possibly due to the lack of awareness-raising and training, tax officials indicated that they have not detected potential bribe payments in tax audits.

### *Commentary*

*The lead examiners are concerned that no awareness raising or training specific to foreign bribery has been organised for tax officials. Therefore, they consider that Phase 2 Recommendation 6 is still only partially implemented, and reiterate the recommendation that Estonia make additional efforts to train tax officials on bribery detection and reporting, and to raise their awareness of foreign bribery.*

#### *(c) Reporting and sharing of tax information*

107. Estonian public officials, including tax officials, are required by law “not to conceal” crimes and to report them to law enforcement authorities (see section 10(b)(i) below on reporting obligations of Estonian public officials). The Phase 2 report<sup>121</sup>, as well as information provided by Estonia in

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<sup>118</sup> Ibid. §§ 47-48 and Recommendation 6.

<sup>119</sup> Estonia Written Follow-Up Report, § 8.

<sup>120</sup> Estonia Phase 2 Report, §§ 49-50.

<sup>121</sup> Ibid. § 45.

Phase 3 indicates that tax authorities may share all information, including information subject to tax secrecy, with law enforcement authorities. More specifically, Estonia indicates that the reporting obligation under section 6(1) of the Anti-Corruption Act applies to tax officials (see below section 10(b) on reporting obligations of Estonian public officials). Consequently, all suspicions of corruption must be referred to the Internal Control Department (ICD) in the Tax and Customs Board. The ICD checks the circumstances and forwards the materials to the Police or Security Police Board (KAPO). Conversely, if information is required by law enforcement authorities from the Tax and Customs Board, it has to be provided without discretion or delay.<sup>122</sup> Estonian tax authorities report having detected and reported criminal offences to the law enforcement authorities on 11 occasions in 2012 and 12 occasions in 2013. None of these reports concerned suspicions of foreign bribery.

108. In relation to the sharing of tax information with foreign authorities, Estonian tax authorities may also exchange information with foreign authorities in both tax and criminal proceedings even information subject to tax secrecy.<sup>123</sup> Estonia has indicated that it generally uses in its bilateral treaties the language of Article 26 of the OECD Model Tax Convention which allows the use of information received by a Contracting State for non-tax purposes including in particular in corruption-related investigations. Information-sharing for criminal purposes is also allowed under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters developed by the OECD and the Council of Europe. The Convention also contains language similar to Article 26 of the Model Tax Convention. Estonia has signed and ratified the Convention on 7 April 2014. Estonia reports to have shared tax information spontaneously with foreign authorities in numerous occasions in recent years, although not in instances relating to foreign bribery.

#### *Commentary*

*With respect to the sharing of tax information at the national level, the lead examiners recommend that Estonia provide clear guidance to tax officials to facilitate reporting of foreign bribery suspicions to law enforcement authorities, in conformity with the 2009 Tax Recommendation, and disseminate the new OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors.*

*With respect to the international sharing of information, the lead examiners congratulate Estonia for signing and ratifying the multilateral Convention on Mutual Administrative assistance in Tax Matters.*

## **9. International Cooperation**

### **(a) Mutual legal assistance and extradition framework**

109. In the Phase 2 report of Estonia, the Working Group identified no fundamental problems with respect to the law, procedure, or quality and timeliness of responses to MLA and extradition requests. In Estonia, the general principles of international cooperation are stipulated in CPC section 433. The bodies Responsible for MLA and extradition are the courts, Prosecutors' Offices, Police and Border Guard Board, KAPO, the Tax and Customs Board, the Competition Board and the Military Police.<sup>124</sup> The OPG plays a central role in the execution of international cooperation requests. The OPG must be immediately informed of all requests and will first assess whether they are executable

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<sup>122</sup> CPC 32(2) and 215.

<sup>123</sup> Estonia Phase 2 Report, § 46.

<sup>124</sup> CPC, section 435.

and meet all requirements. The OPG will then forward the request to the appropriate agency. Estonia has extradition and MLA arrangements with most of its major trade and investment partners.<sup>125</sup>

110. A potentially more serious issue that was flagged for follow-up in Phase 2 is the denial of MLA or extradition for reasons of national economic interest,<sup>126</sup> the potential effect upon relations with another State, or the identity of natural or legal persons involved – considerations prohibited under Article 5 of the Convention. Under section 436 of the CPC, Estonia may refuse to engage in international cooperation if “it may endanger the security, public order or other essential interests of the Republic of Estonia”.<sup>127</sup> In 2008, Estonia amended the Penal Code to mandate that “Estonia shall not refuse to engage in international co-operation with a Member State of the European Union on the ground that the offence is regarded as a political offence”. However, this does not address the concerns expressed by the Working Group in Phase 2, since foreign bribery in international business transactions would rarely be deemed a “political offence”, and since many countries Party to the Convention are not a part of the European Union. Estonian authorities at the on-site explained that this “essential interests” provision is intended to cover an interest that would be considered essential to the whole Republic or involve classified or secret information. Prosecution authorities stated that they could not conceive of a situation in which an economic interest was so vital to the state it would provide the basis for denial of international cooperation. They further explained that, in determining whether a state interest should be used to deny cooperation, the State Prosecutor in charge of reviewing such requests will consider the proportionality of the request (i.e., the nature of the request compared to the gravity of the interest). Finally, Estonia also pointed out that under section 123 of the Estonian Constitution, the Convention (as an international instrument ratified by Estonia) takes precedence over conflicting provisions in Estonia’s domestic law. According to panellists, no international cooperation requests have been denied based on considerations of national economic interest, the potential effect upon relations with another State, or the identity of natural or legal persons involved. Following the on-site visit, Estonia informed the evaluation team of a proposal to amend section 436 of the CPC in order to expressly prohibit denying MLA on grounds of economic or political interests, should those reasons be contrary to Estonia’s international obligations.

111. Estonia reports that for 2013, the average time for execution of MLA requests received by Estonia was 42 days. The average time for Estonian requests to foreign jurisdictions to be processed was 95 days. In 2013, Estonia received 547 MLA requests and sent 198 requests. Estonia rejected 28 requests (14 of which were administrative cases, 11 of which due to expiry of the statute of limitations, 2 of which due to procedural deficiencies and one of which was due to the fact that the request was mistakenly sent to Estonia). In terms of outgoing MLA requests, Estonia indicated that, in *Case #2 – Real Estate Case* concerning foreign bribery allegations, two requests had been sent to a non-Party to the Convention; in the absence of response to these requests, the investigation was closed due to insufficient evidence (see also section A.5 on foreign bribery allegations). Estonia also informed the evaluation team that it is currently participating in over 30 joint investigative teams (JITs), making it one of the leading countries in Europe to have JITs (though none of these investigations concern foreign bribery).

112. With respect to extradition, under section 439 of the Criminal Procedure Code, persons may be extradited for all offences which carry an imprisonment sentence of at least one year in both Estonia and the requesting country. Therefore, from the perspective of Estonian law, all foreign

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<sup>125</sup> Estonia Phase 2 Report, § 115.

<sup>126</sup> Ibid. § 116 and Commentary.

<sup>127</sup> This provision is in line with Article 2 of the European Convention on Mutual Legal Assistance.

bribery offences – including the less sanctioned one of non-aggravated arranging of bribery – are extraditable offences.

**(b) Spontaneous sharing of information with foreign authorities**

113. In the Phase 2 report of Estonia, the Working Group identified no fundamental problems with respect to the law, procedure, or quality and timeliness of responses to MLA and extradition requests.<sup>128</sup> The Working Group did, however, highlight an issue with respect to spontaneous transmission to foreign states of information relevant to a foreign bribery investigation in that State (Recommendation 7(d)). Recommendation 7(d) was considered unimplemented as of the Phase 2 Written Follow-Up.<sup>129</sup> In 2008, Estonia amended the CPC to allow a competent judicial authority to spontaneously transmit information to Eurojust when such information may be the reason for initiating criminal proceedings in a foreign state for selected criminal offences, which include corruption and money laundering. Estonian authorities further noted at the on-site that spontaneous transmissions of information have occurred in the context of joint investigations and through Eurojust. Lead examiners are satisfied this issue has been sufficiently addressed.

**Commentary**

*Despite assurances by Estonian authorities that, to date, no international cooperation requests have been denied based on considerations of national economic interest, lead examiners are concerned that adequate safeguards may not be in place to ensure that the consideration of MLA requests would not rely on the impermissible factors contained in Article 5 of the Convention. However, lead examiners welcome the news that Estonia intends to propose a draft amendment specifically addressing this situation and recommend that Estonia proceed promptly with its expressed intention to amend its legislation with a view to ensuring that international cooperation is not denied based on considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal person involved.*

*Finally, in light of the 2008 amendment to the CPC and recent cooperation in JITs, including the spontaneous transmission of information, lead examiners are satisfied that Estonia has fully implemented Recommendation 7(d).*

**10. Awareness-raising in the public and private sectors and reporting of acts of corruption**

114. This section addresses awareness-raising efforts, reporting of foreign bribery, and whistleblowing. The reporting obligations of tax officials, and those involved in the disbursement of public advantages are addressed under sections 8 and 11 respectively.

**(a) Awareness-raising in the public and private sectors**

115. As highlighted above in section 6 of the Introduction, the Anti-Corruption Strategy 2013-2020 does not specifically target foreign bribery. Furthermore, the Ministry of Foreign Affairs (MoFA) is not listed as an implementing agency.<sup>130</sup> As a result, relatively limited awareness-raising

<sup>128</sup> Estonia Phase 2 Report, § 117.

<sup>129</sup> Estonia Phase 2 Written Follow-Up, § 11.

<sup>130</sup> Estonia – Ministry of Justice (2013), *Anti-Corruption Strategy 2013-2020*. § 28 of the Strategy lists the following agencies as “primary” implementers of the Strategy: the Ministry of Education and Research, the KAPO, the Ministry of Economic Affairs and Communications, the Police and Border

activities have been directed at the private and the public sectors in the area of foreign bribery. Estonian public and private sector representatives at the on-site visit expressed the view that foreign bribery is not an issue for Estonian companies, which are fully aware of the legal risks of bribing abroad and would pull out or decide not to operate in jurisdictions where the corruption risk is reputedly high. However, given the size, growth and openness of Estonia's economy and the efforts undertaken by Estonia to enhance the competitiveness of its companies abroad, the risk of foreign bribery by Estonian companies could increase in the medium to long term.

(i) *Awareness-raising in the public sector*

116. The Phase 2 report already noted low levels of awareness of the foreign bribery offence in the public sector, and formulated recommendations 1(a) and (b) to that effect.<sup>131</sup> These recommendations were considered as partially implemented during the Phase 2 written follow-up, thanks to two positive yet insufficient initiatives: (i) the publication of an information bulletin to diplomatic personnel, and an enhanced version thereof to judges, prosecutors and officials of Ministries of Justice, Internal Affairs, Finance, and Economic Affairs, and (ii) the organisation of two seminars shortly before the written follow-up.<sup>132</sup>

117. Estonia itself describes its efforts since then in terms of awareness-raising as "sporadic".<sup>133</sup> The information bulletin, which was an essential element of the WGB's assessment during the Phase 2 written follow-up, has not been updated since 2010. The MoFA however indicated during the on-site visit that an update would be available in May 2014 as part of the revamping of its website and Intranet. Estonia confirmed in June 2014 that guidelines for MoFA public officials on how to inform companies and address foreign bribery risks were posted on the Intranet, although the evaluation team did not have to opportunity to consult or discuss them.

118. With respect to training, Estonia indicates that no funds have been set aside to train public officials on foreign bribery issues. The MoFA described yearly trainings for their officials, including those posted abroad, which includes some focus on foreign bribery. It does not appear that any other activities or training focusing on foreign bribery have been developed for staff in trade promotion agencies, the MOJ, the Ministry of Economic Affairs and Communications or any other officials involved with Estonian enterprises operating abroad.

119. Estonia sought to outsource its training activities on foreign bribery for public officials as well as the private sector through a grant request to the European Commission which was partly accepted in May 2014.<sup>134</sup> One item of the project to start in September 2014 will be the training of law enforcement officials and policy-makers, as well as exchanges of best international practices on investigation techniques, guidelines and networks, with some seminars and conferences explicitly covering foreign bribery.

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Guard Board, the Prosecutor's Office, the Ministry of Finance, the State Chancellery, the Chancellery of the *Riigikogu*, the Ministry of Internal Affairs and the Ministry of Social Affairs.

<sup>131</sup>. Estonia Phase 2 Report, §§ 14-19.

<sup>132</sup>. Estonia Phase 2 Written Follow-Up Report, §§ 2-3.

<sup>133</sup> Estonia Responses to the Phase 3 Questionnaire, 11.1(b).

<sup>134</sup> The requested grant was EUR 400 000, and the awarded amount is EUR 290 896. During the on-site visit, the MOJ indicated that alternative funding could come from budget funds, to be considered in light of current budget restrictions.

(ii) *Awareness-raising in the private sector*

120. Estonia's Phase 2 report highlighted the relative inactivity of the government to raise awareness of the private sector on the issue of foreign bribery, which negatively impacted the prevention, detection and prosecution of foreign bribery and led to "a complete absence of initiatives by the private sector to raise awareness of foreign bribery".<sup>135</sup> Such observation led to recommendation 2(a), which was considered partially implemented at the time of the Phase 2 written follow-up, thanks to the special information bulletin for businesses on combating corruption published by the MOJ in December 2010.<sup>136</sup> Recommendation 2(b) was considered not implemented in the absence of information on whether Estonia had taken steps to help the business community prevent and detect foreign bribery.<sup>137</sup> As of the time of this Phase 3 evaluation, the 2010 bulletin, published in English and Estonian, and making an explicit reference to the Convention, was the latest awareness-raising activity focussing specifically on foreign bribery. The Bulletin does not, however, refer to the 2009 Anti-Bribery Recommendation, in particular the Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II. Moreover, it appears somewhat dated, still referring to Estonia as a non-member of the OECD.<sup>138</sup>

121. Of related interest is the MOJ's initiative to create a yearly Corporate Sustainability and Responsibility Index to distinguish voluntarily participating Estonian companies having put in place internal compliance mechanisms. However, this Index was not known from business associations interviewed during the on-site visit. A joint seminar for entrepreneurs was organised recently by the Ministry of Justice, the Estonian Chamber of Commerce and Industry, the Responsible Business Forum in Estonia, and Transparency International Estonia, but Estonia did not provide further details on the event. Further awareness-raising activities targeting corruption and assessing risks in the private sector have been listed as part of the successful European grant. Outputs would include trainings for entrepreneurs and SOE managers, awareness-raising activities on corruption among entrepreneurs and business students, dissemination of best practices, and creation of informal networks.

122. Lack of tailored awareness-raising activities for the private sector and attention to the foreign bribery issue turned out to be a major concern during the on-site visit. No government representative could provide data on the number of Estonian companies operating abroad. Some officials even considered that this was a non-issue given the size of Estonia's economy and its structure, mostly domestically-driven and SME-based. However, information provided by the Estonian Chamber of Commerce and Industry after the on-site revealed that approximately 1 800 Estonian companies have set up subsidiaries in foreign countries (2012 data), and that 24 500 were doing business abroad (2013 data).<sup>139</sup> Feedback from the business sector during the on-site confirmed that Estonian companies were most prominently active in neighbouring countries, namely the Baltic region, Scandinavia, and the Russian Federation. Discussions also showed that the business sector (with the exception of Estonian subsidiaries of multinational enterprises) was mostly unaware of the legal risks in Estonia when bribing abroad, and that government- and civil society-led activities were scarce or unknown.

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<sup>135</sup> Phase 2 Report, §§ 14-19.

<sup>136</sup> The Working Group however noted insufficient activities for the accounting and auditing profession, hence its evaluation that the recommendation was only partially implemented

<sup>137</sup> Phase 2 Written Follow-Up Report, § 4.

<sup>138</sup> See <http://www.korruptsioon.ee/42846>.

<sup>139</sup> This should be read in conjunction with data provided by the Estonian government, relying on 2011 Eurostat data which showed that there were 896 subsidiaries of Estonian firms abroad (722 in the EU), mostly in the services sector.

## *Commentary*

*While the lead examiners note some proactivity on the part of the Estonian government to raise awareness on the issue of corruption generally, they consider that activities, including those under the 2013-2020 Anti-Corruption Strategy, place insufficient focus on foreign bribery risks. The lead examiners are concerned that the lack of awareness of both public officials and the private sector may affect the proper detection of foreign bribery. They therefore consider that further steps are necessary to comply with Phase 2 recommendations 1a, 1b, 2a and 2b on awareness-raising in the public sector and with businesses, and recommend Estonia to place a more intensive policy focus on the foreign bribery offence, in order to create awareness of the Convention and further public-private dialogue.*

*In particular, the lead examiners reiterate the Phase 2 recommendations to raise the level of awareness of and provide training on the Convention and foreign bribery within the public sector, including overseas diplomatic representations, law enforcement, prosecutor's offices, the judiciary, as well as the Ministries of Justice, Internal Affairs, Finance (including tax officials), and Economic Affairs and Communications.*

*The lead examiners also consider that the Estonian government has not taken the measure of the need for the private sector, in particular the SME sector, to be regularly informed and made increasingly aware of the issue of the foreign bribery offence. Consequently, they recommend that Estonia (i) continue to actively raise awareness within the private sector, and in particular SMEs, on foreign bribery risks in international business transactions and (ii) encourage the private sector to adopt effective internal controls, ethics and compliance measures for preventing foreign bribery. The lead examiners also note that the engagement with SMEs is a horizontal issue that affects many other Parties to the Convention.*

### **(b) Reporting suspected acts of foreign bribery**

#### *(i) Reporting of suspected transnational bribery in the public sector*

123. In Phase 2, the Working Group welcomed the existence of a duty for public officials to report violations under the previous Anti-Corruption Act, while noting that “the effectiveness of such a reporting duty is tempered by the lack of awareness of the foreign bribery offence among Estonian public officials”.<sup>140</sup> Since Phase 2, the Anti-Corruption Act 2012 has introduced significant amendments to the duty for public officials to report corruptive acts, as explained below.

124. Under section 6 of the Anti-Corruption Act 2012, the duty for public officials to report their knowledge of bribery acts is now a negative obligation in the form of a duty “not to conceal”, as opposed to a positive obligation under the previous regime.<sup>141</sup> Sanctions for not reporting are no longer clearly stated in the law. It is left to the Explanatory Memorandum to clarify that all sanctions from sections 306-7 of the Penal Code (criminal sanctions) and Chapter 8 of the new Public Services Act (disciplinary sanctions) still apply. During the on-site visit, it was clarified that when criminal sanctions for not reporting applied, no disciplinary sanctions could be incurred. The new law allows public officials to report suspected acts to “agencies performing public duties, their officials, persons

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<sup>140</sup>. Estonia Phase 2 Report, § 24.

<sup>141</sup> See Annex 4 for relevant excerpts.



exercising supervision over agencies, persons controlling declarations or bodies conducting proceedings concerning an offence”, but leaves the definition of internal reporting mechanisms to each institution. During the on-site visit, the issue of reporting channels for overseas officials was discussed with the MoFA, which indicated after the on-site that, while no specific channel to law enforcement authorities was in place, the Diplomatic Security Department (placed under the authority of the Secretary-General of the Ministry) could serve as an internal reporting channel and that MoFA public officials would be clearly informed thereof. Of positive note, the scope of the reporting obligation is larger than under the previous legislation, with the new law covering all “incidents of corruption”.<sup>142</sup> Section 6(5) explicitly provides that section 6 applies to “an incident of corruption occur[ing] outside the performance of public duties”, thus covering incidents of foreign bribery.

125. Estonia explains that one of the reasons for these changes is the fact that, under the previous regime, no reporting was recorded and no sanctions for not-reporting were imposed. However, one consequence of this change appears to be the lack of awareness of public officials of their duty not to conceal. Some public officials interviewed during the on-site were not aware of their own reporting obligations, or had not received any specific training on reporting channels. For instance, during the on-site visit, MoFA representatives explained that no reports were made by overseas officials because no concrete evidence was available – a sign that either no foreign bribery allegation occurred or that economic missions abroad may not be sufficiently fulfilling their role in the detection of foreign bribery allegations.

(ii) *Reporting suspicions of transnational bribery in the private sector*

126. There is no obligation for the general public (including the private sector) to report suspicions of second-degree offences such as foreign bribery (with the exception of a repeated offence). Such duty applies only to suspicions of crimes of the first degree (section 307 of the Penal Code). With respect to bribery, Estonia mentions reporting mechanisms such as the hotline of the KAPO or the government’s anti-corruption webpage. On average, 30 such reports are received each year, 2 of which have led to the opening of investigations (not on foreign bribery charges).<sup>143</sup> It would appear, however, that this hotline is essentially meant to provide a channel for the general public to report instances of domestic bribery. This should be read in conjunction with the lack of awareness-raising mentioned above, and the fact that, in practice, 1% of Estonian citizens and business owners indicate that they would report bribe solicitation to law enforcement authorities.<sup>144</sup> Given also the concerns regarding whistleblower protection in the private sector (see section c(ii) below), the likelihood of reporting by private sector employees of foreign bribery allegations appears very low.

***Commentary***

***The lead examiners recommend that Estonia take steps to ensure that (i) all public servants who could play a role in detecting acts of foreign bribery in the course of their work, including in overseas representations, are made aware of their duty not to conceal suspected acts of foreign bribery involving Estonian individuals or companies to Estonian***

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<sup>142</sup> . As opposed to a duty to report “*in writing of giving or grant, arranging receipt or acceptance of a bribe or gratuities which becomes known to him or her*” (section 23 of the 2003 Anti-Corruption Act).

<sup>143</sup> The Phase 2 Report mentioned 96 reports of domestic bribery from 2004 to April 2008 (Phase 2, § 25).

<sup>144</sup> Transparency International (2013), *Whistleblowing in Europe: Legal protections for whistleblowers in the EU*, pp. 40-42.

*enforcement authorities, and that (ii) easily accessible channels are in place for the reporting to law enforcement authorities of suspected acts of foreign bribery.*

(c) ***Whistleblower Protection***

127. In Phase 2, the WGB recommended Estonia to strengthen measures protecting whistleblowers, in order to encourage public and private sector employees to report acts of foreign bribery without fear of reprisals or dismissal.<sup>145</sup> Recommendation 3 was considered as not implemented in the 2010 Phase 2 written follow-up report, while noting that a draft law in Parliament at the time (now the Anti-Corruption Act 2012) would allow whistleblower protection.<sup>146</sup> At the time of this Phase 3 evaluation, legislation provides protection to whistleblowers in the public sector. However, whistleblower protection for private sector employees is still largely unclear.

(i) *Whistleblower protection in the public sector*

128. Since the Phase 2 written follow-up, the Anti-Corruption Act 2012 came into force, and provides some protection to whistleblowers in the public sector. Specifically, section 6 guarantees confidentiality to whistleblowers reporting “*incidents of corruption*” in good faith, and civil law remedies against discrimination due to whistleblowing, with a reversal of the burden of proof.<sup>147</sup> No information could be provided by Estonia on the implementation of this legal framework, due to the recent entry into force of the Anti-Corruption Act.

(ii) *Whistleblower protection in the private sector*

129. With respect to private sector employees, the evaluation team had serious doubts as to whether private sector whistleblowers would be protected under the new law. The interpretation of section 6 of the Anti-Corruption Act is central to the assessment of the legal framework in this respect. Section 6(1) addresses Estonian public officials and their reporting obligations (see section b(i) above), which tends to focus the reading of this section on the duties and protections afforded to such public officials. However, during the on-site, the Estonian government pointed to the applicability of certain provisions of the Anti-Corruption Act to private sector employees, by operation of section 6(5) which applies to “*an incident of corruption occur[ing] outside the performance of public duties.*” However, this provision merely intends to include acts of corruption committed in the private sector, without extending protection to persons in the private sector making such reports. Section 6(2) could, arguably, be deemed to ensure confidentiality to any person making a notification, since it promises confidentiality “of the fact of notification”, regardless of whether the person is a public or private sector employee. Estonia also points to the Explanatory Memorandum to the draft law which describes that “Pursuant to [section 6] subsection (5), the same principles of whistleblower protection are also applicable if the object of notification is corruptive activity in the private sector”, adding in an earlier portion that “the notifier may be an official or any other person” and that “there are no plans to adopt a separate regulation for private persons” with respect to whistleblower protection. Estonia provided to that effect a series of recent Supreme Court decisions in which Explanatory memoranda of draft legislation were used as a source of interpretation of the law, however not with respect to the

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<sup>145</sup>. Estonia Phase 2 Report, § 27 and Recommendation 3.

<sup>146</sup>. Estonia Phase 2 Written Follow-Up Report, § 4.

<sup>147</sup> Section 6(4) of the Anti-Corruption Act (2012) – See Annex 4 for relevant excerpts. See also sections 319 and 320 of the Penal Code and section 226(4) of the Code of Criminal Procedure.

Explanatory Memorandum to the Anti-Corruption Act, and not to the extent of extending the scope of a legislative act.<sup>148</sup>

130. However, since section 6 focuses on the facts supporting a notification rather than the person making that notification, another possible interpretation of the language of section 6(5) could be that whistleblower protection would apply only to public sector employees, including where they report incidents of corruption committed in the private sector. On this point, the ambivalence of the private sector and civil society during discussions on-site should be noted. With the exception of one legal expert, most interlocutors had no knowledge of the provision or expressed doubt as to its applicability to private sector whistleblowers. The discussion with Parliamentarians also revealed that the scope of the Anti-Corruption Act may be insufficiently clear to establish with certainty that section 6 was applicable to all whistleblowers, when in fact the Anti-Corruption Act aims primarily at fighting corruption in the public sector. It therefore appears that Estonian law is at best unclear on the topic, or, more worryingly, does not apply to private sector whistleblowers.

131. In terms of protection afforded to whistleblowers through companies' internal policies, most Estonian companies which have introduced such protection mechanisms are subsidiaries of foreign companies implanted in Estonia. Out of the 20 major Estonian companies researched by the evaluation team, only 5 had introduced comprehensive whistleblower protection mechanisms, and only 1 was headquartered in Estonia and listed on the Tallinn Stock Exchange.

#### **Commentary**

*The lead examiners welcome the progress made through the adoption of the Anti-Corruption Act 2012 which introduces in Estonian law whistleblower protection for public sector employees. Given the recent entry into force of this legislation, the lead examiners recommend that the Working Group follow up on the application of provisions on whistleblower protection in the public sector in Estonia.*

*The lead examiners however regret that Estonia did not follow a clearer approach to covering whistleblowers in the private sector. While they take note of Estonia's explanations in this respect, they consider that the law is, at best, ambiguous in its wording. In addition, they regard the quasi-total lack of awareness of the private sector and civil society and the lack of practice and case-law as further indication that the law is not sufficiently clear. Consequently, the lead examiners recommend that Estonia (i) amend its legislation or otherwise expressly clarify the application of whistleblower protection provisions to private sector employees, with a view to ensuring that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private sector employees who report suspicions of foreign bribery; and (ii) raise awareness of the public and private sector on the protection afforded to them under the law where they report such suspicions.*

*The lead examiners also recommend that Estonia encourage its companies to put in place protection and easily accessible channels for whistleblowers, in the context of its internal controls, and ethics and compliance programmes.*

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<sup>148</sup> Estonia's Supreme Court decision No. 3-1-1-129-13, 13 January 2014; decision No. 3-4-1-45-13, 2 October 2013; decision No. 3-1-1-112-12, 14 January 2013.

## 11. Public advantages

### (a) Public procurement

132. Public procurement, which accounted for EUR 1.6 billion in 2012, is decentralised in Estonia. Each procuring authority (ministries, government agencies, local authorities) is individually responsible for executing its public procurement procedures, subject to the rules and procedures laid out in the Public Procurement Act (2007) (PPA). The Department of Public Procurement and State Aid Department of the Ministry of Finance exercises state supervision over the organisation of public procurement in Estonia, and advises on the implementation of the PPA.<sup>149</sup> As an EU Member, Estonia's public procurement law transposes EU Directives; Estonia is also a party to the WTO Agreement on Government Procurement.

133. Section 38(1)(1) PPA prohibits procuring authorities from awarding a contract to tenderers where the company, or its legal representative, have been "convicted" of "offences relating to professional misconduct." Pursuant to the Guidelines on Public Procurement from the Ministry of Finance, such offences include the "accepting, arranging or giving gratuities or bribe".<sup>150</sup> Pursuant to the PPA, debarment is valid until the conviction is deleted from the Registry of Convictions, namely after three to five years for a criminal offence such as foreign bribery, depending on aggravating circumstances.<sup>151</sup> After the on-site visit, the Ministry of Finance revised its statement whereby convictions were systematically checked (a legitimate inference from the language of section 38(1)(1) PPA), to indicate rather that the procurement registry does not have a "direct electronic link" to the Registry of Convictions (even though is accessible to "everyone"<sup>152</sup>), and that the procuring authority will only check the Registry of Convictions in case of doubt. Pursuant to section 38(1)(1) the PPA, convictions in the "country of residence or country of location" are also a basis for exclusion, although, by their very nature, such convictions would be more difficult to verify for the authorities. In this regard, the Ministry of Finance representatives indicated at the on-site visit that checks with foreign authorities were only conducted when prompted by inconsistent declarations or doubts. These statements evidence non-systematic checks for past convictions or ongoing investigations including abroad, thereby relying on the vigilance of individual procuring officers rather than systematic checks. In a context when Estonia will be increasingly using electronic procurement<sup>153</sup>, such approach may in fact lead to fewer opportunities for procurement officials to exercise their vigilance and conduct checks. In practice, Estonia indicates that no company has been excluded from tendering by a procuring authority since 2011 (earlier data not available), for any conviction.

134. During the on-site visit, the Ministry of Finance indicated that internal controls, ethics and compliance measures of companies are not mandatorily considered through the accreditation process. The Ministry also indicated that reporting to police bodies in cases of suspicions was systematic<sup>154</sup>,

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<sup>149</sup> PPA section 104. At the time of the Phase 2 report, Estonia had a Public Procurement Office, distinct from the Central Ministry, which was dismantled in 2010.

<sup>150</sup> Exclusion also applies to fraud, money laundering, and tax offences. See Annex 4 for relevant excerpts.

<sup>151</sup> Registry of Convictions Act, section 24. Section 24(6) also provides that the information is archived for 50 years in case of criminal offences. See Annex 4 for relevant excerpts.

<sup>152</sup> Registry of Convictions Act, sections 7(1) and 15(1). See Annex 4 for relevant excerpts.

<sup>153</sup> PPA section 55(7). Estonia indicated a rate of fully electronic public procurement of 44% in 2013.

<sup>154</sup> PPA, section 109(1).

and added after the on-site that, no such reporting had occurred since 2010. Furthermore, there is no obligation on procuring authorities to report to the Ministry of Finance on exclusions.

**(b) Official Development Assistance**

135. The External Economic and Development Co-operation Department of the MoFA, consisting of three staff, administers Estonia's development aid. For the 2012 financial year, ODA disbursements amounted to EUR 17.98 million. The main recipient countries for bilateral aid (150 projects) were Afghanistan (13.12%), Georgia (3.15%), Moldova (2.54%), Ukraine (1.48%) and the Palestinian Authority (0.35%). 72.5% of total ODA was channelled through multilateral donors (European Commission, 34.8%).

136. The PPA applies to ODA grants and contracts. Since 2010, the MoFA's standard ODA contract includes an anti-bribery declaration (not expressly covering foreign bribery) whereby contractors must certify that "*no person acting on behalf of [project implementer] has accepted, offered or arranged any bribes in relation to implementing the development co-operation project funded by the Ministry of Foreign Affairs or in relation to other relevant agreements*". Such conduct may be ground for termination under section 21.6 of the Conditions and Procedure for the Provision of development assistance and humanitarian aid (Government regulation No. 8 of 21 January 2010, currently being revised, although not with respect to that provision as indicated by Estonia). The standard ODA contract also includes a "right to audit" clause, allowing the MoFA and the Ministry of Finance to verify "*the purposefulness of the use of the grant*" at the end of the grant.

137. During the on-site visit, the MoFA affirmed that it systematically checked the Registry of Convictions, but not foreign convictions or debarment lists from international financial institutions. The Ministry also acknowledged that the veracity of information contained in the anti-bribery declaration was not systematically investigated, primarily due to lack of administrative capacity and the generally small size of the awarded grants. Internal controls, ethics and compliance measures of companies are not considered through the accreditation process. In practice, the Ministry relayed two or three occurrences where the projects were halted due to "political problems" (not linked to foreign bribery issues), but no termination of any ODA contract.

138. In terms of detection, the Ministry organises internal workshops discussing the foreign bribery offence and its reporting. While representatives from the Ministry consider that reporting is a duty for public officials, only verbal instructions have reportedly been issued in that respect to MoFA procuring authorities.

**(c) Officially supported export credits**

139. KredEx Credit Insurance Ltd (*AS KredEx Krediidikindlustus*, KredEx) is Estonia's officially supported export credit and insurance agency. This state-owned enterprise, 66%-owned by the Estonian government, was created within the framework of the 2009 State Export Guarantees Act, and currently employs seven staff members, in addition to three supervisory board members appointed by the ownership and two management board members.<sup>155</sup> KredEx participates in the OECD Working Party on Export Credits and Credit Guarantees (ECG), which regularly surveys how adhering countries implement the 2006 Export Credit Recommendation. Estonia's latest responses to the survey questionnaire date back to May 2013.<sup>156</sup> The Phase 2 report, adopted prior to the creation of KredEx in

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<sup>155</sup> See KredEx (2013), *2012 Annual Report*.

<sup>156</sup> See <http://www.oecd.org/tad/xcred/anti-bribery-survey.htm>

its current form, contained two recommendations applying to the Agency, namely recommendations 4(a) on detection and reporting and 13(b) on the establishment of formal, written policies for denying guarantees. When considered in 2010 as part of the written follow-up, both recommendations were found not implemented by the WGB due to the lack of information on steps taken by KredEx to ensure that suspicions of foreign bribery were reported by KredEx employees, and in the absence of a written policy for export credit support and denial of benefits.<sup>157</sup>

140. In practice, KredEx covers transactions primarily held in Estonia. For its medium- and long-term guarantees, KredEx requires exporters to adhere to an anti-bribery declaration, which expressly refers to the 2006 Export Credit Recommendation, and whereby exporters commit not to engage in promising, offering or giving bribes in connection with the guaranteed operation. However, this declaration is not mandatory for short-term export credit guarantees, which, as confirmed during the on-site visit, represent the majority of credit guarantees provided by KredEx. KredEx indicated during the on-site visit that consideration would be given to applying a mandatory anti-bribery declaration for short-term guarantees within the six months following the on-site. After the on-site, KredEx confirmed this intention, and added that standard general provisions for short-term contracts (including denial of benefits) would also be amended within that timeframe.

141. During the on-site visit, KredEx confirmed that they did not check the Registry for prior convictions, due to a (waivable) State fee imposed to access the Register, as explained after the on-site. In 2013, KredEx updated its due diligence system and now checks applicants against debarment lists of international financial institutions, in addition to international sanctions lists from the European Union and the United Nations. Appearance on such lists triggers enhanced due diligence, and suspension of the application (KredEx indicated after the on-site that this process would be electronically automated). However, at the time of the on-site, there was still no written policy for excluding exporters from guarantees. In practice, no red flag have been raised and benefits have never been denied. Since the on-site, KredEx indicated that a written procedure for credit insurance contracts, amending KredEx' internal rules, had been put in place as from 1 April 2014. Following the on-site, excerpts of the policy were made available, although the evaluation team did not have the opportunity to discuss it.

142. KredEx representatives indicated during the on-site visit that credible evidence of foreign bribery would be reported to investigative authorities. However no written guidelines had been drafted to that effect at the time of the on-site. The chair of the management board of KredEx further expressed the view that all KredEx employees, management board and supervisory board members have a duty under Estonian law to report allegations. It is unclear what the legal basis is for such a reporting obligation given that KredEx employees are not considered public officials under Estonian law (with the exception of supervisory board and management board members appointed by the Estonian government, who are public officials). Following the on-site, KredEx indicated that a written procedure was in place since 1 April 2014, which required KredEx staff to report suspicions of bribery to the management board, which would then consider whether the information is relevant to be transmitted to law enforcement.

143. During the on-site visit, KredEx representatives acknowledged that they had not benefitted from any training on foreign bribery. In terms of awareness-raising, the only mention of the foreign bribery issue appears in the anti-bribery declaration referred to above.

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<sup>157</sup>. Estonia Phase 2 Written Follow-Up Report, §§ 6 and 16.

### *Commentary*

*With respect to exclusion of companies convicted of bribery by public procurement and ODA agencies, the lead examiners welcome Estonia's framework which allows in principle for debarment of entities and individuals, but regret the absence of a systematic approach with respect to consultation of the Registry of Convictions. The lead examiners therefore recommend that Estonia consider adopting more streamlined processes, including systematic checking of the Registry in public procurement procedures. Furthermore, the lead examiners believe that publicly available debarment lists of international financial institutions can be a useful source of information for Estonian public procurement agencies about companies that have been debarred for corruption, and recommend that the Ministry of Finance consider requiring the consultation of such debarment lists in the granting of public advantages, including public procurement and ODA.*

*Regarding awareness of foreign bribery issues within public contracting agencies in charge of public procurement, ODA and export credits, the lead examiners renew Phase 2 recommendation 13b and recommend that Estonia develop training, written guidelines and awareness-raising activities on the modalities for the denial of benefits, as well as detection and reporting of foreign bribery allegations.*

*Finally, with respect to export credits, the lead examiners consider that Phase 2 recommendation 4a remains not implemented. They recommend that Estonia's export credit agency, KredEx (i) consult the Registry of Convictions when considering applications for export credit support; and (ii) raise awareness of the new policy on the reporting obligations of KredEx staff where they encounter suspicions of foreign bribery, and of the management board to report these suspicions to law enforcement authorities.*

## **C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP**

144. The Working Group on Bribery commends the Estonian authorities for their high level of transparency and cooperation throughout the Phase 3 process. Due to previous amendments in 2008, Estonia's foreign bribery offence is now self-contained and largely conforms to the requirements of the Convention. The Working Group also welcomes the draft amendments to the Penal Code and Code of Criminal Procedure currently before Parliament, further streamlining the offence and increasing sanctions against natural persons. Also before Parliament is draft legislation strengthening the offence of arranging a bribe or gratuity. The Working Group is however concerned by other draft amendments to the Criminal Procedure Code (draft law SE 295) which, if passed, could seriously undermine investigative capacities and prosecutorial powers, thus impacting effective enforcement of the foreign bribery offence. The Working Group also regrets that, since Estonia's foreign bribery offence came into force in January 2005, it has not investigated nor prosecuted any cases of bribery of foreign public officials. Since the Phase 2 evaluation of Estonia, two foreign bribery allegations have come to light, but neither has led to any proceedings. Further, the Working Group remains concerned that Estonia's corporate liability regime, despite the recent amendments fixing many legislative deficiencies, remains largely untested in cases of complex financial crimes and may still have shortcomings that could

impede the effective prosecution of legal persons in foreign bribery cases, particularly where a natural person cannot be identified. The Working Group also considers that the prevention and detection of foreign bribery could be improved through increased engagement with Estonian companies, as well as with the accounting and auditing profession, tax authorities, money laundering authorities and reporting entities, and through clarification of whistleblower protection in the private sector.

145. Regarding outstanding recommendations from previous evaluations, Estonia has fully implemented Phase 2 recommendations 7(a), (c) and (d), and 14(a). Estonia has partially implemented recommendations 1(a) and (b), 2(a) and (b), 3, 6, 7(b), 13(b) and 14(b). Recommendations 4(a), 10, 12 and 13(a) remain unimplemented.

146. In conclusion, based on the findings in this report on the implementation by Estonia of the Anti-Bribery Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below. The Working Group invites Estonia to report orally on implementation of recommendations 1(a), 2(a), 3, 9 and 10(b) in one year (i.e., in June 2015). The Working Group invites Estonia to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., in June 2016).

## **1. Recommendations of the Working Group**

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

1. Regarding the offence of bribing a foreign public official, the Working Group recommends that Estonia:
  - a) Proceed with the adoption of legislation strengthening the offence of arranging a bribe or gratuity by increasing the applicable sanctions and allowing the use of special investigative techniques [Convention, Article 1];
  - b) Provide appropriate guidance to the relevant authorities, once the new legislation has been passed, on the difference between arranging a bribe or gratuity and aiding and abetting, in particular when one offence should be applied over the other [Convention, Article 1].
2. Regarding the investigation and prosecution of foreign bribery, taking into account the increasing risk of foreign bribery by Estonian companies, the Working Group recommends that Estonia:
  - a) Take steps to more proactively gather information at the pre-investigation stage to increase the sources of allegations and enhance investigations by considering all available sources and engaging with stakeholders involved in anti-money laundering, accounting and auditing, tax, as well as in private business [Convention, Article 5; 2009 Recommendations III, IX and X];
  - b) Ensure that the level of resources, training and expertise among law enforcement authorities is sufficient to allow for effective investigation and prosecution of foreign bribery cases [Convention, Article 5];
  - c) Provide appropriate guidance on, inter alia, factors to be taken into account when considering whether to enter into settlement agreements and the degree of mitigation of



- sanctions, to ensure that plea-bargaining does not impede the effective enforcement of foreign bribery [Convention, Article 5];
- d) Amend its legislation to allow MLA requests to toll the statute of limitations in foreign bribery cases [Phase 2 recommendation 10; Convention, Articles 5, 6 and 9];
  - e) Ensure that any amendments envisaged to the Code of Criminal Procedure do not affect the effective investigation and prosecution of the foreign bribery offence, in particular as concerns (1) the availability of special investigative techniques for all foreign bribery offences; (2) the time limit set on investigation periods; and (3) the possibility for prosecutors to appeal court decisions on grounds of misvaluation of evidence [Convention, Article 5].
3. Regarding the liability of legal persons, the Working Group recommends that Estonia:
- a) Take steps, including by clarifying existing procedure and legislation as necessary, to ensure that in practice, proceedings against a natural person are not a prerequisite to proceedings against a legal person involved in a foreign bribery scheme [Convention, Article 2; Annex I to the 2009 Anti-Bribery Recommendation];
  - b) Take all necessary steps to clarify the terminology on “competent representatives” and “in the interest of the legal person”, whether by issuing an interpretive note to the draft amendment or through other means as appropriate under Estonian law, with a view to ensuring that interpretation of these provisions is harmonized and in conformity with the Convention and 2009 Anti-Bribery Recommendation [Convention, Article 2; Annex I to the 2009 Anti-Bribery Recommendation];
  - c) Address as a matter of urgency the potential loopholes in Estonia’s corporate liability framework through which a company might delay court proceedings and avoid liability [Convention, Article 2].
4. Regarding the provision of mutual legal assistance in cases of transnational bribery, the Working Group recommends that Estonia proceed with its expressed intention to amend its legislation to clarify that international cooperation shall not be denied based on considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved [Convention, Articles 5 and 9].
5. Regarding sanctions and confiscation in cases of transnational bribery, the Working Group recommends that Estonia :
- a) Take the necessary steps, such as through providing guidance and training, to ensure that its law enforcement authorities routinely consider confiscation in foreign bribery cases [Convention, Article 3];
  - b) Maintain comprehensive statistics on the application of sanctions and confiscation measures imposed against natural and legal persons in cases of foreign bribery and false accounting offences [Convention, Articles 3 and 8].

***Recommendations for ensuring effective prevention and detection of foreign bribery***

6. Regarding money laundering, the Working Group recommends that Estonia:

- a) Increase awareness and training among the Financial Intelligence Unit and reporting entities on mechanisms to detect transactions that could potentially involve the laundering of proceeds of foreign bribery [Convention, Article 7; 2009 Recommendation III.(i)];
  - b) Increase resources dedicated to the analysis of STRs to more effectively make use of collected information [Convention, Article 7; 2009 Recommendations III.(iv) and IX.(ii)].
7. Regarding accounting requirements, external audit and internal controls, ethics and compliance, the Working Group recommends that Estonia:
- a) Amend its Penal Code to ensure (i) that the false accounting offences cover all of the activities described in Article 8(1) of the Convention; and (ii) that sanctions for false accounting are effective, proportionate and dissuasive [Phase 2 recommendation 12; Convention, Article 8];
  - b) Engage with the accounting and auditing profession to raise awareness of the foreign bribery offence, and encourage the profession to develop specific training [Phase 2 recommendation 2(a); Convention, Article 8];
  - c) Promote among Estonian companies active in foreign markets, including SMEs, the adoption of effective internal controls, ethics and compliance measures designed to prevent and detect foreign bribery, for instance by disseminating the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation X.C. and Annex II].
8. With respect to tax-related measures, the Working Group recommends that Estonia:
- a) Increase awareness and training of tax officials on detection and reporting of foreign bribery [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)];
  - b) Provide clear guidance to tax officials on the reporting of foreign bribery suspicions to law enforcement authorities, and disseminate the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)].
9. Regarding awareness-raising, the Working Group recommends that Estonia:
- a) Raise the awareness of and provide training on foreign bribery within the public sector agencies involved with Estonian companies operating abroad, including overseas diplomatic representations, as well as the Ministries of Justice, Internal Affairs, Finance and Economic Affairs and Communications [Phase 2 recommendations 1(a) and 1(b); 2009 Recommendation III.(i)];
  - b) Actively and promptly raise awareness within the private sector, in particular SMEs, on foreign bribery risks in international business transactions, in coordination with business organisations as appropriate [Phase 2 recommendations 2(a) and 2(b); 2009 Recommendation III.(i)].
10. With respect to the reporting of foreign bribery and whistleblower protection, the Working Group recommends that Estonia:

- a) Ensure that (i) all public officials who could play a role in detecting acts of foreign bribery, including in overseas representations, are made aware of their duty not to conceal suspected acts of foreign bribery involving Estonian individuals or companies, and encourage them to report such acts; and, (ii) easily accessible channels are in place for the reporting to law enforcement authorities of suspected acts of foreign bribery [2009 Recommendation IX.(iii)];
- b) (i) Amend its legislation or otherwise expressly clarify the application of whistleblower protection provisions to private sector employees with a view to ensuring that appropriate measures are in place to protect them from discriminatory or disciplinary action where they report suspicions of foreign bribery, and (ii) raise awareness of the public and private sector on the protection afforded to them under the law [2009 Recommendations III.(i) and IX.(iii)].

11. Regarding public advantages, the Working Group recommends that Estonia:

- a) Consider adopting more streamlined processes, including systematic checking of the Registry of Convictions in public procurement procedures and when considering applications for export credit support [2009 Recommendation XI.(i); 2006 Export Credit Recommendations 1(f) and 1(g)];
- b) Consider requiring the consultation of international financial institutions debarment lists in the granting of public advantages, including public procurement and ODA [2009 Recommendation XI.(i)];
- c) Provide training and information, including written guidelines and awareness-raising activities, on the modalities for the denial of benefits, as well as detection and reporting of suspicions of foreign bribery [Phase 2 recommendation 13(b), Convention, Article 3(4); 2009 Recommendation VI];
- d) Raise awareness of the new policy on the reporting obligations of (i) KredEx staff to law enforcement authorities where they encounter suspicions of foreign bribery, and (ii) the management board to law enforcement authorities [Phase 2 recommendation 4(a); 2009 Recommendation XII.(ii); 2006 Export Credit Recommendation 1(h)].

**2. Follow-up by the Working Group**

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

- a) The status of draft legislation changing the language of Penal Code section 288(4) from “taking advantage of [...] official position” to “use of official position” and subsequent judicial interpretation of this phrase;
- b) The application of the foreign bribery offence in practice to ensure that reliance on foreign law is not the only element relied upon to establish the foreign public official’s position;
- c) The application in practice of the liability of legal persons for acts committed by intermediaries, including related legal persons;

- d) The application of nationality jurisdiction over legal persons, particularly where (i) the legal person only offered or promised to bribe abroad, or (ii) where Estonia does not have jurisdiction over the natural person;
- e) The exercise of jurisdiction over natural persons through the newly broadened universality principle;
- f) The flow of information to the relevant investigative authorities to ensure that foreign bribery allegations are effectively investigated, in particular in light of the recent reorganisation within the Police;
- g) That investigations and prosecutions of foreign bribery cases are not influenced by the factors prohibited under Article 5 of the Convention, notably to assess whether recent amendments to the Prosecutor's Office Act are sufficient to ensure the independence of prosecutors;
- h) The application of the "reasonable time" criteria, to ensure that it does not result in the premature termination of foreign bribery cases;
- i) The application of section 205 of the CPC on co-operating offenders to ensure that its application does not prevent effective prosecution of an Estonian active briber who cooperated with foreign authorities;
- j) The application of plea bargaining ("settlement agreements") in foreign bribery cases;
- k) The detection of foreign bribery allegations through money laundering cases;
- l) The application of the non-tax deductibility of bribes in practice, particularly whether tax authorities examine the tax returns of taxpayers convicted of foreign bribery; and,
- m) The application of whistleblower protection in the public sector.

**ANNEX 1: PHASE 2 RECOMMENDATIONS TO ESTONIA AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY IN 2010**

	<i>PHASE 2 RECOMMENDATIONS – 2008</i> <sup>158</sup>	<i>Written Follow-Up – 2010</i> <sup>159</sup>
<b><i>Recommendations for Preventing and Detecting Bribery of Foreign Public Officials</i></b>		
1.	Regarding <u>awareness-raising in the public sector</u> , the Working Group recommends that Estonia take steps to:	
	a) Raise the level of awareness of the Convention and foreign bribery within overseas diplomatic representations, law enforcement, prosecutor’s offices, the judiciary, as well as the Ministries of Justice, Internal Affairs, Finance (including tax officials), and Economic Affairs and Communications; and,	Partially Implemented
	b) Provide training to personnel in these bodies on relevant issues where appropriate (Revised Recommendation I).	Partially Implemented
2.	Regarding <u>measures in the private sector</u> , the Working Group recommends that Estonia:	
	a) Raise awareness of the Convention and foreign bribery among the public generally, as well as specifically within the business sector, and the accounting and auditing professions (Revised Recommendation I); and,	Partially Implemented
	b) Take steps to assist the business community to prevent and detect foreign bribery, including by developing tools to that end (Revised Recommendation I).	Not Implemented
3.	Regarding <u>whistleblower protection</u> , the Working Group recommends that Estonia strengthen measures for protecting whistleblowers, in order to encourage public and private sector employees to report acts of foreign bribery without fear of reprisals or dismissal (Revised Recommendation I).	Not Implemented
4.	Regarding the <u>reporting</u> of foreign bribery, the Working Group recommends that Estonia:	
	a) Ensure that suspicions of foreign bribery detected by employees of KredEx are reported to law enforcement (Revised Recommendation I); and,	Not Implemented
	b) Require auditors to report indications of a possible illegal act of bribery to management and corporate monitoring bodies, and consider requiring auditors to report such indications to the competent authorities (Revised Recommendation V.B.iii and iv).	Fully Implemented
5.	Regarding <u>official development assistance (ODA)</u> , the Working Group recommends that Estonia:	
	a) Further raise awareness of foreign bribery among staff and project partners involved in ODA, including by providing training (Revised Recommendation I); and,	Fully Implemented
	b) Incorporate an anti-bribery declaration in its standard contract for ODA-funded projects (Revised Recommendation I).	Fully Implemented
6.	Regarding <u>taxation</u> , the Working Group recommends that Estonia make additional efforts to train tax officials on bribery detection and reporting, and to raise their awareness of foreign bribery (Revised Recommendation I).	Partially Implemented

<sup>158</sup> This column sets out the recommendations of the Working Group on Bribery to Estonia, as adopted in June 2008 in [Estonia’s Phase 2 Report](#).

<sup>159</sup> This column sets out the findings of the Working Group on Bribery on [Estonia’s Written Follow-up Report to Phase 2](#), as adopted by the Working Group in October 2010.

<b>Recommendations for Effective Investigation and Prosecution of Foreign Bribery and Related Offences</b>		
7.	Regarding the <u>investigation and prosecution</u> of foreign bribery cases, the Working Group recommends that Estonia:	
	a) Train new and practising prosecutors, police officers and judges on the offence of foreign bribery and the investigation of legal persons (particularly in bribery cases) (Convention Article 5; Revised Recommendation I); and,	Partially Implemented
	b) Take steps to ensure (i) prosecutorial independence in foreign bribery cases, (ii) that terminations of foreign bribery prosecutions under Section 204 of the Criminal Procedure Code are consistent with Article 5 and Commentary 27 of the Convention, and (iii) that plea bargaining and the provision of immunity to co-operating offenders do not impede the effective enforcement of the foreign bribery offence (Convention Article 5);	Partially Implemented
	c) Amend its legislation to make special investigative techniques available for all cases of foreign bribery where appropriate (Convention, Article 5; Revised Recommendation I); and,	Not Implemented
	d) Transmit as soon as possible information in foreign bribery cases to the competent authorities in foreign states whenever such information could be relevant to an investigation in that state (Convention, Article 9(1); Revised Recommendation VII.i).	Not Implemented
8.	Regarding the <u>offence of foreign bribery</u> , the Working Group recommends that Estonia:	
	a) Amend its Penal Code to define an autonomous foreign bribery offence that fully complies with the requirements of the Convention (Convention, Article 1);	Fully Implemented
	b) Amend its Penal Code to expressly cover bribery of foreign public officials who perform legislative functions (Convention, Article 1);	Fully Implemented
	c) Ensure that it covers all acts in relation to the performance of an official's duties, including any use of the public official's position, whether or not within the official's authorised competence (Convention, Article 1).	Fully Implemented
9.	Regarding the <u>liability of legal persons</u> for foreign bribery, the Working Group recommends that Estonia:	
	a) Amend its Penal Code to broaden the criteria for the liability of legal persons in order to make prosecution of legal persons that commit foreign bribery more likely and more effective (Convention, Articles 2 and 3(2)); and,	Fully Implemented
	b) Establish nationality jurisdiction to prosecute legal persons for foreign bribery (Convention, Articles 2, 3(2) and 4(2)).	Fully Implemented
10.	Regarding the <u>limitation period</u> for prosecuting foreign bribery, the Working Group recommends that Estonia consider whether the limitation period allows adequate time for the investigation and prosecution of this offence, especially in light of the fact that the making of an MLA request does not interrupt or suspend the limitation period (Convention, Article 6).	Not Implemented
11.	Regarding <u>money laundering</u> , the Working Group recommends that Estonia:	
	a) Examine why it has a low number of convictions for money laundering; and,	Fully Implemented
	b) Clarify whether its money laundering offence covers the laundering of a bribe, and whether the predicate offence for money laundering must be a crime at the place where it occurred (Convention, Article 7).	Fully Implemented
12.	Regarding <u>false accounting</u> , the Working Group recommends that Estonia (a) amend the Penal Code to ensure that the false accounting offences cover all of the activities described in Article 8(1) of the Convention, and (b) take steps to ensure that sanctions for false accounting are effective, proportionate and dissuasive (Convention, Article 8).	Not Implemented

13.	Regarding <u>sanctions</u> for foreign bribery, the Working Group recommends that Estonia:	
	a) Take steps to ensure that sanctions for arranging a bribe and arranging a gratuity are effective, proportionate and dissuasive (Convention, Article 3); and,	Not Implemented
	b) Establish formal, written policies for denying ODA contracts and export credit support to legal and natural persons who have been convicted of foreign bribery (Convention, Article 3(4); Revised Recommendation VI).	Partially Implemented
14.	Regarding <u>statistics</u> , the Working Group recommends that Estonia:	
	a) Maintain more consistent statistics on investigations, prosecutions, convictions and sanctions involving the money laundering offence, including the identification of predicate offences for money laundering (Convention, Articles 7 and 8); and,	Partially Implemented
	b) Maintain statistics on the sanctions (including confiscation) imposed against natural and legal persons for false accounting, money laundering, domestic bribery, and foreign bribery (Convention, Article 3).	Partially Implemented

#### **Follow-up by the Working Group**

15. The Working Group will follow up the issues below as practice develops:

- a) Termination of proceedings under Section 202 of the Criminal Procedure Code, plea bargaining, and granting immunity to co-operating offenders (Convention, Article 5).
- b) Prosecutorial independence in foreign bribery cases (Convention, Article 5).
- c) Whether Estonia considers the factors listed in Article 5 and Commentary 27 of the Convention when denying extradition or MLA (Convention, Article 5).
- d) Impact of cross-references between the foreign bribery offence and other Estonian statutes on the enforcement and visibility of the offence (Convention, Article 1; Revised Recommendation I).
- e) Dual criminality requirement on nationality jurisdiction to prosecute natural persons for foreign bribery, and the absence of nationality jurisdiction to prosecute legal persons for foreign bribery (Convention, Article 4(2)).
- f) Limitation period for investigating and prosecuting foreign bribery (Convention, Article 6).
- g) The number of convictions for money laundering (Convention, Article 7).
- h) Whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred (Convention, Article 7).
- i) Sanctions against natural and legal persons for foreign bribery (Convention Article 3).

## ANNEX 2: LIST OF PARTICIPANTS

### Public Sector

- Ministry of Justice
- Ministry of Foreign Affairs
- Ministry of Internal Affairs
- Ministry of Economic Affairs and Communications
- Ministry of Finance
- Ministry of Interior
- Financial Intelligence Unit of the Central Criminal Police
- Financial Supervision Authority
- Office of the Prosecutor General
- Estonian Supreme Court
- Harju County Court
- Police and Border Guard Board
- Internal Security Service (KAPO)
- Estonian Tax and Customs Board
- Northern District Prosecutor's Office
- Estonian Credit and Export Guarantee Fund (KredEx Krediidikindlustus)
- Law Committee of the Parliament (Riigikogu)

### Private Sector

#### *Private enterprises*

- Swedbank
- Real Systems
- OMX Tallinn Stock Exchange
- ChemiPharm

#### *Business associations*

- Estonian Chamber of Commerce and Industry
- Estonian Association of Small- and Medium-Sized Businesses

#### *Legal profession and academics*

- Tartu University School of Law
- Estonian Bar Association

#### *Accounting and auditing profession*

- Estonian Board of Auditors
- Baker Tilly Baltics

### Civil Society and Media

- Transparency International Estonia
- Open Estonia Foundation
- Jaan Tõnisson Institute
- Association of Estonian Trade Unions



### ANNEX 3: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AML	Anti-money laundering
CCB	Corruption Crimes Bureau
CCP	Central Criminal Police
CPC	Criminal Procedure Code
DPO	District Prosecutor Office
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
FIU	Financial Intelligence Unit
GDP	Gross domestic product
KAPO	Internal Security Service ( <i>Kaitsepolitseiamet</i> ) (formerly known as Security Police Board)
MLA	Mutual legal assistance
MoFA	Ministry of Foreign Affairs
MOJ	Ministry of Justice
NGO	Non-governmental organisation
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
OPG	Office of the Prosecutor General
SME	Small and medium-sized enterprises
STR	Suspicious transaction report
UNCAC	United Nations Convention against Corruption
USD	United States dollar
WGB	Working Group on Bribery

## **ANNEX 4: EXCERPTS FROM RELEVANT LEGISLATION**

### **ANTI-CORRUPTION ACT (2012)**

#### **Section 6 – Notification of incidents of corruption**

- (1) An official is not permitted to conceal violations of the prohibitions specified in subsection 3(1) of this Act or any other incidents of corruption known to the official.
- (2) If agencies performing public duties, their officials, persons exercising supervision over agencies, persons controlling declarations or bodies conducting proceedings concerning an offence are notified of an incident of corruption, the confidentiality of the fact of notification shall be ensured. Information about the fact of notification may be disclosed only with the written consent of the notifier. If the notifier is involved as a witness in the proceedings concerning the offence, the provisions of proceedings concerning the offence apply to incidents of corruption without violating the confidentiality of the fact of notification.
- (3) If the notifier knowingly communicates incorrect information, the confidentiality of the fact of notification shall not be ensured.
- (4) Courts shall apply shared burden of proof for the protection of the person having notified of an incident of corruption. A person having recourse to a court shall state in his or her application the facts based on which it may be presumed that he or she has been subject to unequal treatment. If the person against whom the application was filed does not prove otherwise, it is presumed that unequal treatment was caused by notification of an incident of corruption.
- (5) The principles provided for in this section also apply in the case of notification of an incident of corruption occurred outside the performance of public duties.

### **PENAL CODE**

#### **Section 4 – Degrees of criminal offences**

- (1) Criminal offences are criminal offences in the first and in the second degree.
- (2) A criminal offence in the first degree is an offence the maximum punishment prescribed for which in this Code is imprisonment for a term of more than five years, life imprisonment or compulsory dissolution.
- (3) A criminal offence in the second degree is an offence the punishment prescribed for which in this Code is imprisonment for a term of up to five years or a pecuniary punishment.
- (4) The mitigation or aggravation of a punishment on the basis of the provisions of the General Part of this Code shall not alter the degree of a criminal offence.

#### **Section 6 – Territorial Applicability of Penal Law**

- (1) The penal law of Estonia applies to acts committed within the territory of Estonia.
- (2) The penal law of Estonia applies to acts committed on board of or against ships or aircraft registered in Estonia, regardless of the location of the ship or aircraft at the time of commission of the offence or the penal law of the country where the offence is committed.

#### **Section 7 – Applicability of penal law by reason of person concerned**

- (1) The penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act and if:
  - 1) the act is committed against a citizen of Estonia or a legal person registered in Estonia;
  - 2) 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.
- (2) The penal law of Estonia applies:

- 1) to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of Estonia and the offender is a member of the Defence Forces performing his or her duties;
- 2) to grant, arranging receipt or acceptance of gratuities or bribes or influence peddling committed outside the territory of Estonia if such act was committed by an Estonian citizen, Estonian official or a legal person registered in Estonia, or an alien who has been detained in Estonia and who is not extradited.

#### **Section 14 – Liability of Legal Persons**

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

#### **Section 22 – Accomplice**

- (1) Accomplices are abettors and aiders.
- (2) An abettor is a person who intentionally induces another person to commit an intentional unlawful act.
- (3) An aider is a person who intentionally provides physical, material or moral assistance to an intentional unlawful act of another person.
- (4) Unless otherwise provided by § 24 of this Code, a punishment shall be imposed on an accomplice pursuant to the same provision of law which prescribes the liability of the principal offender.
- (5) In the case of an aider, the court may apply the provisions of § 60 of this Code.

#### **Section 81 – Limitation Period of Offence**

- (1) No one shall be convicted of or punished for the commission of a criminal offence if the following terms have expired between the commission of the criminal offence and the entry into force of the corresponding court judgment:
  - 1) ten years in the case of commission of a criminal offence in the first degree;
  - 2) five years in the case of commission of a criminal offence in the second degree.
 [...]
- (5) The limitation period of a criminal offence is interrupted with the performance of the following procedural act in the criminal proceeding:
  - 1) application of a preventive measure with regard to the suspect or accused, or seizure of his or her property, or property which is the object of money laundering;
  - 2) the prosecution of the accused;
  - 3) adjournment of the hearing of a matter in the case the accused fails to appear;
  - 4) interrogation of the accused in the court hearing;
  - 5) ordering of expert assessment or additional evidence in the court hearing.
- (6) If the limitation period of a criminal offence is interrupted, the limitation period shall commence again with the performance of the procedural act provided in subsection (5) of this section. A person shall however not be convicted of or punished for the commission of a criminal offence if the period between the commission of the criminal offence and the entry into force of the corresponding court judgment is five years longer than the term provided for in subsection (1) of this section.
- (7) The limitation period of offence is interrupted:
  - 1) in the case a suspect, accused or person subject to proceedings absconds from pre-trial proceedings, extra-judicial proceedings or court, until the person is detained or appears before the body conducting the proceedings; [...]
- (8) In the cases provided by clauses (7) 1) and 2) of this section the limitation period shall not be resumed if more than fifteen years have passed from the commission of the criminal offence or more than three years have passed from the commission of the misdemeanour.

#### **Section 288 – Definition of Official**

- (1) For the purposes of the Special Part of this Code, an official is a natural person who holds an official position for the performance of public duties regardless of whether he or she performs the duties

imposed on him or her permanently or temporarily, for a charge or without charge, while in service or engaged in a liberal profession or under a contract, by appointment or election.

[...]

- (3) In the criminal offences specified in §§ 293–298 of this Code, "an official" is also a foreign official. A foreign official is an elected or appointed person who performs the functions of the legislative, executive or judicial power in a foreign state or an administrative unit of any level thereof, or who performs public law functions for a foreign state, its administrative unit, public institution or public undertaking, as well as a public servant or representative of an international organisation in public law, including a member of an international representative body or court.
- (4) Taking advantage of his or her official position by an official of a foreign state is deemed to include commission of an act or omission thereof taking advantage of his or her official position regardless of whether the act is in the competence of the official.

### **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 to him or her or third persons 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, is punishable by a pecuniary punishment or up to 3 years' imprisonment.

[...]

### **Section 294 – Accepting bribe**

- (1) An official who consents to a promise of property or other benefits or who accepts property or other benefits to him or her or third persons 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.

[...]

### **Section 295 – Arranging Receipt of Gratuities**

- (1) Arranging a receipt of gratuity is punishable by a pecuniary punishment or up to one year of imprisonment.
- (2) The same act, if committed:
  - 1) by a person who has previously committed arranging receipt of a bribe or gratuities;
  - 2) or by taking advantage of an official position, is punishable by a pecuniary punishment or up to 3 year' 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 296 – Arranging a Bribe**

- (1) Arranging a bribe is punishable by a pecuniary punishment or up to one year of imprisonment.
- (2) The same act, if committed:
  - 1) by a person who has previously committed arranging receipt of a bribe or gratuities; or
  - 2) by taking advantage of an official position, is punishable by a pecuniary punishment or up to 3 year' 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 297 – Granting of Gratuities**

- (1) Granting or promising a gratuity is punishable by a pecuniary punishment or up to 3 years' imprisonment.
- (2) The same act, if committed:
  - 1) by a person who has previously committed grant of gratuities or a bribe;
  - 2) by a group; or
  - 3) 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 298 – Giving Bribe**

- (1) Giving or promising a bribe is punishable by 1 to 5 years' imprisonment.
- (2) The same act, if committed:
  - 1) by a person who has previously committed grant of a bribe or gratuities;
  - 2) by a group;
  - 3) on a large-scale basis; or
  - 4) with serious consequences, 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 394 – Money Laundering**

- (1) Money laundering shall be punished by a pecuniary punishment or up to 5 years' imprisonment.
- (2) The same act, if: 1) by a group; 2) at least twice; 3) on a large-scale basis; or 4) by a criminal organisation, 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.
- (5) A court may, pursuant to the provisions of § 83 of this Code, apply confiscation of an property which was the direct object of the commission of an offence provided for in this section.
- (6) For the criminal offence provided for in this section, the court shall impose extended confiscation of assets or property acquired by the criminal offence pursuant to the provisions of § 83-2 of this Code.

#### **Section 394-1 – Money Laundering Agreement**

Conclusion of an agreement for the purpose of execution of money laundering, is punishable by a pecuniary punishment or up to one year of imprisonment.

### **CODE OF CRIMINAL PROCEDURE**

#### **Section 202 – Termination of criminal proceedings in case of lack of public interest in proceedings and in case of negligible guilt**

- (1) If the object of criminal proceedings is a criminal offence in the second degree and the guilt of the person suspected or accused of the offence is negligible, and he or she has remedied or has commenced to remedy the damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses, and there is no public interest in the continuation of the criminal proceedings, the Prosecutor's Office may request termination of the criminal proceedings by a court with the consent of the suspect or accused. [...]

#### **Section 204 – Termination of criminal proceedings concerning criminal offences committed by foreign citizens or in foreign states**

- (1) A Prosecutor's Office may terminate criminal proceedings by an order if:
  - 1) The criminal offence was committed outside the territorial applicability of this Code;
  - 2) The criminal offence was committed by a foreign citizen on board a foreign ship or aircraft located in the territory of the Republic of Estonia;
  - 3) An accomplice to the criminal offence committed the criminal offence in the territory of the Republic of Estonia but the consequences of the criminal offence occurred outside the territorial applicability of this Code;
  - 4) A decision concerning extradition of the alleged criminal offender to a foreign state has been made.
- (2) A Prosecutor's Office may, by an order, terminate criminal proceedings concerning a criminal offence which was committed in a foreign state but the consequences of which occurred in the territory of the

Republic of Estonia if the proceedings may result in serious consequences for the Republic of Estonia or are in conflict with other public interests.

- (3) Termination of criminal proceedings on the basis of economic interests, interests in the field of foreign policy or other considerations is not permitted if this is contrary to an international agreement binding to Estonia.

#### **Section 205-2 – Termination of criminal proceedings in connection with expiry of reasonable time of processing**

If it becomes evident in pre-trial procedure that a criminal matter cannot be adjudicated within a reasonable time of proceedings, the Public Prosecutor's Office may terminate the criminal proceedings by an order with the consent of the suspect taking into account the gravity of the criminal offence, complexity and extent of the criminal matter, current course of the criminal proceeding and other circumstances.

#### **Section 436 – Prohibition on international co-operation in criminal procedure**

- (1) 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.

### **CIVIL CODE**

#### **Section 115 – Entry into transaction through representative**

- (1) A transaction may be entered into through a representative. A transaction entered into by a representative is valid with regard to the principal if the representative entered into the transaction on behalf of the principal and the representative had the right of representation in entry into the transaction.

#### **Section 116 – Entry into transaction on behalf of principal**

- (1) A representative may enter into a transaction directly on behalf of the principal; entry into a transaction on behalf of the principal may also arise from the circumstances relating to the transaction.
- (2) If a transaction is entered into by an employee of a person engaged in economic or professional activity or by any other person for whom the person engaged in economic or professional activity is responsible, and the transaction is related to such economic or professional activity, the transaction is presumed to be performed on behalf of the person engaged in economic or professional activity.

#### **Section 117 – Right of representation**

- (1) Right of representation is a collection of rights within the limits of which a representative may act on behalf of the principal.
- (2) A right of representation may be granted by a transaction (authorisation) or it may arise from law (right of representation arising from law).

### **MONEY LAUNDERING AND TERRORIST PREVENTION ACT (2007)**

#### **Section 4 – Money laundering**

- (1) Money laundering means:
  - 1) concealment or maintenance of the confidentiality of the true nature, origin, location, manner of disposal, relocation or right of ownership or other property-related acquired as a result of a criminal activity or property acquired instead of such property;
  - 2) conversion, transfer, acquisition, possession or use of property acquired as a result of a criminal activity or property acquired instead of such property with the purpose of concealing the illicit origin of the property or assisting a person who participated in the criminal activity so that the person could escape the legal consequences of his or her actions.
- (2) Money laundering also means a situation whereby a criminal activity, as a result of which the property used in money laundering was acquired, occurred in the territory of another state.

## **PUBLIC PROCUREMENT ACT (2007)**

### **Section 38 – Exclusion of tenderer and candidate from procurement procedure**

- (1) A contracting authority will not award a public contract to a person and will exclude from a procurement procedure a tenderer or candidate: 1) who or whose legal representative has been convicted of organising a criminal group or belonging thereto or violating the requirements of public procurement or fraud or committing offences relating to professional misconduct or money laundering or tax offences in criminal or misdemeanour proceedings, and whose data concerning the conviction have not been deleted from the registry of convictions in accordance with the Registry of Convictions Act or whose conviction is valid in accordance with the legislation of their country of residence or country of location;  
[...]
- (5) If a contracting authority has justified doubts that the grounds specified in clauses 1) to 4) of subsection (1) of this section exist with regard to a tenderer or candidate, the contracting authority may request from the tenderer or candidate a relevant certificate of the registry of convictions on the absence of the specified grounds or submit an enquiry to the authorised processor of the registry of convictions or request an equivalent document issued by a court or an administrative authority of the country of location of the tenderer or candidate or a certificate issued by any other competent authority or written authorisation of the tenderer or candidate for addressing relevant authorities in order to obtain a confirmation of the absence of the given grounds. If the country of location of the tenderer or candidate issues does not issue such documents, these may be replaced by a testimony given by the tenderer or candidate or their representative under oath or with a testimony given before the competent justice or administrative authority or notary public or professional association in accordance with the legislation of the country of location of the tenderer or candidate.

## **REGISTRY OF CONVICTIONS ACT (2011)**

### **Section 7 – Accessibility of register data**

- (1) The data entered in the register are public, except in the cases provided by law.
- (2) Register data are processed only under the conditions and pursuant to the procedure provided by law.

### **Section 15 – Right to obtain data from register**

- (1) Everyone has the right to obtain data from the register, unless otherwise provided by law.
- (2) Data shall be released from the register on the basis of an inquiry setting out the following:
  - 1) the person concerning whom the data are requested;
  - 2) the name and personal identification code of the applicant, in the absence of a personal identification code, the date of birth;
  - 3) if the data are requested on behalf of a legal person, the name and the registry code of the legal person shall be also indicated or, in the case of a foreign legal person without a registration number, the number or letter combination considered equal to a registration number;
  - 4) the address or e-mail address of the applicant;
  - 5) the name and number of the identity document of the applicant.
  - 6) the signature in the case of paper applications, the digital signature in the case of an application submitted by e-mail.
- (3) Registry data regarding a minor, data from the archives of the register and data obtained from another member state of the European Union shall be issued under the conditions and pursuant to the procedures provided for in this Act.

### **Section 24 – Terms for deletion of information concerning punishment from register**

- (1) Information concerning punishment shall be deleted from the register and transferred to the archives if:  
[...]
  - 5) three years have passed since the enforcement of a pecuniary punishment judgment imposed for a criminal offence;
  - 6) three years have passed since the end of the probationary period determined upon release on parole or conditional release from a pecuniary punishment; [...]

- 8) five years have passed since an imprisonment of less than five years was served;
- 9) ten years have passed since an imprisonment of five to twenty years was served; [...]
- 12) the person has died;
- 13) the legal person is dissolved.

[...]

- (6) [...] [T]he information concerning punishments imposed for criminal offences shall be preserved in the archives for 50 years as of the date of transfer to the archives.