POLAND

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Poland signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD Secretary-General on September 8, 2000. On September 9, 2000, it enacted implementing legislation in the form of the *Act of 9 September 2000 on the amendment to the Act –Penal Code, the Act –Code of Criminal Procedure, the Act on Combating Unfair Competition, the Act on Public Orders and the Act –Banking Law*, which came into force on February 4, 2001.

Convention as a Whole

To meet the requirements of the Convention, Poland amended several pieces of legislation (listed above in the title of the implementing Act). Poland concluded that a simple extension of the domestic bribery offence would satisfy the requirements of the Convention, and established criminal liability for the active bribery of a foreign public official through an amendment to the Penal Code by adding a new paragraph to article 229. According to Poland, this approach allows the use of the same terminology and interpretations of the domestic bribery offence that have already been developed. Poland also amended provisions of the General Part of the Penal Code on forfeiture in order to satisfy the requirements of the Convention concerning confiscation of the proceeds gained through bribery.

Additionally, to implement the requirement of the Convention to establish the responsibility of legal persons for the offence of bribery, Poland introduced amendments to the Act on Combating Unfair Competition, which establishes administrative responsibility for legal persons by deeming bribery to be an act of unfair competition.

Pursuant to article 87.1 of the Polish Constitution, "ratified international agreements" are one of the legal sources universally binding in Poland. Article 91 states that, a ratified international agreement, after its promulgation in the Journal of Laws, constitutes a part of the domestic legal order, and is directly applicable unless its application depends on the enactment of a statute. Moreover, an international agreement ratified upon a "prior consent granted by statute" has precedence over provisions of a domestic law if they do not reconcile with the agreement. Therefore, it would appear that the Convention has precedence over domestic law in Poland. However, since the Polish Constitution requires statutes in domestic law in order to limit constitutional rights, the provisions on constituent elements of the offence (i.e. Article 1 of the Convention) are not directly applicable.

Under the Polish legal system, judicial decisions are not legally binding on the courts except under certain circumstances[1]. However, according to the Polish authorities, in practice, the courts treat Supreme Court decisions as binding.

[1] For instance: 1) it is binding where a valid decision establishes new rights or relationships (art. 8.2 of the Code of Criminal Procedure); 2) where the Appellate Court refers a question of substantial interpretation of law to the Supreme Court, its resolution shall be binding on the Appellate Court (art. 441); and 3) the legal opinion, etc. of the Appellate Court shall be binding on the court to which the case has been remanded for re-examination (art.442).

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

Poland translates article 229.5 of the Penal Code, which was added by amendment to establish the offence of bribing a foreign public official, as follows:

> *To the penalties provided for in sections 1- 4 respectively shall be subject also the person, who provides or promises to provide a material or personal benefit to a person performing public function in foreign state or in international organisation, in relation to the performance of that function.*

Thus, it is necessary to refer to the relevant penalties for domestic bribery contained in articles 229.1-4 in order to determine the penalties for the bribery of a foreign public official. Sections (1) to (4) of article 229, state as follows:

1) *Whoever provides a material or personal benefit or promises to provide it to a person performing public functions, in connection with the performance of this function shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.*
2) *In the event that the act is of less significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.*
3) *If the perpetrator of an act prescribed in section 1 acts in order to induce a person performing public functions to breach the law or provides such a benefit to that person for a breach of the law shall be subject to the penalty of deprivation of liberty for a term of between 1 year and 10 years.*
4) *Whoever provides or promises to provide to the person performing public function, in relation to the performance of that function, a material benefit of a considerable value, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.*

Pursuant to article 229, the severity of the penalties for both domestic and foreign bribery cases depends on the nature of the act of the public official that the briber intends to induce in exchange for the bribe, as well as the value of the bribe.

General Defences & Mitigation of Penalty

Articles 28 to 30 provide the general defences pursuant to which a person is exempted from liability for a prohibited act committed in the following circumstances:

1. Being in error as to a circumstance constituting a feature of a prohibited act (article 28.1).
2. With a justified but mistaken conviction that a circumstance has occurred which excludes unlawfulness or guilt ("circumstances excluding guilt" and "circumstances excluding unlawfulness") (article 29).
3. Being justifiably unaware of the act's unlawfulness (article 30).

In addition, an offender benefits from an extraordinary mitigation of penalty (articles 29/30) or a less severe penalty (article 28.2) when he/ she commits an offence in the following circumstance:

1. With the justified but mistaken conviction that a circumstance has occurred that constitutes a feature of a prohibited act carrying a less severe penalty (article 28.2).

2. With an unjustified mistaken conviction that a circumstance has occurred that excludes unlawfulness or guilt (article 29).
3. Being unaware of the act's unlawfulness by mistake not justifiable (article 30).

These defences pertain to the notion of mistake of fact and mistake of law. The Polish authorities do not believe that article 28 would contravene Commentary 4 or 7 of the Convention. In addition, the Polish authorities confirm that article 30 would not contradict Commentary 8 of the Convention since for the advantage to be lawful, it would have to be permitted or required by the written law of the foreign public official's country, including case law. Furthermore, Poland confirms that ignorance of Polish law including article 229 of the Penal Code would not be covered by these defences or subject to mitigation of penalties.

Where an extraordinary mitigation of penalty applies, the reduction in penalty is made pursuant to the relevant subsection of article 60.6 or article 60.7 of the Penal Code. In the case of the principal offence (article 229.1), the penalty is reduced to a fine or a restriction of liberty[2], and in the case of the aggravated offences (articles 229.3 and 229.4), it is reduced to a fine, a restriction of liberty, or a deprivation of liberty[3]. In the case of the mitigated offence (article 229.2), the imposition of penalty is renounced or a penal measure[4] is imposed[5].

1.1. The Elements of the Offence

1.1.1 any person

Article 229.5 applies to "whoever" gives or promises to give a bribe to a foreign public official. Pursuant to article 10 of the Penal Code, only persons who have attained the age of 17 years at the time of the commission of the offence are liable under the Penal Code.

1.1.2 intentionally

The Polish authorities explain that pursuant to article 9.1 in the General Part of the Penal Code, a "prohibited act is committed with intent", which means that the perpetrator is aware that he/she is providing, promising or offering a material or personal benefit to a person performing a public function and "wants to perform the act", or with *dolus eventualis*. However, Poland states that, in practice, *dolus eventualis* seems to apply only to the aggravated offences.

1.1.3 to offer, promise, or give

Article 229 of the Penal Code only refers to a person who "provides"(*"udzielac"*) or "promises to provide" a bribe and does not expressly cover a person who "offers" a bribe. However, the Polish authorities state that, despite the lack of judicial decisions or other legal authorities in this regard, the term "promises to provide" covers the acts of both promising and offering.

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[2] See article 60.6.3 of the Penal Code.

[3] See article 60.6.2 of the Penal Code.

[4] Penal measures under article 39 sections 2-8 are applicable. These include: 1) an interdiction preventing the occupation of specific posts, the exercise of specific professions or the performance of specific economic activities, 2) an interdiction on driving vehicles, 3) the forfeiture of items, 4) an obligation to redress the damage, 5) a supplementary payment to an injured party or for a public purpose, and 6) pecuniary consideration.

[5] See article 60.7 of the Penal Code.

1.1.4 any undue pecuniary or other advantage

Article 229.5 of the Penal Code applies to the providing etc. of "a material or personal benefit" to a foreign public official. There is no definition of this term in the Penal Code. However, according to case law, "material" benefit has a monetary value and covers an increase in assets or reduction of debts[6]. The Polish authorities confirm that all pecuniary advantages, tangible and intangible, real and personal, are covered by this term. They state that in contrast, a "personal" benefit is a benefit that has no monetary value, and improvement of professional status, promotion, limitation of professional duties, facilitating to meet important persons, support to get a post or receive state honours, and teaching a profession could be considered personal benefits. Poland states that where there is a doubt about the nature of the advantage, the decisive factor would be whether it mainly satisfies material or non-material needs. It is notable that article 229.4, which establishes the offence of aggravated bribery, only applies where the bribe involves a "material" benefit.

The Polish authorities confirm that the offence of bribery of a foreign public official applies regardless if the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business (Commentary 4). Also, the Polish authorities confirm that considerations such as the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage (Commentary 7) will not be taken into account in determining the liability. However, according to the Polish authorities, these factors could be taken into account when the court determines the severity of the sanction.

1.1.5 whether directly or through intermediaries

Article 229 does not expressly apply to bribes made through intermediaries. However, Poland states that the general provisions of the Penal Code on complicity apply to punish the briber who bribes through an intermediary. Pursuant to article 18.1 of the Penal Code, the person who has directed the commission of a prohibited act by another person, or who has taken advantage of the subordination of another person to him/her to order that person to commit a prohibited act, is responsible for the act as a perpetrator. Poland states that this would cover the case where an intermediary acts with knowledge and commits the offence himself/ herself, as well as where, for example, an intermediary is used for delivering/ exchanging information between the briber and the official, or for delivering the advantage.

As article 18.1 only seems to cover cases where a person "directs" or "orders" another person to commit a prohibited act, it would not cover cases where intermediaries are not aware of the intent of the briber to commit an offence. However, the Polish authorities confirm that where the intermediary has no knowledge about the bribe, he/ she is only a "tool" and the act is entirely committed by the person using such an intermediary. Thus, Polish law covers bribes made through an intermediary where he/ she is not aware of the briber's intent.

Article 18.1 requires the briber to "direct" another person or "take advantage of the subordination of another person" and "order" such person. This seems to require that the briber exercise control over the intermediary. However, the Polish authorities state that the term "direct" requires that the briber

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[6] Resolution of the Supreme Court, entire Penal chamber, of 30 January 1980, case VII KZP 41/ 78: "Material benefit is every increase of property of the person himself/herself or of the third party, or avoidance of a loss, with the only exception for the benefits to which the perpetrator or other person had been entitled in accordance with legal relation existing at the moment of commission of the offence."

exercise "the factual control" over the intermediary, which means that the briber initiates the action of the intermediary and is able to halt his/ her action.

1.1.6 to a foreign public official

Article 229.5 of the Penal Code applies to bribes given to a "person performing a public function in a foreign state or in an international organisation". The Penal Code does not provide a definition of the term "person performing a public function", which is identical for both the domestic and foreign bribery offences. However, article 115.13 of the Penal Code, which applies to a number of offences other than the bribery offences, defines the term "public official" as follows:

A public official is:
1) *the President of the Republic of Poland;*
2) *a deputy to the Sejm, a senator, a councillor;*
3) *a judge, a lay-judge, a state prosecutor, a notary public, a court executive officer [komornik], a professional court probation officer, a person adjudicating in cases of contraventions or in disciplinary authorities operating in pursuance of a law;*
4) *a person who is an employee in a state administration, other state authority or local government, except when he performs only service-type work, and also other persons to the extent in which they are authorised to render administrative decisions;*
5) *a person who is an employee of a state auditing and inspection authority or of a local government auditing and inspection authority, except when he performs only service-type work;*
6) *a person who occupies a managerial post in another state institution;*
7) *an official of an authority responsible for the protection of public security or an official of the State Prison Service;*
8) *a person performing active military service*.

According to Poland, although Polish law does not provide a definition of a "person performing a public function", the courts have stated that a "person defined as a 'public official' is always performing a public function". In addition, the Supreme Court[7] states that the offence of passive bribery, which employs the same terminology, could be committed by a public official or by any other person, if this person is performing a public function. The Polish authorities consider that it is therefore clear that the term "person performing a public function" has a broader scope than the definition in article 115.13. Poland states that, with respect to the foreign bribery offence, the same rule would apply. Thus, the court would first examine whether the person in question occupies a post for a foreign state comparable to one of those enumerated in article 115.13, and if so, the person would be considered as a "person performing a public function in a foreign state". If the person does not fall within this scope, then the court would determine whether he/ she performs a "public function". There is no general definition in the statute or case law for "public function". However, the Polish authorities explain that a legal doctrine, which consists of an analysis of case law, states that a "person performing a public function" is someone whose activities in a public sphere are regulated by law. They confirm that in determining whether a person is performing a "public function", the court does not have to refer to the law of the public official's country.

In addition, although there are certain categories of persons who are excluded from the definition of "public official" under article 115.13 (e.g. an employee of a state administration performing only "service-type work") or who are not expressly covered thereunder (e.g. a person who exercises a public function for a public agency or a public enterprise), the Polish authorities emphasise that such

[7] Resolution of the Supreme Court of 3 June 1970, case VI KZP 27/ 70

persons might be covered as a "person performing a public function". For instance, they state that employees, etc. of a public enterprise or a public agency are covered by case law[8]. However, both the statute and case law do not define the term "service type work". The Polish authorities confirm that a person who issues or influences decisions of the entity cannot be considered as such. However, the Polish authorities are not certain whether secretarial work would fall within the scope of "service-type work", and in the event it does, whether it would be included in a "public function". Poland nevertheless believes that the court would interpret the term "public function" broadly enough to cover all the categories of foreign public officials enumerated in the Convention; however, it is up to the judiciary to decide in each case what is covered by a "public function".

Article 229.5 describes a foreign public official as a person performing a public function "in" a foreign state or "in" an international organisation. Poland confirms that this does not indicate the place of the performance of such function. However, the term "foreign state" and "international organisation" are not defined in the Penal Code.

Poland confirms that a "foreign state" includes all levels and subdivisions of government, from national to local, and any organised foreign area or entity, such as an autonomous territory or a separate customs territory. Also, Poland confirms that an "international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence.

1.1.7 for that official or for a third party

Article 229.5 of the Penal Code does not expressly refer to third party beneficiaries. Poland states that it is covered pursuant to article 115.4, which defines the term "material benefit" as one for: 1) the person himself; 2) another natural or legal person; 3) an organisational unit not having the status of a legal person; or 4) a group of persons pursuing an organised criminal activity. Article 229.5 applies in respect of the promising, etc. of a "material benefit" to a person performing a public function and this formulation appears to require that the advantage be given, etc. directly (i.e. physically) to the foreign public official, regardless of who it shall benefit. However, the Polish authorities confirm that, despite the lack of judicial decisions, the case where a material benefit goes directly to the third party would be covered. Poland explains that the Polish term "*udzielac*", which is translated as "provide", has a broad meaning covering any form of transfer from one party to another, not limited to a physical transfer of items, and thus, it is not required that the benefit be transferred physically to the foreign public official.
However, since article 115.4 only refers to a "material benefit", the case where a "personal benefit" goes to a third party is not covered.

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

Article 229 of the Penal Code applies to the giving etc. of a bribe, to a person performing public functions in the following three separate cases:

8. According to case law (decisions of the Supreme Court or the Appellate Court), a person who directs a state-owned tabacco company, employees of the state-controlled banks, the director of a state hospital, the chairman of the governing board of the private banks which perform activities under articles 46 and 53 of the Banking Law, etc. are included within the scope of a "person performing a public function". In addition, the Supreme Court decision (judgement of 10.10.1991, case IKZP 21.91) states that a "head of a village" is included therein.

1. Where the bribe is given etc. to him/ her (no act is specified in return for the bribe) [229.1].
2. Where the bribe is given etc. to him/ her in order to induce him/ her to breach the law [229.3].
3. Where the bribe is given to him/ her for having breached the law [229.3].

Poland confirms that bribes for the purpose of obtaining an omission are also covered.[9] While the first two cases apply to the future acts of the officials, the third case applies to the past acts of officials, and thus is beyond the scope of the Convention.

In the first case, article 229.1 does not expressly require that there be an intention to obtain an act or omission of the official in return for the promise, etc. Poland states it is not required that the bribe be given with the aim that the official acts or refrains from acting in relation to the performance of his/her official duties; however, the advantage shall be given or promised in connection with the performance of his/ her public function. Poland confirms that article 229.1 is not limited to the situation where a person bribes a public official in exchange for a specific act or omission, but also covers the case where a person bribes a public official for the purpose of obtaining a "general positive attitude of the official", which would appear to include creating a more favourable climate for the company, obtaining a generic guarantee of privileges or favours or obtaining political protection.

Poland states that, according to the judicial decisions, the benefit should be provided, etc. to an official for the purpose of obtaining an act/ omission in any way connected with his/ her public function. They state that this does not require that the official be the only person competent to decide a particular matter, and it is sufficient if it is within his/ her duties to give an opinion on the matter. Moreover, Poland confirms that in accordance with Article 1.4c of the Convention, "in relation to the performance of that function" includes any use of the public official's position, whether or not within the official's authorised competence. According to Poland, the case where a person bribes a public official in order to obtain confidential information which the official is not authorised to release, but he/ she has access to because of the nature of his/ her official duties, would be covered thereunder.

In the second case, article 229.3 requires that there be an intention to induce the public official to breach the "law". Poland states that the intent to induce him/ her to breach any provision of the law, including all criminal, administrative and civil laws, is covered.

1.1.9 /1.1.10 in order to obtain or retain business or other improper advantage/ in the conduct of international business

Article 229 of the Penal Code is not expressly limited in application to bribes given etc. "in order to obtain or retain business or other improper advantage in the conduct of international business". In addition, Poland confirms that the sphere of activity in connection with which bribe is given etc. does not limit the ambit of the offence.

The Polish authorities confirm that there is no exception for small facilitation payments. (See, however, discussion under 3.1/ 3.2 concerning mitigating circumstances in determining the sanction.)

[9] Although the decision doesn't refer to this issue, the Supreme Court judgement of 7 November 1994, case WR 186/94 recognised the following case as bribery: where a drunk driver promises or gives money to a policeman to induce him to refrain from seizing his driver's licence and bringing the case to court.

1.2 Complicity

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

Complicity in the bribery of a foreign public official is established as a criminal offence under the general provisions of the Penal Code. Article 18.1 states that the following persons are liable as perpetrators: 1) one who commits an offence together or under arrangement with another person; 2) one who directs the commission of an offence by another person; and 3) one who takes advantage of the subordination of another person to him/her to order that person to commit an offence. The Polish authorities explain that in the first case, an offence is committed where two or more persons commit an offence whereby each one of them commits one or more of the elements thereof jointly or separately. Complicity is punished within the same limits of the full offence.

Article 18.2 provides for the liability of a person who wills (induces) another person to commit a prohibited act, and thus, covers incitement. Article 18.3 establishes liability for aiding and abetting. It states that a person who facilitates by his/her behaviour the commission of an offence, particularly by providing the instrument or means of transport, giving counsel or information, or by failing to prevent the commission of an offence by omitting to perform his/her legal duty, is liable for aiding and abetting. Pursuant to article 19, instigating, aiding and abetting carry the same punishment as the full offence; however, the court may apply an "extraordinary mitigation of punishment".

The concept of "authorisation" is not expressly covered by Polish criminal law. However, according to Poland, acts of authorisation could be treated in the context of directing the perpetration of the offence, or aiding and abetting, which applies to advising, providing information and facilitating another's act by not preventing its performance in breach of a particular obligation under the law.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic officials.

Attempt

An attempt to commit every offence, including the offence of bribing a domestic or foreign public official, is punishable in Poland under article 13.1 of the Penal Code, which states that "whoever with the intent to commit a prohibited act, directly attempts its commission through his conduct which, subsequently however does not take place, shall be held liable for an attempt." Poland states that in the context of active bribery, a person who makes an offer of a bribe to a public official, which is not accepted, is responsible not for the attempt, but for the perpetration of the offence itself. In addition, according to Poland, the question of whether an offence includes the case where a bribe is offered, etc. to a foreign public official but the official does not become aware thereof, has not been the subject of a Supreme Court decision. However, one source in the academic literature provides that such a case would constitute an attempt (Roman Goral, Criminal Code, Practical Commentary, Warsaw 1996).

Pursuant to article 14, an attempt is punishable by the same punishment provided for in respect of the full offence.

Pursuant to article 15.1 of the Penal Code, a person who voluntarily abandons the prohibited act or prevents the consequence thereof shall not be subject to the penalty for an attempt. And pursuant to article 15.2, he/ she is subject to an extraordinary mitigation of punishment when he/ she voluntarily attempts to prevent a consequence that constitutes a feature of the prohibited act.

Conspiracy

Conspiracy is not covered under the Penal Code.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

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

2.1 Criminal responsibility

The Polish legal system does not establish criminal responsibility of legal persons. However, Poland states that it was decided that this issue would be analysed by the Institute of Justice (a scientific institute of the Ministry of Justice) in 2001 with a view to establishing such liability in the near future.

2.2 Non-criminal responsibility

Standard of liability

Legal persons can be liable for a non-criminal financial penalty under the Act of 16 April 1993 on Combating Unfair Competition (ACUC) for certain acts of unfair competition[10]. Article 22a of the ACUC, which provides for the liability of an "entrepreneur who is not a natural person", reads as follows:

> *An entrepreneur who is not a natural person shall be liable for acts of unfair competition referred to in article 15a, subparagraphs 2-3, pursuant to the provisions of this chapter.*

Article 3 of the ACUC defines the acts of unfair competition. Article 3.1 defines an act of unfair competition generally as an "activity contrary to the law or good practices which threatens or infringes the interest of another party or customer". In addition, article 3.2 lists specific acts of unfair competition, including "bribery of a person discharging a public function", which was added by the implementing legislation.

Poland states that the list of unfair competition acts in article 3.2 addresses the most commonly committed acts, and while in the case of acts of unfair competition other than those listed, danger to the interest of the customer or another entrepreneur is required to be proved, in the case of the listed acts, it is presumed that such acts are endangering those interests. Moreover, the overall purpose of the ACUC, as stated in article 1 appears to be the protection of competition in the domestic market, as

[10] Poland believes that using competition law is the most practical way to implement the obligation under the Convention in respect of legal persons for the following reasons: 1. Polish competition law contains a general definition of an unfair competition act, the scope of which active bribery falls within; 2. The Office for Protection of Competition and Consumers (OPCC), which is designated as the competent authority in the field of competition law as well as anti-monopoly law, has practical experience in conducting proceedings against companies in the field of anti-monopoly law.

it governs "the prevention and combating of unfair competition in the economic activity, in particular in industrial and agricultural production, in construction works, trade and services in the interest of general public, entrepreneurs and customers, in particular consumers". The Polish authorities confirm that the bribery of a foreign public official would be considered an act of unfair competition irrespective of whether or not the interest of a customer or another entrepreneur were threatened or infringed. Moreover, the Polish authorities confirm that despite the purpose of the ACUC, application of the administrative responsibility of legal persons would not be dependent on whether or not the act of the natural person affects domestic competition.

Article 15a, which was added by the implementing legislation and gives rise to the responsibility of an "entrepreneur who is not a natural person" for bribery under article 229 of the penal Code, states as follows:

> *An act of unfair competition consisting of the bribery of a person performing a public function is a conduct specified in article 229 of the Penal Code on the part of a natural person[11]:*
>
> *1) who is an entrepreneur,*
> *2) acting on behalf of an entrepreneur within the authority to represent him or take decisions on his behalf, or to exercise control over him,*
> *3) acting on behalf of an entrepreneur, upon the consent of a person referred to in subparagraph 2.*

Pursuant to article 18, where an act of unfair competition is committed by a natural person belonging to a category mentioned in article15a.2-3, the entrepreneur whose interest is threatened or infringed may request a remedy, including the "relinquishment" of the prohibited practice and damages for the harm done[12]. And pursuant to article 22d, which was also added by the implementing legislation, where an entrepreneur who is not a natural person is liable under article 22a for an act of unfair competition under article 15a.2-3, the President of the Office for Protection of Competition and Consumers (OPCC) shall order it to pay a fine "in the amount of up to 10% of the revenue in the meaning of the provisions on income tax on legal persons, obtained in the tax year preceding the date of rendering the decision". The Polish authorities state that article 15a.2 covers persons who are directors, plenipotentiaries or members of a board. Employees or other persons could be covered by article 15a.3. In addition, Poland states that "acting on behalf of an entrepreneur" does not require any "formal connection" between the offender and the entrepreneur. For instance, it covers the situation where an employee who conducts a negotiation or is responsible for a particular contract is authorised by a director to provide, etc. a bribe to an official.

The Polish authorities confirm that effective supervision does not exempt the legal person from liability.

Poland states that the territorial jurisdiction in the proceedings against legal persons for bribery is determined by the criminal jurisdiction over the natural person who fulfils the conditions under article 15a.2-3 of the ACUC. Where there is criminal jurisdiction over such natural person, the proceedings against legal persons under the ACUC would apply.

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[11] Poland states these categories have been taken from the Second Additional Protocol to the Convention on Protection of the Financial Interests in the European Communities.

[12] The remedies under article 18.1 of the ACUC also include: 1) removing the effects of prohibited practices; and 2) handing over unjustified benefits, pursuant to general rules.

Entities subject to liability

Pursuant to article 2 of the ACUC, for the purpose of the ACUC, "entrepreneurs" are defined as "natural and legal persons and entities without legal personality, which by performing even casually, paid or professional activity participate in economic activity". The Polish authorities confirm that state-owned and state-controlled entities are covered.

Proceedings against legal persons

The responsibility of legal persons under the ACUC is connected to the criminal proceedings in relation to the relevant natural person. Poland states that such proceedings, which are conducted by the President of the OPCC, can be instituted only after the final judgement or other final decision in the criminal proceedings has been taken and the information has been transmitted to the OPCC. Pursuant to articles 22b and 22c of the ACUC, the President of the OPCC is obliged to institute proceedings against the entrepreneur who is not a natural person when "a certified copy of the final judgement together with a certified copy of the dossier of the proceedings" is sent from the court or the prosecutor. Poland confirms that there is no requirement of a motion/ request of injured parties in order to institute the proceedings. Poland also confirms that article 4, which states that "the rights resulting from the provisions of the ACUC shall apply to the foreign natural and legal persons by virtue of the international agreements binding the Republic of Poland or by reciprocity", only applies to the civil liability of entrepreneurs under the ACUC, and does not affect the proceedings against legal persons for bribery.

The court or the prosecutors are obliged to send a certified copy of the final judgement together with a certified copy of the dossier of the proceedings to the President of the OPCC as follows:

1. In the case of a sentencing for an offence under Article 229 of the Penal Code committed by a person referred to in article 15a, subparagraphs 2-3.
2. If the proceedings in respect of an offence under article 229 of the Penal Code against a person referred to in article 15a, subparagraphs 2-3, may not be conducted due to circumstances which exclude prosecution specified in article 17.1, subparagraphs 5- 6 and 8-10 of the Code of Criminal Procedure[13].

In the first case, "sentencing" only refers to the judgement of a finding of "guilty". This means, where the criminal proceedings resulted in a final judgement, the proceedings against the legal person would only be initiated if the natural person were convicted under article 229 of the Penal Code.

According to Poland, when the final judgement etc. is sent to the OPCC, the judge and prosecutor are obliged to evaluate whether the natural person who was convicted, etc. of bribery, belongs to one of the categories in article 15a subparagraph 2 or 3. Poland states that the court makes such a decision after the judgement. However, according to Poland, an injured party who acts as a "party" in the criminal trial, can request the court to decide on notification and to conduct evidence proceedings to prove the circumstances under article 15a.2-3 of the ACUC during the course of the trial. Poland states that this decision on notification is issued to the OPCC, and pursuant thereto the OPCC is obliged to institute proceedings against the legal person. However, the President is free to evaluate the

[13] Circumstances which exclude prosecution are; (a) the accused is deceased (b) the prescribed statute of limitations has lapsed, (c) the perpetrator is not subject to the jurisdiction of the Polish criminal courts, (d) there is no complaint from an entitled prosecutor, or (e) there is no permission required for prosecuting the act, or no motion to prosecute from a person so entitled, unless otherwise provided by law.

evidence and determine whether the necessary conditions establishing an "act of unfair competition" under article 15a.2-3 have been satisfied. Consequently, there cannot be any liability of the legal person under article 22d of the ACUC in the absence of an evaluation by the criminal court or the prosecutor that a person described under article 15a.2-3 was the subject of an offence under article 229 of the Penal Code.

The proceedings against the entrepreneur are conducted in accordance with the Code of Administrative Procedure unless the ACUC provides otherwise. The Code of Administrative Procedure provides for a full-hearing, including oral testimony and, it appears, cross-examination. The Polish authorities state that normally the procedure has been for the President of the OPCC to conduct a process involving written submissions. There were doubts whether this procedure could lead to the imposition of a penalty. However, the Polish authorities explain that (1) where the "parties" (e.g. the legal person) make a request, or the President of the OPCC considers it necessary, a full-hearing would take place; and (2) the evidence can be assessed adequately under the proceedings conducted by written submissions where the criminal proceedings against the natural person have resulted in a conviction, because findings of the criminal court are binding on the President of the OPCC (article 22c. 3 of the ACUC).

The President of the OPCC can gather evidence and rely on this in the proceedings against the legal person within the restriction mentioned above under article 22c.3 of the ACUC.

The decisions of the President of the OPCC are subject to appeal to the Antimonopoly Court, which is a division of the Regional Court in Warsaw.

Pursuant to article 22d.2 of the ACUC, financial penalty against the entrepreneurs cannot be imposed if a period of 10 years has elapsed since the commission of the act of unfair competition. There are no provisions for the extension of this period.

3. ARTICLE 3. SANCTIONS

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

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

Article 229 of the Penal Code provides for the same penalties in relation to domestic and foreign bribery[14]. For the principal offence (i.e. bribery of a person performing public functions), the

[14] In general, these penalties for bribery offences are comparable to those for offences such as fraud, theft, extortion, and embezzlement.

punishment is a deprivation of liberty from 6 months to 8 years[15]. For the aggravated offence (i.e. bribery of a person performing public functions in order to induce him/ her to breach the law), the punishment rises to a deprivation of liberty from 1 to 10 years [16]. Where the bribe is of "a material benefit of a considerable value" the punishment rises to a deprivation of liberty from 2 to 12 years[17]. For the mitigated offence, where "the act is of less significance", the punishment is a fine, a restriction of liberty, or a deprivation of liberty of up to 2 years[18]. Pursuant to the general provisions of the Penal Code, a restriction of liberty ranges from 1 to 12 months[19] and the term of the deprivation of liberty shall not be less than 1 month.[20]

A fine shall be imposed in terms of daily rates, which define the number of daily rates to be levied and the amount of each rate[21]. Pursuant to article 33, the number of daily rates ranges from 10 to 360, and the amount of daily rates ranges from 10 to 2,000 PLN. Consequently, the amount of a fine ranges from 100 to 720,000 PLN (approximately, 172,800 U.S. dollars/ 187,200 Euros) [22]. In determining the daily rate of the fine, the court shall consider the income of the perpetrator, his/ her personal situation, family situation, property ownership and earning capacity.[23]

Although the term "considerable value" is not defined in the Penal Code, Poland states that the applicable definition is contained in articles 115.5 and 115.7, which define "property of considerable value" and "considerable damage" respectively, as property or damage with a value at the time of the commission of a prohibited act that exceeds two hundred times the level of the lowest monthly salary. The lowest monthly salary is defined in section 8 of the same article as the "lowest salary of workers" determined on the basis of the Labour Code. Poland states that this amount, which is determined by the Minister of Labour, is currently 700 PLN, and consequently, "a material benefit of considerable value" would be a benefit exceeding 140,000 PLN (approximately, 36,400 U.S. dollars/ 33,600 Euros).

Moreover, Poland states that the term "of less significance" refers to very minor cases. Under the Polish Penal Code, a number of offence, such as theft, larceny, etc. use the term "of less significance" for the mitigated offences, and the Supreme Court[24] has established guidelines for determining this, such as the behaviour of the perpetrator, character and size of the damage, time, place and other circumstances of the commission of the offence, degree of guilt, and motivation and purpose of the perpetrator. The Polish authorities state that in the case of bribery, the value of the benefit provided, etc. to a public official, the rank of the official, the kind of act that the briber intends to induce, and the effect or the danger caused would be considerations. They state further that the case where the bribe constitutes a "small facilitation payment" in the meaning of the Convention is likely to be considered

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15 See article 229.1, 229.5 of the Penal Code.

16 See article 229.3, 229.5 of the Penal Code.

17 See article 229.4, 229.5 of the Penal Code.

18 See article 229.2, 229.5 of the Penal Code.

19 See article 34.1.

20 See article 37.1.

21 See article 33.1.

22 On January 22, 2001, 100 PLN (Polish Zlotys) was valued at 24 U.S. dollars (approximately, 26 Euros).

23 See article 33.3 of the Penal Code.

24 Judgement of 9 October 1996, case VKKN 79/ 96

as a case "of less significance". Additionally, Poland states that the case where conditions for the aggravated offence are fulfilled, article 229.2 would not apply. In addition, Poland confirms that article 229.2 would not apply to repeated bribery offences "of less significance". According to Poland, such a case would be punishable as a principal offence under article 229.1 or an aggravated offence under article 229.4.

In addition, pursuant to article 33.2 of the Penal Code, the court can impose a fine, which ranges from 100 to 720,000 PLN, in addition to the penalty of deprivation of liberty, if the perpetrator has committed the act in order to gain a material benefit or when he/ she has gained such a benefit. Poland states that such an additional fine would normally be imposed in cases of bribery.

Article 53 provides guidelines on the imposition of penalties. It provides that the court shall impose a penalty according to its own discretion but within the limits prescribed by law. For instance, the court shall take into account, the motivation and the manner of conduct of the perpetrator, the characteristics and personal conditions of the perpetrator, his/ her way of life prior to the commission of the offence and conduct thereafter, his/ her efforts to redress the damage, the behaviour of the injured person, the positive results of any mediation between the injured person and the perpetrator or any settlement reached by them in the proceedings before the state prosecutor or the court, the degree of guilt, and the level of social consequences of the act committed.

General Provisions for Reduction of Penalty

Articles 60.3 and 60.4 provide for "an extraordinary mitigation of penalty" as follows:

Article 60.3

> *The court shall apply an extraordinary mitigation of the penalty or may even conditionally suspend the execution of the penalty, with respect to a perpetrator who, co-operating with others in the commission of an offence, reveals information pertaining to the persons involved therein or essential circumstances thereof, to the agency responsible for its prosecution.*

Article 60.4

> *§ 4. Upon a motion from the state prosecutor, the court may apply an extraordinary mitigation of the penalty or even conditionally suspend the execution of the penalty with respect to a perpetrator, who, irrespective of any explanation provided in his case, revealed and presented to the agency responsible for prosecution, essential circumstances, not previously known to that agency, of an offence subject to a penalty exceeding 5 years deprivation of liberty.*

Poland states that these provisions apply to bribery offences as well as other offences under the Penal Code. Poland states that article 60.3 would apply, for instance, in a case where a person who is an employee bribes a foreign public official, is caught by the prosecutorial authorities and reveals to them that the director, etc. authorised the offence, etc. The Polish authorities emphasise that article 60.3 is only triggered where two or more other persons were involved in addition to the perpetrator in question. Where a person who bribes a foreign public official informs the prosecutorial authority of important details of another offence, for which the maximum penalty is deprivation of liberty of more than 5 years, such as time, place and the perpetrator thereof, and if such information is previously unknown to the authority, article 60.4 would apply.

Poland states that Ministry of Justice has found some deficiencies in these provisions, and in order to amend this, a draft law has been submitted to the Parliament. This draft includes adding the

requirement in article 60.3 that the information shall be the one previously unknown to the competent authority.

Additional "Penal Measures"

In addition to the penalties such as a deprivation of liberty or fine etc., article 39 of the Penal Code provides a set of "penal measures", which may be imposed on a perpetrator in addition to the penalties applicable to a specific offence. These measures include: 1) a deprivation of public rights, 2) an interdiction preventing the occupation of specific posts, the exercise of specific professions or the performance of specific economic activities, 3) an interdiction on driving vehicles, 4) the forfeiture of items, 5) an obligation to redress the damage, 6) a supplementary payment to an injured party or for a public purpose, 7) pecuniary consideration, and 8) publication of the sentence. Poland states that for both passive and active bribery, suitable measures would be the prohibition from occupying certain posts, performing certain professions or conducting certain economic activities.

3.3 Penalties and Mutual Legal Assistance

Polish law does not generally make mutual legal assistance conditional upon the length of the term of imprisonment provided for in the criminal law of either Poland or the requesting state. However, pursuant to the European Convention on Mutual Legal Assistance in Criminal Matters, Poland has reserved the right to refuse a request for the provision of MLA in the form of search and seizure, unless the offence in question is extraditable, and under the relevant instruments a length of imprisonment is a condition for extradition (see below under 3.4).

3.4 Penalties and Extradition

Poland states that the sanctions for all the foreign bribery offences are sufficient to enable extradition. Poland is a party to the European Convention on Extradition and a number of bilateral treaties on extradition. Poland states that according to these instruments, offences for which a penalty of deprivation of liberty for a certain period can be imposed in both the requesting state and in Poland are extraditable. This period is a maximum term of imprisonment of not less than 1 year under the European Convention, and is more than 1 year under some bilateral treaties[25].

Where a treaty is not applicable, extradition is possible pursuant to article 604 of the Code of Criminal Procedure, but article 604.2 (5) requires that in the requesting state the offence is subject to a maximum penalty of more than 1 year or that such a penalty has been imposed.

3.5 Non-Criminal Sanctions for Legal Persons

Pursuant to article 22d of the ACUC, legal persons are subject to a non-criminal financial penalty for the bribery of a foreign public official in the amount of up to 10% of the "revenue"[26], obtained in the

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[25] e.g. treaties concluded with Ukraine and the United States

[26] "Revenue" is defined in article 12 of the Act on Corporate Income tax. Art. 12.1 states as follows:

Revenues, subject to paragraphs 3 and 4, are in particular:

1) *money received, cash values, including exchange rate differences,*

2) *the value of free benefits received and in kind revenues, except for benefits connected with the use of fixed assets received by budget funded enterprises, by auxiliary enterprises of budget funded entities, by*

tax year preceding the date of the decision of the President of the OPCC. Poland confirms that the "revenue" is calculated on the basis of before tax revenue. Poland states that this penalty has been designed to take into account the size of the economic activity and financial status of the legal person concerned. However, it appears that a company showing no or little revenue in the preceding year would not be liable to a fine, or would be liable to a very low fine despite the amount of its assets. It also appears that a newly established company could escape liability for a fine. It is within the discretion of the President of the OPCC to determine the amount of the financial penalty and there are no guidelines for this.

According to article 22d.6, the financial penalty "shall be payable from the income of the sentenced entrepreneur after tax, or from another form of surplus of revenues over expenditures, diminished by taxes". This provides for the manner of paying the penalty rather than the level thereof. The Polish authorities confirm that it would not result in a reduction of the actual amount paid.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

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

Forfeiture

The Polish Penal Code provides for the forfeiture of items (article 44), forfeiture of a financial benefit (article 45), and an obligation on a third party to return the benefit to the State Treasury (article 52). In the case of natural persons, all these provisions apply, and in the case of legal persons, only the latter provision applies.

Pursuant to article 44, the court shall forfeit "items directly derived from an offence" (section 1) and may forfeit "items which served or were designed for committing the offence"(section 2)[27]. The forfeiture of "items which served or were designed for committing the offence" shall not be applied "if its imposition would not be commensurate with the severity of the offence committed", and may be subject to a supplementary payment to the State Treasury (section 3). Additionally, if the perpetrator has intentionally prevented the possibility of imposing the forfeiture of items under articles 44.1 or

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public utility companies, with the exclusion of local government entities or their unions, from the State Treasury, from local government entities or their unions - for gratuitous management or use,

3) *the value, subject to paragraph 4, subparagraph 8, of remitted or time-barred liabilities, including those on account of contracted loans (credits), with the exception of redeemed loans from the Labour Fund,*

4) *the value of returned liabilities, including loans (credits), which, in accordance with article 16, paragraph 25, have been written off as irrecoverable or accounted for as lost, or for which reserves previously included into the revenue earning costs have been created,*

5) *in the case of insurers – the amount which constitutes the equivalent of a decrease in the level of technical-insurance reserves created pursuant to separate regulations,*

6) *in the case of banks – the amount which constitutes the equivalent of the reserve for general risk, created in accordance with the Act of 29 August 1997 – Banking Law (Journal of Laws – Dz.U. No 140, item 939, of 1998 No 160, item 1063 and No 162, item 1118 and of 1999 No 11, item 95 and No 40, item 399), dissolved or used in another manner.*

[27] In both cases, forfeiture is not available where the item is subject to return to the injured party or another entity.

44.2, the court may impose a monetary sanction of comparable effect. Pursuant to article 45, if the perpetrator obtained – even if indirectly– a "financial benefit" from the commission of an offence, the court may forfeit it or its equivalent (section 1). If the perpetrator obtained a "substantial benefit", which, according to the Polish authorities means that the benefit exceeds 140,000 PLN, the court shall forfeit it or its equivalent (section2).

In conclusion, it would appear that with respect to active bribery, forfeiture of the proceeds of bribery that are in the form of an "item" is mandatory, forfeiture of a bribe in the form of an "item" is discretionary, and in both cases where forfeiture is not possible, there is discretion to order a monetary sanction of comparable effect. Where the proceeds of bribery are in the form of a "financial benefit", forfeiture thereof is discretionary unless they are of a "substantial benefit". A bribe in the form of a "financial benefit" does not appear to be liable to forfeiture in relation to active bribery. There are no guidelines for exercising such discretion. However, Poland states that where the court exercises its discretion it would provide reasons therefor. According to Poland, such discretion is exercised, for instance, where the forfeiture would harm a third party who was not involved in the offence.

The Polish authorities state that "items" under articles 44 cover only material objects and include both movable and immovable properties. Additionally, Poland states that, pursuant to article 115.9 of the Penal Code, which defines a "movable item or chattel", Polish or foreign currency, other legal tenders, a document which entitles one to receive a pecuniary amount or to specify the obligation to pay a capital amount, interests, a share in profits, or ascertaining participation in a company, are also covered by this term. On the other hand, Poland states that a "financial benefit" is an increase in assets or reduction of debts and covers all things, rights in property, and benefits which have a financial value. Poland states this covers all the benefits that the offender has obtained as a result of the offence, directly and indirectly. Poland states that there is no substantive difference between these two terms, except that the latter one also covers benefits obtained indirectly, and confirms that in case of an overlap (i.e. benefits obtained directly from an offence), the mandatory forfeiture under article 44.1 takes precedence. In addition, Poland clarifies that with respect to active bribery, "direct" benefits include all kinds of material benefits derived from the offence including those which arise from the contract that has been obtained in exchange of a bribe. In contrast, "indirect" benefits are those derived from "direct" benefits, including any properties.

The Polish authorities state that forfeiture under article 44 and 45 are possible only upon conviction. However, in addition, forfeiture of "things originating directly from the offence", "objects designated or used for the commission of an offence", which would appear to be the bribe and its proceeds of foreign bribery offences may be ordered in the case of discontinuance of the proceedings, etc. under article 100.

Pursuant to article 52, upon sentencing for an offence that brought "material benefits" to a natural, legal person or an organisational unit not possessing the status of a legal person, and was committed by a perpetrator who acted on its behalf or in its interest, the court shall "obligate" the entity that acquired the material benefit, to return it in whole or in part to the benefit of the State Treasury. According to Poland, this is applicable independently from the responsibility of legal persons. However, there are no guidelines for determining whether such an order is to return the benefit in whole or in part.

Pre-trial Seizure

In order to secure property in the event of the imposition of a fine or forfeiture at trial, pursuant to articles 291-293 of the Code of Criminal Procedure, the court, or in the preparatory proceedings, the state prosecutor, may order measures such as the seizure of movables, liabilities and other property

rights, and the prohibition of selling and encumbering real estate. Additionally, pursuant to articles 295 and 296, where there are grounds to fear that the suspect might conceal his/her property, provisional seizure is available. The approval of the state prosecutor is required within 5 days following seizure.

3.8 Civil Penalties and Administrative Sanctions

Pursuant to article 19 of the Act on Public Orders, mandatory exclusion from competition for public orders applies to: (a) natural persons who have been convicted of bribery, (b) legal persons in relation to which a member has been convicted of bribery, and (c) entrepreneurs (natural or legal persons) on whom in the 3 year period before the initiation of the proceeding a financial sanction has been imposed under the ACUC for bribery.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

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

Article 5 of the Polish Penal Code contains the relevant provisions on territorial jurisdiction. It states that the "Polish penal law shall be applied to the perpetrator who committed a prohibited act within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which the Republic of Poland is a party stipulates otherwise"[28]. Pursuant to article 6.2, an offence is deemed to be committed at the place where the offender has acted/ omitted or at the place where the criminal consequence has ensued or has been intended to ensue. The Penal Code does not elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction. However, the Polish authorities confirm that a promise of a bribe made by a telephone call, fax, or e-mail emanating from Poland is sufficient to establish territorial jurisdiction. This has never been the subject of a decision of the Supreme Court, but the Polish authorities state that such interpretation is evident from the provision. Furthermore, Poland confirms that a telephone call, etc. made in furtherance of a promise, etc. (e.g. a confirmation of a promise) triggers territorial jurisdiction.

4.2 Nationality Jurisdiction and Extraterritorial Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official". Commentary 26 on the Convention clarifies that where a Party's principles include the requirement of dual criminality, it "should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute".

[28] Poland confirms that "unless an international agreement to which the Republic of Poland is a party stipulates otherwise" is intended to widen the scope of territorial jurisdiction under an international agreement. However, Poland considers that current territorial jurisdiction need not be extended under the Convention.

Pursuant to article 109 of the Penal Code, Polish penal law is applicable to Polish citizens for offences committed abroad. However, nationality jurisdiction is concluded upon the recognition of the act in question as an offence "by a law in force in the place of its commission"(article 111.1, dual criminality). In addition, article 111.2 provides that if there are differences between the Polish penal law and the law of the place of commission, the court may take these differences into account in favour of the perpetrator. And article 113 states that "notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements". The Polish authorities confirm that the requirement of dual criminality under article 111.1 is deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. Moreover, according to the Polish authorities, the requirement of dual criminality is lifted by article 113 in respect of the foreign bribery offence, as the Convention obliges Poland to prosecute the bribery of a foreign public official. Thus, where the offence is committed by a Polish citizen, Poland will always establish jurisdiction. Poland confirms that a permanent resident of Poland is not considered a Polish a "citizen" for the purpose of applying nationality jurisdiction.

In addition, Poland has jurisdiction over an alien in the case of an offence committed abroad where he/she is within the territory of Poland and where his/ her extradition is denied[29]. This jurisdiction is subject to the condition of dual criminality.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Poland has concluded a number of bilateral treaties providing for the transfer of criminal proceedings. In the absence of a treaty, the provisions under Chapter 63 of the Code of Criminal Procedure would apply, pursuant to which the Minister of Justice conducts consultations with the competent authority of a state that has instituted criminal proceedings "for the same act against the same person" as in Poland, and if the interest of justice so requires, the Minister transfers or requests to transfer the proceedings.

4.4 Review of Current Basis for Jurisdiction

The Polish authorities state that they did not conduct any special analysis concerning the effectiveness of the jurisdiction principles in the fight against bribery of foreign public officials, as the scope of criminal jurisdiction has not created problems to date.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official

[29] See article 110.2 of the Penal Code. This applies to offences subject to penalty of deprivation of liberty exceeding 2 years. Thus, with respect to foreign bribery offences, this is applicable to both the basic and the aggravated offences.

"shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles Regarding Investigations and Prosecutions

There are no special rules or principles governing investigations and prosecutions of the bribery of foreign public officials. The investigation and prosecution of this offence could be initiated, suspended and terminated in the general circumstances provided for in the Code of Criminal Procedure.

Poland states that the bribery of a foreign public official is prosecuted *ex officio* as are most offences. In accordance with the "principle of legalism" (mandatory prosecution), prosecutors are obliged to initiate proceedings if there is a reasonable suspicion that an offence has been committed (article 303 of the Code of Criminal Procedure). Pursuant to article 10.1, "the agency responsible for prosecuting offences" is obliged to institute and conduct the preparatory proceedings, and the public prosecutor is obliged to bring and support the charges, with respect to an offence prosecuted *ex officio*. Poland states that notification of an offence, after which the competent authorities institute the proceedings *ex officio,* may be filed by any person. Additionally, the Polish authorities confirm that the institution of investigative proceedings is not conditional upon a motion by an injured party in respect of foreign bribery offences.

The Code of Criminal Procedure provides for two different investigative proceedings –"inquiry" and "investigation"– depending on the type of offence. In principle, the offence of bribery of a foreign public official is subject to inquiry. However, it is possible to conduct the proceedings in the form of investigation if the public prosecutor decides that the case is to be dealt with in the form of investigation on account of its importance or complexity. An inquiry is conducted by the police under the supervision of the public prosecutor. In an inquiry, the public prosecutor may request the materials collected during the proceedings be presented to him/ her, issue orders or decisions, change orders or decisions issued by the police, take over any action of legal procedure. In addition, the majority of decisions made by the police during an inquiry are subject to approval by the public prosecutor. On the other hand, an investigation is conducted by the public prosecutor. During an investigation, the public prosecutor may mandate the police to execute certain investigative actions. However, decisions to institute, terminate or not to institute an investigation, bringing charges, etc. are exclusively within the public prosecutor's competence.

In addition, pursuant to the provisions of Part III of the Code of Criminal Procedure, an "injured person" can participate in the proceedings as a "subsidiary prosecutor" or a "private prosecutor". The Polish authorities state that with respect to the foreign bribery offence, a competitor whose interest has been violated or threatened could be an "injured person". Pursuant to article 54.1, with respect to the foreign bribery offence, a competitor who is an "injured person" may act as a "subsidiary prosecutor" where he/ she submits a "statement" to the court to act as a subsidiary prosecutor before the court of first instance and if the court approves him/ her as such. Poland states that a subsidiary prosecutor is entitled to take all kinds of actions during the trial as a "party", such as submitting evidence, appealing a decision of the court, etc. Also, if the public prosecutor terminates, or refuses to initiate the proceedings, a competitor may act as a "private prosecutor" to bring an indictment under certain conditions (See the discussion below in this section.).

Pursuant to article 22.1, when an impediment, which prevents the conduct of proceedings for a lengthy period arises (e.g. when the accused cannot be arrested or cannot participate in the proceedings because of mental disease or other serious illness), the proceedings shall be suspended until such impediment is removed. Poland confirms that circumstances such as (i) the offender is not detected,

or (ii) a foreign state to which Poland made a request for MLA has not provided assistance could be grounds for suspension.

Criminal proceedings at all stages, including the pre-trial, shall not be instituted, or if instituted, shall be terminated under certain circumstances enumerated in article 17.1. In particular[30]:

- there is no complaint from an entitled prosecutor (subsection 9);
- permission that is required for prosecuting the act has not been provided, or no motion to prosecute from a person so entitled has been made, unless otherwise provided by law (subsection 10);
- other circumstances precluding such proceedings occur (subsection 11).

The Polish authorities state that subsection 9 of article 17 addresses the situation where an unauthorised person brings the indictment. With respect to the offence of bribery of a foreign public official, which is an offence subject to a public indictment, the situation would be where a private party brings an indictment directly to the court. However, according to the Polish authorities, in such a case, there would be no obstacles for the public prosecutor, etc., after having been notified, to institute investigative proceedings and to conclude them with an indictment. The Polish authorities state that, with respect to foreign bribery offences, subsection 10 applies where the perpetrator is protected by immunity (e.g. diplomats[31], parliamentarians). In such cases, permission of the organ authorised is required for the prosecution of such offences. With respect to a parliamentarian, a resolution of the Chamber (i.e. Sejm, Senat) to which the parliamentarian belongs is required. The Polish authorities confirm that the institution of investigative proceedings is not conditional upon a motion by an injured party. They further state that subsection 11, which provides for "other circumstances" that would terminate the proceedings, would include the expiry of the limitation period for the investigative proceedings under articles 309 and 310 of the Code of Criminal Procedure (see Article 6 "Statute of Limitations" below).

Pursuant to article 306, a decision to terminate the proceedings may be appealed to the public prosecutor who is more senior to the one who has made such a decision. According to Poland, injured persons, their attorneys, the suspect, and the defence counsel are entitled to appeal. Additionally, in the case where the decision to terminate the proceedings is upheld, the court shall then decide the issue. An injured person may bring an indictment to the court as a private prosecutor only where after reversal by a court of a decision not to prosecute, the public prosecutor again decides to terminate proceedings, which decision is upheld by the senior public prosecutor.

Article 320 provides for mediation proceedings between the suspect and the injured party in connection with a "respective motion to the court". Poland confirms that such proceedings can not be alternative proceedings to criminal proceedings. According to Poland, this provision is relevant to an offence for example, such as assault between neighbours.

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30 The other circumstances under article 17.1 are: 1) the act has not been committed, or there have not been sufficient grounds to suspect that it has been committed, 2) the act does not possess the qualities of a prohibited act, or it is acknowledged by law that the perpetrator has not committed an offence, 3) the act constitutes an insignificant social danger, 4) it has been established by law that the perpetrator is not subject to a penalty, 5) the accused is deceased, 6) the prescribed statute of limitations has lapsed, 7) criminal proceedings concerning the same act committed by the same person have been validly concluded or, if previously instituted, are still pending, or 8) the perpetrator is not subject to the jurisdiction of the Polish criminal courts.

31. The Polish authorities confirm that diplomatic immunity is applicable only where the diplomat is serving abroad.

Article 335 provides for proceedings for convicting the offender without a trial with his/ her consent. With respect to foreign bribery, this provision is applicable only to mitigated offences under article 229.2 of the Penal Code. Under these proceedings, an extraordinary mitigation of penalty, a penal measure, a remission, or a conditional stay of execution of penalty is applicable.

5.2 Considerations such as National Economic Interest

Poland confirms that the principle of legalism excludes any considerations of the factors listed in Article 5 of the Convention in the investigation and prosecution of all cases, including cases of bribery.

6. ARTICLE 6. STATUTE OF LIMITATIONS

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

Polish penal law provides for limitation periods for every offence, including bribery, and the length of the periods is related to the penalty provided for each offence. According to Poland, pursuant to article 101.1 of the Penal Code, for the basic type and the aggravated type of domestic and foreign bribery offences, which fall within the scope of article 229.1, 229.3, and 229.4, the limitation period is 10 years (period for an offence subject to the penalty of deprivation of liberty exceeding 3 years). For the mitigated offence, which falls within the scope of article 229.2, the limitation period is 5 years (period for an offence subject to the penalty of deprivation of liberty not exceeding 3 years). The period starts running from the date of commission of the offence. In addition, article 101.3, provides that if the commission depends on the occurrence of a consequence specified in the law, the limitation period starts to run from the date when this consequence has ensued. However, the foreign bribery offence does not fit within the scope of article 101.3.

Pursuant to article 102, if during the limitation period criminal proceedings against the offender have been instituted, the limitation period would be prolonged for an additional 5 years. In addition, pursuant to article 104.1, "the period of limitation does not run, if a provision of law does not permit the criminal proceedings to be instituted or to continue; this however, does not apply to the lack of a motion or a private charge." However, according to the Polish authorities, article 104.1 addresses the issue of legal obstacles such as immunity, and therefore is not relevant to the bribery offences.

Superimposed on the statute of limitations is the deadline for the investigative proceedings (i.e. inquiry/ investigation). Pursuant to articles 310.2 and 310.3 of the Code of Criminal Procedure, an "inquiry", which, in principle, is relevant to foreign bribery cases, should be completed within 1 month. The state prosecutor who supervises the inquiry may extend this period for up to 3 months. Where the inquiry is not concluded by the expiration of such period, the files of the case shall be referred to the state prosecutor. The state prosecutor may extend the period for a further prescribed period not exceeding 3 months, or take over the inquiry for investigation. Pursuant to articles 309.2 and 309.3, an "investigation" should be completed within 3 months. "In justifiable cases", a senior state prosecutor may extend this period for a prescribed term not exceeding 1 year, and "in a particularly justifiable cases", the Attorney General may extend the period for a prescribed period. There is no upper limit for the extension period granted by the Attorney General.

When the deadline period has expired, the prosecutor should decide whether to bring an indictment or to terminate the proceedings.

The Polish authorities state that such a period functions as an instruction for the investigative authorities and confirm that this would not shorten the limitation period in practice for the following reasons: (1) In practice, an extension would always be granted as far as it is needed due to the complexity of the case; (2) Where there are circumstances which prevent the conclusion of investigative proceedings within the prescribed period (e.g. the offender not detected, waiting for the response of MLA), the investigative authority shall suspend the proceedings until such circumstances are resolved; (3) Even in the event where the extension of the deadline period is rejected before having gathered sufficient evidence for prosecution and the proceedings were terminated therefor, the investigative authorities can re-initiate proceedings against the same person in respect of the same offence, unless in the prior proceedings a charge has been brought which would be tried when the authority has gathered sufficient evidence against the suspect.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Poland has made amendments to article 299 (section 1,2 and 7) of the Penal Code[32], which provides the offence of money laundering. The amended article 299, which applies to domestic and foreign bribery, states as follows:

1. *Whoever accepts, transfers or transports abroad, assists in transfer of ownership or possession of legal tenders, securities or other foreign currency values, property rights or real or movable property, obtained from the proceeds of a forbidden act, or takes any other action which can prevent or make significantly more difficult determination of their criminal origin, or place of deposition, detection, seizure or forfeiture, shall be subject to the penalty of deprivation of liberty for a term of between 6 month and 8 years.*
2. *The penalty specified in section 1 shall be also imposed on anyone who, being an employee of a bank, financial or credit institution, or other entity required by law to register transactions and persons carrying out transactions, accepts in cash, in violation of a regulations, money or other foreign currency values, transfers or converts them or accepts them in other circumstances arousing justifiable suspicion that they are an objects of an acts referred to in section 1, or performs other services to conceal the criminal origin or to secure them against the seizure.*
3. *Whoever being responsible in a bank or credit institution for reporting to the board or a financial supervisory authority, carrying financial transaction, fails to do it promptly and in prescribed form, even though the circumstances raise reasonable suspicion that they involve the source as defined in section 1shall be subject to the penalty of deprivation of liberty for a term up to 3 years.*
4. *The penalty specified in section 3 shall be imposed on anyone who being responsible in a bank, financial or credit institution, for appointing a person authorised to receive information referred to in section 3 or imparting this information to an authorised person, fails to comply with regulations in force.*
5. *Who commits the acts referred to in section 1 or 2, acting together with other persons shall be subject to the penalty of deprivation of liberty for a term between 1 year to 10 years.*

[32] The amendment was made by The Act of 16 November 2000 on Counteracting Introduction into financial Circulation of Property Values Derived from Illegal or Undisclosed Sources, which will enter into force on 23 June 2001.

6. *The same penalty shall be imposed on a perpetrator who, committing the acts defined under section 1 or 2, benefits significantly from this act.*
7. *In the event of conviction for the offence specified in section 1 or 2, the court shall decree forfeiture of objects originating directly or indirectly from the offence, as well as the benefits derived from the offence or its equivalent, even if these are not the property of the perpetrator. Forfeiture shall not be decreed, completely or partially, if the object, benefit or equivalent thereof is subject to restitution to the injured party or to the other entity.*
8. *Who had voluntarily revealed to the authority empowered to prosecute offences information regarding persons involved in commission of an offence, circumstances in which it was committed, if this prevented commission of other offence, shall not be liable to punishment for offences specified in section 1 through 4; when the perpetrator made efforts to reveal such information and circumstances, the court shall apply extraordinary mitigation of punishment.*

Poland explains that all offences including domestic and foreign bribery offences qualify as predicate offences under article 299.

Although the bribe would be covered as properties, etc. "obtained from the proceeds of a forbidden act" in respect of passive bribery, it is not covered in respect of active bribery. The Polish authorities appear to state that the proceeds of active bribery are covered by article 299. However, they also state that in the context of money laundering "this is not so important because proceeds of the bribery in business transactions usually do not need any 'laundering' as they appear in the form of payments for executing contracts etc." However, the Polish authorities confirm that laundering the gain that is obtained from the contract to provide services, etc. to a government as a result of having bribed a foreign public official is covered under article 299.

Poland states that all offences under article 299 have to be committed with intent. However, offences under sections 2 and 3 would apply where the circumstances in which money, etc. has been accepted raise "justifiable suspicion" as to their origin. In addition, Poland confirms that for the purpose of applying article 299.1, the requirement is only that the offender knows that the property, etc. is derived from a criminal offence and not that he/ she knows that it is derived from the specific offence.

The amended article 299.1 applies to the perpetrator of the predicate offence (i.e. self-laundering) as well as a third person.

Section 8 of article 299 provides for a defence for the money laundering offence or an extraordinary mitigation of punishment where a person discloses voluntarily information about money laundering activities in which he/ she was involved to the competent authorities. Where the disclosure prevents the commission of the offence, there is no liability, and where the commission of the offence was not prevented, the penalty is reduced.

Poland states that the money laundering provisions apply regardless of where the bribery occurred.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1 Accounting and Auditing Requirements

Accounting Standards

Accounting and auditing requirements are regulated in the Act of 29 September 1994 on Accountancy[33]. This act has been drafted to meet the requirements of the International Accountancy Standards and the relevant directives of the European Union. The Polish authorities provide that pursuant to article 4, "entities subject to this act are obliged to apply rules of accountancy properly, ensuring honest and clear presentation of the financial condition, material status, financial result and profitableness of the entity". This obligation is developed in articles 20-22. Pursuant to article 20, companies and other entities conducting economic activity are obliged to maintain the books and to enter every economic operation performed during the given month. Every operation should be recorded on the basis of proper "source" documents which "ascertain the performance of a given economic operation". Article 22 states that accounting documents should reflect the true course of the economic operation and be free from accounting errors. Deletions or alterations are "inadmissible".

Articles 45-48 require companies and other entities conducting economic activity to prepare an annual financial statement and an annual economic activity report. The annual financial statement consists of a balance, profit and loss account, and data not included in a balance and a profit and loss account but necessary to reflect honestly and clearly the financial status, financial result and profitability of the entity concerned. After approval by an independent auditor, financial statements shall be submitted to the court of competent jurisdiction (register division). In addition, Poland states that, pursuant to article 70 of the Act on Accountancy, audit reports including the balance, profit and loss statement, and the certified accountant's opinion, shall be published.

The Polish authorities confirm that under these rules, it is forbidden to make off-the-books or inadequately identified transactions, record non-existing expenditures, enter liabilities with incorrect identification of their object as well as use false documents.

Audits

Article 64 of the Act on Accountancy requires that an independent auditor examine the financial statement of the following entities: banks and insurance companies, stock companies, investment funds, pension funds, as well as entities that fulfil two or more conditions of the following: (1) employ more than 50 persons, (2) have assets at the year end exceeding 2,500,000 EURO, and (3) net income from the sale of goods and financial operations exceeds 5,000,000 EURO. An auditor shall prepare a report declaring particularly whether the financial statement has been prepared on the basis of properly maintained books, whether it has been prepared in accordance with the provisions of the law and whether it reflects honestly and clearly all information relevant to a proper and complete evaluation of the entity concerned.

The independence of auditors is guaranteed by the provisions of the Act on Accountancy. Pursuant thereto, an independent auditor should not be connected with the entity in question as a shareholder or stockholder (including an entity subordinated or dominated by the company), an employee, manager or a board member during last 3 years, or have participated during the last 3 years in keeping the books or the preparation of the financial statement of the entity.

[33] This act was amended on 9 November 2000. The new Act entered into force on 1 January 2001.

According to article 1.4 of the Law of September 21, 2000, which amended the Act on Certified Accountants and their Self-government Bodies, certified accountants are bound by professional secrecy. However, the Polish authorities confirm that professional secrecy would not be violated by a notification of a suspected offence. Moreover, under the "Conduct of Qualified Auditor's Profession", which regulates general principles for auditing financial statements, auditors are obliged to report to the entity's management suspected criminal activities or irregularities. Furthermore, with respect to entities such as banks[34], insurance companies, investment funds and pension funds, auditors are obliged to report to the competent state supervisory body (e.g. the State Office of Insurance Supervision) any activity which breaches a law, etc. Pursuant to article 304.2 of the Code of Criminal Procedure, such supervisory bodies are obliged to inform the state prosecutor or the police when they receive information of suspected criminal activity from auditors.

8.2 Companies Subject to Requirements

Poland states that the Act on Accountancy applies to:

- Companies and other legal persons except the State Treasury and the National Bank Of Poland (central bank);
- Natural persons whose net income from selling goods or financial operations for the past year exceeds 800,000 Euro;
- Banks, stock exchanges, trust funds, investment funds, insurance companies, pension funds – regardless of their legal form and income;
- Local municipalities, districts, regions (units of administrative division of the country);
- Entities not having legal personality;
- Foreign natural or legal persons conducting economic activity in the territory of Poland – in relation to that activity;
- Other entities if they are receiving allocations from the state budget or budgets of territorial self-government units.

8.3 Penalties

Article 77 .2 of the Act on Accountancy states that, "whoever being responsible in accordance with the provisions of this Act for creation of a financial statement allows to not create such a statement or create thereof in contradiction with the conditions stipulated in the law or to include in this statement dishonest information, shall be subject to a fine or a deprivation of liberty for a period up to 2 years or both." Pursuant to article 79, whoever being responsible under the law does not submit a financial statement for auditing or publication is subject to the same penalty. Article 60 of the Fiscal Criminal Code[35] states that, "whoever against a obligation does not keep the books of accounts shall be subject to a fine in an amount up to 240 daily rates." Article 61 states that, "whoever dishonestly keeps the books, shall be subject to a fine in an amount up to 240 daily rates". (Poland states this fine under the Fiscal Criminal Code ranges from 230 to 2,208,000 PLN.)[36]

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34. Auditors are obliged to report suspected criminal activity, etc. to the state supervisory body (i.e. the Banking Supervision Commission) also under the Banking Law.

35. This act was enacted on 10 September 1999 and entered into force on 17 October 1999.

36 According to Poland, Polish Senate (second chamber of Parliament) is currently discussing on the amendment to the Act on Accountancy, which re-introduces "penal responsibility for carrying the books disregarding the provisions of law or entering false data into the books."

In addition, Poland confirms that the falsification of an account document could constitute the offence of forgery under article 270.1 of the Penal Code, subject to a penalty of deprivation of liberty from 3 month to 5 years. If such a falsification results in the loss of tax liabilities, it would constitutedf a tax criminal offence separately.

The Polish authorities are of the opinion that the penalties for omission and falsification in respect of records and accounts are in accordance with Article 8.2 of the Convention.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1/9.2 Criminal Matters/ Dual Criminality

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

Poland may provide mutual legal assistance on criminal matters on the basis of bilateral and multilateral treaties to which Poland is a party. Poland is a party to the European Convention on Mutual Legal Assistance in Criminal Matters of 1959, and several bilateral treaties[37].

Poland has reserved the right under the European Convention on Mutual Legal Assistance in Criminal Matters of 1959, to make the provision of MLA in the form of search and seizure conditional on dual criminality, the availability of extradition for the offence in question, and the execution of the request in accordance with Polish law.

In the absence of a treaty, Poland may provide MLA[38] pursuant to the provisions of the Code of Criminal Procedure, which only applies where there is no applicable treaty. Pursuant to article 588.2, assistance shall be refused if the request conflicts with the legal order of Poland (e.g. a request for conducting interrogation using a polygraph) or constitutes an infringement of its sovereignty (e.g. a request for making an arrest in the territory of Poland by a foreign authority). In addition, pursuant to article 588.3, assistance may be refused if;

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[37] Poland has concluded bilateral treaties on MLA with U.S.A and Canada. Poland states that under these bilateral treaties, the standards set by the European Convention are adopted.

[38] . Pursuant to article 585 of the Code of Criminal Procedure, the forms of MLA that are available include the following: 1) service of documents on persons staying abroad or on agencies having their principal offices abroad; 2) taking depositions of accused persons, witnesses, or experts; 3) inspection and searches of dwellings and persons, confiscation of material objects and their delivery abroad; 4) summoning persons staying abroad to make a personal voluntary appearance before the court or state prosecutor, in order to be examined as a witness or to be cross-examined, and making persons under detention available for the same purposes; and 5) providing access to records and documents, and information on the criminal record of the accused.

- the performance of the requested action lies beyond the scope of activity of the court or state prosecutor under Polish law;
- the foreign state in which the letters rogatory have originated, does not guarantee reciprocity in such matters;
- the request is concerned with an act that is not an offence under Polish law (dual criminality).

The Polish authorities state that dual criminality shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention.

Decisions to grant or refuse MLA are made by the competent courts or public prosecutors. A decision of the court to refuse legal assistance may be appealed by the public prosecutor within the framework of the Code of Criminal Procedure. Additionally, a decision of the public prosecutor to refuse assistance may be appealed to the superior public prosecutor.

Poland confirms that it can provide MLA in response to a request concerning criminal proceedings against a legal person on either a treaty or a non-treaty basis.

9.1.2 Non-criminal Matters

The ACUC contains measures to provide mutual legal assistance to the authorities in foreign states in relation to proceedings against a legal person. Pursuant to Article 22f, the President of the OPCC "shall" provide legal assistance in relation to the proceedings against a legal person for the purpose of establishing its liability or imposing on it sanctions for the bribery of a person performing a public function.

Measures of assistance include necessary actions undertaken in administrative proceedings, such as serving documents, hearing witnesses and experts, summoning persons to appear in person, making available files and documents. Coercive measures are not available. Additionally, financial information could be provided if it is not covered by bank secrecy.

Pursuant to article 22f.4 of the ACUC, the President of the OPCC may refuse legal assistance to a foreign state if:

- The requested action would "contravene fundamental principles of the legal order in the Republic of Poland" or "violate its sovereignty". Poland states that this ground has the same effect as the corresponding ground in respect of MLA in criminal matters (see 9.1/ 9.2 above);
- no agreement stipulating such assistance has been concluded between the Republic of Poland and the state from which the request originates, and that state does not guarantee reciprocity. Poland confirms that the Convention is an "agreement stipulating such assistance".

9.3 Bank Secrecy

Pursuant to article 105.1(2)(b) and (c) of the Banking Law, Poland is "obliged" to provide information "covered by bank secrecy" in relation to a request from a foreign state concerning criminal proceedings against a natural person or an entity (with or without legal personality) if the request is based on an international treaty. The Polish authorities consider the Convention as a sufficient basis for rendering information covered by bank secrecy. Poland confirms that there are no additional conditions that need to be satisfied in order to grant MLA in respect of information covered by bank secrecy. According to Poland, if there is a criminal proceeding in a requesting state with which Poland has concluded a bilateral or multilateral treaty on MLA including rendering information

covered by bank secrecy, the request by the proper authorities fulfilling general conditions is sufficient to grant such assistance.

10. ARTICLE 10. EXTRADITION

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

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

As mentioned above in 3.4 ("Penalties and Extradition"), Poland may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral / multilateral treaties[39], or under the provisions of the Code of Criminal Procedure where there is no applicable treaty. In addition, the Polish authorities state that in the absence of an extradition treaty with another Party, it will consider the Convention as a legal basis for extradition in respect of the offence of bribing a foreign public official.

Requests for extradition are transmitted by the state prosecutor to the Voivodship Court, which shall issue an opinion following the opportunity of the accused make submissions orally or in writing. Where he/ she requests "evidence taking proceedings" based on a "well-founded request", they "should" be conducted "with respect to the evidence accessible" in Poland (articles 602 and 603 of the Code of Criminal Procedure). The Polish authorities confirm that in the "evidence taking proceedings", the person whose extradition is sought is not allowed to argue that he/ she is not guilty, and therefore, the requesting state would not have to provide any additional evidence in order to prove the criminal act of the person in question thereunder. According to Poland, such proceedings take place to determine whether extradition could be granted pursuant to Polish law[40].

A decision of the Court on whether to extradite shall be referred to the Minister of Justice who shall make the final decision (article 603.5). The decision of the Minister of Justice is not subject to appeal.

Under article 604.1 of the Code of Criminal Procedure, extradition shall be refused if:

- the person whose extradition is sought is a Polish citizen or has the right of asylum in Poland;
- the act for which extradition is sought does not have the features of a prohibited act, the law stipulates that the act does not constitute an offence, or a perpetrator of the act does not commit an offence or is not subject to a penalty;
- the period of limitation has lapsed;
- the criminal proceedings have been validly concluded concerning the same act committed by the same person;
- the extradition would contravene Polish law

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39 Poland is a party to the European convention on Extradition of 1957. In addition, Poland has concluded bilateral treaties on extradition with U.S.A and Australia. Poland states that under these bilateral treaties, the standards set by the European Convention are adopted.

40. For instance, the "evidence taking proceedings" take place to evaluate whether the human rights of the person in question would be safeguarded (e.g. a fair trial) in the requesting state if extradition is granted.

In addition, pursuant to article 604.2, extradition may be refused "in particular", under the circumstances including the following:

- where pursuant to the law of the requesting state, the offence is subject to the penalty of deprivation of liberty for a maximum term of one year or less, or such a penalty has been actually imposed;
- where the offence for which the extradition is sought is of a political, military or fiscal nature;
- where the requesting state does not guarantee reciprocity in this matter.

The Polish authorities confirm that bribery of a foreign public official who is a political party member could not be considered as a "political" offence and the bribery of a foreign public official could not in general be considered as a "fiscal" offence.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

As mentioned above, Poland cannot extradite its nationals pursuant to article 604.1 of the Code of Criminal Procedure, and in accordance with article 55 of the Polish Constitution, which prohibits the extradition of Polish nationals.

As mentioned above in 5.1, the Polish prosecutorial authorities are obliged to institute criminal proceedings where there is a reasonable suspicion that an offence has been committed. The Polish authorities consider that a request for extradition creates such a suspicion. Thus, where the nationality is the sole reason for declining a request to extradite a person for the bribery of a foreign public official, the competent authorities in Poland are obliged to institute criminal proceedings against such a person.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

As mentioned above, dual criminality is required for extradition. However, the Polish authorities consider that it shall be deemed to be fulfilled as long as the offence for which extradition is sought is within the scope of the Convention.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

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

Poland has notified the Secretary-General that the Ministry of Justice has been designated as the authority responsible for the matters listed in Article 11. In addition, Poland intends to designate the Office for Protection of Competition and Consumers as the responsible authority for mutual legal assistance in relation to non-criminal proceedings against a legal person after the entry into force of the Act of 9 September 2000, which will take place on February 4, 2001.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

Neither the Act on Personal Income Tax (article 2.1.4) nor the Act on Corporate Income Tax (article 2.1.3) explicitly prohibits tax deductibility of the bribe paid to a foreign public official. However, both acts contain an identical provision, which states as follows:

> *The provisions of this Act shall not apply to the revenues resulting from acts which cannot be a subject matter of a legally effective contract.*

The Polish authorities state that the Ministry of Finance interprets this provision as prohibiting the tax deductibility of an expenditure representing a bribe paid to a person performing a public function. However, this explanation raises two issues of concern**.** Firstly, the provision quoted by the Polish authorities refers to "revenues", and thus seems to be addressing the taxability of revenues as opposed to the non-tax deductibility of expenditures, in which case the income derived from bribing would not be taxable. Secondly, it is presumed that the provision is interpreted as excluding from the ambit of the Tax Act (revenues) derived from bribing a foreign public official because bribery is illegal, and a contract to perform a criminal act would be an illegal contract and thus unenforceable, hence not "the subject matter of a legally effective contract". However, an equally plausible interpretation could be that the act from which the revenue is derived is the act (or omission) of the foreign public official, and if his/ her act does not involve a breach of law (civil or criminal), the Tax Act would apply.

The Polish authorities state that they interpret the term "revenues" broadly so that it includes both the expense and the income. And thus, the proceeds of a criminal offence are not taxable because of their criminal origin, and the deductibility of the bribe is prohibited for the same reason. However, there is still doubt as to whether this addresses the taxability of the proceeds and the non-tax deductibility of the bribe in respect of foreign bribery cases.

EVALUATION OF POLAND

General Remarks

The Working Group commends the Polish authorities for their excellent co-operation during all stages of the examination. In particular, the Working Group appreciates the thoroughness of Poland's responses and timeliness in providing translations of all the relevant legislation.

Poland implemented the Convention through an amendment to article 229 of the Penal Code, which applied only to the bribery of domestic public officials prior to the amendment. The new provision retains its application to domestic public officials, and extends its ambit to persons exercising foreign or international public offices or functions. In addition, Poland created the administrative liability of legal persons for the bribery offence under the Act on Combating Unfair Competition (ACUC). Overall, the Working Group is of the opinion that the relevant Polish laws, including article 229, conform generally to the standards under the Convention. However, the Working Group has focused on the specific issues identified below.

Specific Issues

1. Third Parties

Article 229.5 does not expressly apply to the case where the bribe is for a third party. The Polish law covers the case where a "material benefit" (i.e. pecuniary benefits) goes to a third party by applying a general provision in the Penal Code defining "material benefit", which addresses several situations including the one where the benefit is for a third party. However, since this provision does not refer to a "personal benefit" (i.e. non-pecuniary benefits), the case where such a benefit goes to a third party is not covered.

The Working Group considers this a gap in the implementation of the Convention and recommends that the Polish authorities take remedial action as soon as possible to cover the case where a "personal benefit" goes to a third party. Poland acknowledges that this issue is not covered by their legislation and informs the Group that they will amend their legislation in order to address this issue.

2. Administrative Responsibility of Legal Persons

Poland establishes the administrative liability of legal persons for the foreign bribery offence within the framework of the Act on Combating Unfair Competition. It is triggered where the natural person who is a director, a member of the board, etc. of the legal person bribes a public official, or where an employee or another person who is authorised by a person holding a high managerial post to bribe a public official. The Working Group is concerned about certain features of this approach as explained in the review report, in particular the requirement, in most cases, of a prior conviction of the natural person, the exclusion of parallel criminal and administrative proceedings, and that sanctions are based on the revenue of the legal person in the preceding year.

The Polish authorities stress that the requirement of the Convention is to establish the liability of legal persons "in accordance with its legal principles", and is of the opinion that their implementing legislation sufficiently meets the standards under the Convention. In addition, although there is no experience in practice with the administrative liability of legal persons for bribery cases, Poland believes that this would be an effective way to implement the requirements of the Convention.

However, the Working Group expressed doubts whether the standard of effective, proportionate and dissuasive sanctions has been fully met and recommends that this issue should be re-examined in Phase 2 in light of Articles 2 and 3.2 of the Convention.

3. Forfeiture of the Bribes and its Proceeds

Under articles 44, 45 and 52 of the Penal Code, forfeiture of a bribe in the form of an "item", and of the proceeds of bribery in the form of a "financial benefit" is subject to discretion in several different ways. In addition, ordering monetary sanctions of comparable effect is also discretionary. There are no guidelines for the exercise of the discretion to order forfeiture or to order monetary sanctions of comparable effect.

Poland states that where the court exercises its discretion it would provide reasons therefor. According to Poland, such discretion is exercised, for instance, where the forfeiture would harm a third party who was not involved in the offence.

However, the Group noted that the possible exercise of discretion in some cases regarding forfeiture or the application of monetary sanctions of comparable effect may undermine the effective implementation of the Convention. The Group recommends that this matter be followed up in Phase 2.

4. Tax Deductibility

Poland states that bribes are non-deductible because the tax legislation does not apply to the "revenues resulting from acts which cannot be a subject matter of a legally effective contract". Thus it appears that bribes to foreign public officials are not deductible because a contract to perform a criminal act such as bribery would be an illegal contract, and hence cannot be the "subject matter of a legally effective contract". This raises two concerns: (1) As it refers to "revenues" this may address the taxability of revenues. In such case the non-tax deductibility of a bribe would be irrelevant, as there would be no taxable income to deduct it from. (2) This provision could be interpreted so that the act from which the "revenue" is derived is the act of the foreign public official, and if his/ her act does not involve a breach of law, the tax law would apply and admit the tax deductibility of bribes.

The Polish authorities state that they interpret the term "revenues" broadly so that it includes both the expense and the income. And thus, the proceeds of a criminal offence are not taxable because of their criminal origin, and the deductibility of the bribe is prohibited for the same reason.

The Working Group expressed doubts whether this addresses the taxability of the proceeds and the non-tax deductibility of the bribe in respect of foreign bribery cases. Therefore, the Group recommends that this issue is monitored in Phase 2 in order to confirm whether taxation of the proceeds and prohibition of the deduction of the bribe is possible.