QUESTIONNAIRE

Country self-assessment report on implementation and enforcement of G20 commitments on foreign bribery

G20 countries are invited to complete the questionnaire, below, on the implementation and enforcement of G20 commitments on foreign bribery.

Part I questions are drafted directly from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence endorsed by G20 Leaders in St. Petersburg, and its background note on Enforcement of Foreign Bribery Offences. Part II questions are drafted from the G20 Anti-Corruption Action Plan and the St. Petersburg Leaders' Declaration.

Responses to this questionnaire could be compiled into a summary on the "state of play" in G20 countries on steps taken to date to implement the aforementioned commitments, as well as plans for future actions in this area.

I. Implementation of the Guiding Principles on Enforcement of the Foreign Bribery Offence in G20 Countries

Note 1: This section of the questionnaire is drafted from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence and the background note on Enforcement of Foreign Bribery Offences.

A. A robust legislative framework

In your jurisdiction:

1. Is there a clear and explicit foreign bribery offence that covers the key elements of the internationally agreed definition for foreign bribery, including offering, promising or giving of a bribe, bribery through intermediaries, and bribes paid to third party beneficiaries?

- *If your jurisdiction criminalises foreign bribery*, please provide references to the relevant provisions and/or the full text, if possible.
- *If your jurisdiction does not have a foreign bribery offence:*
  - Please note whether an offence has been "drafted", "submitted for government review", or "adopted but not yet entered into force".
  - Please provide a timeline for the entry into force of draft legislation, where applicable.

Response:

South Africa has criminalised foreign bribery. Section 5 of the Prevention and Combating of Corrupt Activities Act 2004 (the PRECCA) covers the offence of bribery of foreign public officials.

"Section 5. Offences in respect of corrupt activities relating to foreign public officials

(1) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act,

personally or by influencing another person so to act, in a manner—

(a) that amounts to the—

(i) illegal, dishonest, unauthorised, incomplete, or biased; or

(ii) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(b) that amounts to—

(i) the abuse of a position of authority;

(ii) a breach of trust; or

(iii) the violation of a legal duty or a set of rules;

(c) designed to achieve an unjustified result; or

(d) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to foreign public officials.

(2) Without derogating from the generality of section 2(4), ''to act'' in subsection (1) includes—

(a) the using of such foreign public official's or such others person's position to influence any acts or decisions of the foreign state or public international organisation concerned; or

(b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.".

Section 5 does not expressly mention intermediaries but uses the terms "*directly or indirectly*". In our Phase 1 OECD Report, we submitted case law in support of the assertion that these terms would cover bribery through intermediaries. In the 2007 Supreme Court of Appeal decision in *Shaik and Others v S* [2007] 2 All SA 150 (SCA), the Court held that "the definition of 'proceeds of unlawful activities' in section 1(1)includes benefits received 'directly or indirectly', which in its ordinary meaning includes benefits obtained indirectly through another person or entity." (Emphasis added)

Section 5 does not refer to "a third party", but covers gratifications given to a foreign public official, "*whether for the benefit of that foreign public official or for the benefit of another person*" and the term "person" includes both natural and legal persons.

Note 2: For questions 2 through 11, jurisdictions without a foreign bribery offence should include updates on plans to address the following issues in efforts to establish the criminalisation of foreign bribery and a framework for enforcing this offence.

2. What is the statute of limitations for investigating and prosecuting foreign bribery? Please indicate the criteria for suspension, interruption or extension of the statute of limitations?

Response:

Section 18 of the Criminal Procedure Act, 1977 (Act 51 of 1977), provides that the right to institute a prosecution for any offence lapses after the expiration of a period of 20 years from the time when the offence was committed. Because the statute of limitations commences when the state fails to institute a prosecution, the statute of limitations would start running even when an investigation is underway. While there are no limits set by the law on the duration of investigations or prosecutions, it should be pointed out that the courts would protect the accused's right to have a trial "begin and conclude without unreasonable delay", as enshrined in section 35(3) of the South

African Constitution. South African courts have not set specific investigation times, but rather that the particular circumstances of each case would be taken into account. In particular, where certain offences, such as foreign bribery, are involved, which may, for instance, require reliance on mutual legal assistance, this would be a factor considered by the courts.

3. Please describe the form of jurisdiction available over the foreign bribery offence (i.e. territorial or nationality jurisdiction).

Response:

Section 35(1) of the PRECCA establishes the extra-territorial jurisdiction of South African courts for offences under the PCCA, "*regardless of whether or not the act constitutes an offence at the place of its commission […] if the person to be charged—*

(a) is a citizen of the Republic;
(b) is ordinarily resident in the Republic;
(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;
(d) is a company, incorporated or registered as such under any law, in the Republic; or
(e) any body of persons, corporate or unincorporated, in the Republic.

This would extend nationality jurisdiction to both natural and legal persons.

Furthermore, section 35(2) of the PRECCA provides territorial jurisdiction for offences committed by persons not covered under section 35(1) (i.e. persons that are not South African nationals. Section 35(2) provides that:

"any act alleged to constitute an offence under this Act […] shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to also have been committed in the Republic if that—
(a) act affects or is intended to affect a public body, a business or any other person in the Republic;
(b) person is found to be in South Africa; and
(c) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.

Therefore, overall, the provisions in section 35(1) and 35(2) of the PRECCA afford the South African Courts fairly broad jurisdiction over foreign bribery offences (as well as other domestic bribery offences).

4. Please indicate whether your jurisdiction has a corporate liability regime for the offence of foreign bribery.

If your jurisdiction does not have a corporate liability regime for the offence of foreign bribery, please provide a timeline for implementation of corporate liability.

Response:

As a general rule, section 2 of the Interpretation Act, 1957, provides that South African law applies to natural and legal persons alike. This implies that section 5(1) of the PRECCA, which covers the offence of bribery of foreign public officials, applies to both natural and legal persons. However, this text is not directly applicable to legal persons and the main basis for holding a company criminally liable is section 332(1) of the Criminal Procedure Act, 1977 ('CPA') that provides for the prosecution of "corporations and members of associations".
Section 332(1) provides as follows:

> *"For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law —*
> *(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and*
> *(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,*
> *in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."*

5(a) Please describe the sanctions and confiscation measures available for natural and legal persons for the crime of foreign bribery.

5(b) Please provide the number of criminal, administrative, and civil cases of foreign bribery that have resulted in a final disposition, and indicate (i) how many of these cases have resulted in a criminal conviction or acquittal, or similar findings under an administrative or civil procedure, and (ii) the number of natural and legal persons who have been convicted or otherwise sanctioned.

- *Where possible, please provide references to the relevant provisions and/or the full text, if possible.*

Response:

Ad question 5(a):

SANCTIONS

Sanctions are regulated by section 26 of the PRECCA.

Criminal penalties for foreign bribery are either imprisonment or a fine or both. The level of sanctions for both natural and legal persons depends on the court with jurisdiction over the offence.

With regard to imprisonment penalties are as follows:

- Up to 18 years at the Regional Court Level.
- Up to life imprisonment at the High Court Level (section 26(1)(a) PRECCA).
- A minimum term of imprisonment for certain specified offences including foreign bribery must be imposed by either a Regional Court or a High Court where the offence involves, inter alia: (i) amounts of more than ZAR 500 000 (EUR 36 510 as of 16 September 2013), or (ii) amounts of more than ZAR 100 000 (EUR 7 301 as of 16 September 2013), if the offence was committed by a person, group, syndicate or enterprise towards a common purpose or conspiracy. In such circumstances, a minimum of 15 years imprisonment must be imposed for first time offenders although this sanction can be waived if "substantial and

compelling circumstances exist which justify imposition of a lesser sentence" as contemplated in section 51 of the Criminal Law Amendment Act, 1997(Act No. 105 of 1997).

With regards to monetary sanctions, the level of fines provided in the law is the same for both natural and legal persons. As with imprisonment, the level depends on the court with jurisdiction over the offence. At the Regional Court level, since 1 February 2013, a Regional Court may impose a fine of up to ZAR 720 000 (EUR 52 574 as of 16 September 2013), doubling the amount from Phase 2 (ZAR 360 000 EUR 26 288 as of 16 September 2013). The High Court has unlimited jurisdiction over fines.

CONFISCATION

The Asset Forfeiture Unit (**AFU**) of the National Prosecuting Authority is responsible for freezing and confiscation of assets. It applies to the following two systems of forfeiture that can be used in relation to all offences, including foreign bribery:

- A conviction based system in Chapter 5 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (the **POCA**). This system is similar to the UK system.
- A non-conviction based system in Chapter 6 of the POCA. This system is similar to the US and UK systems.

Chapter 5 of POCA: conviction based confiscation of proceeds of crime

Chapter 5 of the POCA is benefit based, i.e the value of the proceeds of crime received by criminals can be recovered from any of their property, including "clean" property that is not proceeds.

Since the proceedings are civil, the state only has to prove its case on a civil standard (balance of probabilities). It is similar to a normal civil claim for damages in that the state obtains a judgment or confiscation order against those convicted for the value of the proceeds that came into their possession.

The value of the proceeds is the gross value of all proceeds received, i.e it does not only deal with profit, and it does not matter if the proceeds are no longer in their possession. It includes the value of proceeds from related crimes of which they have not been convicted, as well as the value of any unexplained income or wealth.

The state can recover the value of the proceeds from any property owned by—

- those convicted, or of which they are the beneficial owners;
- innocent persons or entities who received gifts from those convicted, up to the value of gifts they received, e.g assets in a family trust or "donated" given to family members or others

To ensure that the realisable property is not dissipated, the state may obtain an order to freeze any such property until the case is finalised. This includes clean or untainted property belonging to persons or entities who received gifts to the value of the gifts. The standard of proof is similar to that required for a search warrant.

Chapter 6 of POCA: non-conviction based forfeiture of the proceeds or instrumentalities of unlawful activities

Chapter 6 of POCA provides for the forfeiture of the actual proceeds of all unlawful activities and the instrumentalities of serious offences referred to in Schedule 1 of the POCA. It is applicable even when there is no prosecution or the accused has been acquitted. Unlike Chapter 5, it must be proved that the property itself is proceeds or an instrumentality of unlawful activities, and only the actual tainted property can be frozen and forfeited.

Since the proceedings are civil, the state only has to prove its case on a civil standard (balance of probabilities).

As in Chapter 5, the state can obtain a freezing order over the property. The standard of proof is similar to that

required for a search warrant.

As Chapter 6 is a purely civil process, it also applies to unlawful activities that are not criminal offences. It further applies to activities that are unlawful in foreign states but not in South Africa – i.e dual criminality is not required.

Mutual legal assistance in relation to confiscation or forfeiture of property

A formal mutual legal assistance request can be made to South Africa to register foreign freezing or confiscation/forfeiture orders as an order of a South African court. Registration means that such an order will have the same effect of an order issued by a South African court.

South Africa can also obtain its own freezing or confiscation/forfeiture orders based on South African legislation provided that the necessary evidence is made available for it to do so.

AMOUNTS THAT CAN BE RECOVERED

Recovery of amounts paid in terms of the contract or assets alienated unlawfully

In Chapter 5 cases, the AFU is able to recover the full value of payments made in terms of the awarded contract from any property held by the defendants.

In Chapter 6 cases the AFU is also able to recover the full value of payments made in terms of the awarded contract, but will need to link it to the actual payments.

In both cases, if substantial value has already been delivered in return for the payments, the courts may consider whether it is proportional to recover the full amount.

Recovery of bribes

In Chapter 5, the AFU is able to recover the value of any bribe paid from clean property. In Chapter 6 proceedings, the AFU can recover the actual bribe, but it may be able to make a case to recover the bribe from other property that can be shown to represent bribe.

Forfeiture of bribes in terms of the normal criminal process

The Criminal Procedure Act, 1977 (Act No 51 of 1977) (**CPA**) also provides for the confiscation after conviction of property used in the commission of any offence, including foreign bribery. Section 20 of the CPA provides for seizure of the actual bribe payment (if it is an exhibit or an instrumentality of the specific crime under investigation) if the bribe is still in the hands of the briber or at least in South Africa.

Fines for the value of the bribe in PRECCA

Irrespective of whether the bribe has been forfeited in terms of the POCA or the CPA, section 26(3) of the PRECCA allows for a court to impose a fine of up to "five times the value of the gratification involved in the offence," in addition to any other fine imposed.

Ad question 5(b):

South Africa has not prosecuted one criminal case for foreign bribery. South Africa has investigated 11 cases involving Foreign Bribery since 2009 of which 7 have been finalized without having reached the prosecutorial stage There are 4 pending investigations of Foreign Bribery cases in South Africa.

B. Effective detection and domestic coordination

In your jurisdiction:

6. What steps have been taken to engage with relevant agencies, such as overseas missions, broader tax administrations, trade promotion, public procurement and export credit agencies, as well as with the private sector, on issues related to implementation and enforcement of the foreign bribery offence? *Where possible, please cite specific examples.*

Response:

With regard to private sector awareness-raising, the Department of Public Service and Administration (DPSA) partnered with Business Unity South Africa (BUSA) to develop and implement a three-year programme to increase private sector capacity to prevent and combat corruption, including foreign bribery. The Convention, OECD Good Practice Guidance and other anti-corruption training materials are also made available on BUSA's website.

In 2012, South Africa also launched a communications campaign, in which billboards and posters were developed to raise awareness of anti-corruption issues, including foreign bribery. The campaign covered major airports, train stations and highway off-ramps to target business travellers. In 2010, the Department of International Relations and Cooperation (DIRCO) organised briefings with business communities in its overseas missions.

DIRCO officials "continuously" brief South African companies conducting business abroad on the Convention and its implications.

A National Public Service Anti-Corruption 24-hours hotline (NACH) was established to facilitate the general reporting of corruption. Between 2004 and March 2012, the NACH received 137 512 complaints, of which 14 287 related to reports of alleged corruption. Of these reports, the Public Service Commission which independently administers the hotline, referred 9 881 cases of alleged corruption to relevant authorities for investigation. Between 2011 and 2012, 120 cases were referred to the South African Police Service (SAPS).

The Export Credit Insurance Corporation (ECIC) is South Africa's officially supported export credit and insurance company. ECIC's homepage links to its anti-bribery policy, the Convention and the PRECCA. While South Africa has not formally adhered to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits ('Export Credits Recommendation'), the Working Group found in its Phase 2 written follow-up report that ECIC had integrated in its policies all of the standards of the Export Credits Recommendation.

Accordingly, ECIC informs exporters of the legal consequences of bribery within its application forms and encourages the development, application and documentation of appropriate management control systems to combat bribery. Applicants and exporters must also declare in the application form that they, and anyone acting on their behalf in connection with the transaction, have not engaged and will not engage in bribery. ECIC applies a five per cent ceiling on agents' commission fees, and conducts due diligence on such fees. This includes requesting additional information on the agent's tasks and verifying that the commissions are reasonably proportionate to the value of the product or service provided.

Between January 2012 and March 2013, ECIC held 12 anti-corruption awareness-raising sessions with exporters,

lenders and sponsors, with some sessions covering anti-corruption awareness.

ECIC verifies the debarment lists of the multilateral developments banks in its decisions to grant cover. If an exporter is listed therein, ECIC will refuse to approve credit, cover or other support for the period of the listing ECIC also refuses support to exporters convicted of foreign bribery in a national court (or equivalent national administrative measures) within a five-year period. Where there is credible evidence that bribery was involved in the transaction before support was granted, ECIC would suspend the contract and conduct enhanced due diligence. ECIC's Procedure and Processes Manual provides detailed guidelines on anti-bribery enhanced due diligence and related training has also been provided for staff. If ECIC concludes that bribery was involved in the transaction, support will be refused. If credible evidence of bribery arises after support has been granted, ECIC may *inter alia* invalidate cover, deny indemnification or demand repayment.

7(a) Are appropriate reporting channels available for whistleblowers in both the private and public sectors?

7(b) Are appropriate protections available for whistleblowers in both the private and public sectors?

Where possible, specific reference should be made to implementation of the G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation.[1]

Response:

Ad questions 1(a) and (b):

South Africa's Protected Disclosures, 2000 (Act No. 26 of 2000) (PDA), provides protection for public and private sector employees who report unlawful or irregular conduct of an employer or an employee of that employer.

The Department of Justice (DoJ) &CD has prepared a draft Protected Disclosures Amendment Bill to address a number of issues in the PDA, including to extend protection to independent contractors, consultants and temporary employees. The Bill also seeks to strengthen the PDA by introducing a duty on employers to investigate disclosures of unlawful or irregular conduct and by providing for immunity from civil and criminal liability.

C. Effective investigation and prosecution

In your jurisdiction:

8(a) Please describe the investigative powers granted to law enforcement authorities to proactively and effectively investigate and prosecute foreign bribery.

8(b) Please describe the specialized training on detecting, investigating and prosecuting foreign bribery provided and/or planned to be provided to law enforcement authorities.

Response:

[1] Available online here: http://www.oecd.org/corruption/48972967.pdf

The Directorate for Priority Crime Investigation (DPCI, also known as the "Hawks") within the South African Police Service (SAPS) is responsible for the investigation of serious commercial crime and serious corruption, including foreign bribery. The prosecution of complex commercial crime cases under the PRECCA, including foreign bribery, is the responsibility of the Specialised Commercial Crimes Unit (SCCU) within the National Prosecuting Authority of South Africa (NPA). South Africa has also established Specialised Commercial Crime Courts (SCCCs), which are Regional Courts, with expertise in complex commercial crimes, including foreign bribery.

Under the new structure, prosecutors are no longer placed within the DPCI, as was formerly the case within the now disbanded DSO. However, the National Director for Public Prosecutions (NDPP) must ensure that a dedicated component of prosecutors is available to assist and cooperate with members of the DPCI in conducting its investigations, and may be requested by the Head of the DPCI to appoint a Director of Public Prosecutions to perform the investigative powers referred to in sections 28 and 29 of the NPA Act. The investigation and prosecution process of the SCCU is driven through a combined prosecutor and investigator approach. Prosecutors technically become involved the moment a case has formally been opened under the case docket system. At the commencement of a formal investigation, the investigating officer and the prosecutor are supposed to interact to plan the investigation.

Chapter 2 of the CPA provides for the application and granting of search warrants, seizure, forfeiture and disposal of property connected with any offence. Section 20 covers the seizure of any article which is "concerned or on reasonable grounds is believed to be concerned in the commission or suspected commission of an offence in the Republic of elsewhere; which may afford evidence of the commission or suspected commission of an offence, whether within the Republic of elsewhere; or which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence. This provision can also be relied upon to seize the bribe payment in situations where the bribe is still in the hands of the briber or, at least, on South African territory. The CPA also provides for exceptions where a search and seizure may take place without a warrant. The state has the same powers for investigating an offence in relation to a legal person as it does in relation to a natural person.

Special investigative techniques are also available under the CPA, the Regulation of Interception of Communications and Provision of Communication-Related Information Act 2002 (Act No. 70 of 2002) (RICA), and the National Strategic Intelligence Act 1994 (Act no. 29 of 1994) (NSIA). Special investigative techniques can be used in any criminal investigation, including for foreign bribery, where conventional investigative techniques would not deliver successful results. Investigators may utilise such techniques as controlled deliveries, undercover operations and electronic surveillance, depending on the circumstances of the crime and the activities of the perpetrators. More specifically, section 252(a) of the CPA makes provision for the conducting of sting and undercover operations; RICA makes provision for the interception of certain communications, the monitoring of certain signals and radio frequency spectrums, and the provision of certain communication-related information, and; the NSIA regulates, *inter alia*, the gathering of crime intelligence by overt and covert means.

Regarding training, sustained efforts have been undertaken by South Africa to provide training to investigators and prosecutors on the investigation and prosecution of corruption, including foreign bribery offences. More specifically, in 2013, 22 investigators and prosecutors of the DPCI/NPA were trained on the investigation of the foreign bribery offence. Between 2012 and 2013, 300 members of the DPCI were trained on PRECCA offences, including foreign bribery and related use of international cooperation and subpoenas. During the same period, approximately 58 prosecutors were also trained on the foreign bribery offence. Two other trainings were provided to prosecutors regarding the prosecution of PRECCA corruption offences, financial investigations, asset recovery, MLA and extradition.

9(a) Please describe the procedures in place for ensuring prompt and effective handling of outgoing and incoming mutual legal assistance requests in relation to foreign bribery cases.

9(b) Please describe how informal assistance is encouraged, in conformity with your jurisdiction's legal system.

Where possible, specific reference should be made to implementation of the G20 High-Level Principles on Mutual Legal Assistance.[2]

Response:

Ad question 9(a):

Criminal matters

South Africa provides mutual legal assistance (MLA) in criminal matters on the basis of bilateral and multilateral treaties, and the principle of international comity. South Africa has bilateral MLA treaties with the following member countries Party to the OECD Convention on Bribery: Argentina, Canada, France, and the United States. South Africa, as a member of the Commonwealth, is also a member of the Harare Scheme relating to MLA in criminal matters of which the following countries Party to the Convention are also members: Australia, Canada, New Zealand and the United Kingdom. South Africa is in the process of negotiating new treaties.

Notwithstanding bilateral and multilateral MLA treaties, South Africa enacted in 1996 the **International Cooperation in Criminal Matters Act, 1996 (Act No. 75 of 1996)(the ICCM Act),** to facilitate the execution of MLA requests, including with countries with which South Africa does not have a treaty. The purpose of the ICCM Act is to facilitate the provision of evidence and the execution of sentences in criminal cases, as well as the confiscation and transfer of the proceeds of crime.

Under **sections 2 and 7** of the ICCM Act, MLA requests must be submitted to the Director-General in the Department of Justice and Constitutional Development. The Director-General acts as the central authority for both outgoing and incoming requests. In terms of **section 7** relating to incoming requests, the Director-General shall submit the request to the Minister of Justice for approval where he/she is satisfied that (i) proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; (ii) there are reasonable grounds for believing that an offence has been committed in the requesting State, or the evidence is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State. Once the Minister has approved the request, it is transferred to the magistrate within whose area of jurisdiction the witness (or evidence or documents necessary to satisfy the MLA request) resides. Under the ICCM Act, there are no provisions regulating the discretionary power of the Minister when considering an MLA request.

It should be noted that the Minister is entitled to refuse assistance based on fundamental constitutional considerations such as the likelihood of the use of required evidence to prosecute or torture a person against whom the evidence is to be used. It should also be pointed out that the Minister may be bound by grounds of refusal as provided for in the provisions of bi-lateral and multi-lateral MLA agreements where these exist. These could for instance exclude the provision of MLA where the request relates to a political offence, where the request may prejudice the national security, if there are grounds to believe that the request relates to proceedings against a person on account of that person's race, religion, opinions, etc, and other reasons relating to human rights.
Sections 8 to 11 of the ICCM Act provide for the examination of witnesses and the production of documents. Chapter 3 of the ICCM Act provides for the mutual execution of sentences and compensatory orders, and Chapter 4 of the ICCM Act provides for the confiscation and transfer of proceeds of crime.

[2] Available online here: http://www.oecd.org/g20/topics/anti-corruption/High-Level-Principles-on-Mutual-Legal-Assistance.pdf

The ICCM Act does not regulate the coercive and non-coercive measures that may or may not be undertaken in response to an MLA request. Provisions relating to coercive and non-coercive measures which may be used in rendering mutual legal assistance can be found in the Police Service Act of 1995 (enquiries to be carried out, and documents and affidavits), the Criminal Procedure Act of 1977 (statements to be obtained, subpoena of witnesses, search and seizure), and the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA),under coercive measures relating to confiscation or forfeiture of property derived from crime.

Given the definition of "person" under section 2 of the Interpretation Act of 1957, which covers both individuals and corporate and incorporate bodies, the provisions in the ICCM Act are applicable in respect of both natural and legal persons.

Non-criminal matters

South Africa is unable to provide mutual legal assistance in requests concerned with administrative and not criminal liability. South Africa can only provide assistance within its legal framework, and the only Act in terms whereof such assistance can be provided is the ICCM Act of 1996.

Steps taken to prevent delays

The Department of Justice and Constitutional Development established a dedicated unit within the Chief Directorate: International Legal Relations, to attend to all requests for mutual legal assistance.

Officials within this dedicated unit are required to process requests for mutual legal assistance within two weeks. The period of two weeks has been set as a target and is regularly audited by the Auditor-General of the Department.

The Director in charge of this dedicated unit keeps an updated register to ensure that all requests are processed within the prescribed period and officials within the dedicated unit are required to make regular follow-ups to ensure that requests are executed without undue delay.

Ad question 9(b):

The Department is not in the normal cause of its work involved with informal assistance as investigating officers rely on communication channels between police authorities in different States, including Interpol, to obtain information. However, the ICCM Act does not prohibit informal assistance.

When the need arises, the Department advises the investigating authorities and/or the Central Authorities of foreign States as to whether a formal request for mutual legal assistance is required or whether information can be obtained informally.

The general point of departure is that when coercive measures are required to obtain information, a formal request for mutual legal assistance is to be submitted.

II. Implementation of Foreign Bribery Provisions in the 2012-2013 G20 Anti-Corruption Action and the St Petersburg Declaration

Note 3: This section of the questionnaire is drafted from the 2012-2013 G20 Anti-Corruption Action Plan and the St. Petersburg Leaders' Declaration. It also seeks updates from G20 countries on next steps for fighting foreign bribery.

10. Please specify next steps for continuing "efforts to adopt and enforce laws and other measures against foreign bribery".[3]

Response:

Since the beginning of 2013, South Africa has introduced or implemented the following investigation, detection, reporting and prosecution initiatives for foreign bribery:

(a) The Prosecution Policy of the National Prosecuting Authority was amended to make it clear that prosecutorial decision-making in foreign bribery cases 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.

(b) Fines that may be imposed for corruption offences as prescribed by section 26(1)(a) of the Prevention and Combating of Corrupt Activities Act (PRECCA), 2004 (Act 12 of 2004) were increased with effect from 1 February 2013.

(c) The money laundering regime is being reviewed in order to address gaps identified by the FATF, including lack of enhanced due diligence for politically exposed persons (PEPs), identification of beneficial owners and special attention for higher-risk countries.

(d) The role and functioning of the Anti-Corruption Task Team (ACTT) has been concretised and expanded through the permanent establishment of an Anti-Corruption Component within the Directorate for Priority Crime Investigation (DPCI) to operationalise government's anti-corruption agenda. This gives effect to dealing with corruption as a national priority within the South African 2014-2019 Medium Term Strategic Framework (MTSF), giving effect towards the objectives of the National Development Plan (NDP), Chapter 14.

(e) A senior prosecutor was dedicated to the ACTT, to deal only with cases involving the bribery of foreign officials and cases listed on the OECD Matrix.

(f) South Africa does not allow facilitation payments. All payments with the intent to bribe are prohibited and have been criminalised in the Prevention and Combating of Corrupt Activities Act (PRECCA), 2004 (Act 12 of 2004). In terms of Section 29 of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001), business is required to report suspicious and unusual transactions to the Financial Intelligence Centre Since a "facilitation payment" is illegal it would fall within the scope of what has to be reported under this section if a business detects that such a payment has been made.

To coordinate South Africa's effort in fighting corruption, the President established the Anti-Corruption Coordinating Task Team (ACTT). The ACTT is tasked to coordinate all efforts pertaining to fighting corruption and to act as nodal point and oversight body.

Under the auspices of the ACTT, a number of domestic working groups were created to assist with departmental compliance to South Africa's international obligations pertaining to corruption. One such working group is the OECD Task Team. The National Intelligence Coordinating Committee Anti-Corruption Working Group on Bribery (NICOC ACWGB), who is coordinating all South African efforts to comply with international conventions, treaties and

[3] G20 Anti-Corruption Action Plan 2013 – 2014, Point 2.

agreements, is supporting the OECD Task Team. The OECD Task Team was co-opted as a formal ACTT Task Team. It consists of members of the NPA (including members of the Asset Forfeiture Unit and Special Commercial Crimes Unit), the DPCI, and DOJ & CD. Other Departments and Entities are invited to attend Task Team meetings as and when necessary, or to provide the necessary information in writing. This Task Team was established to deal with the Phase 3 recommendations. The objective of the OECD Task Team is to finalise a written self-assessment report in six months (**October 2014**) on progress made in (i) pro-actively investigating and prosecuting foreign bribery; and (ii) ensuring that investigations and prosecution are not influenced by political and economic considerations. This includes providing written inputs (and evidence) on the implementation of recommendations 1, 4a, 4e, 6, 12c and 12d. The ACTT provides operational support to the OECD Task Team. The Task Team adopted an action log, which were approved by the ACTT and the Minister for Public Service and Administration. All OECD Reports are submitted to the ACTT first, before going to Cabinet.

11. Please specify next steps for engagement with the OECD Working Group on Bribery with a view to explore possible adherence to the OECD Anti-bribery Convention as appropriate.

Specifically and where applicable, please indicate any plans to:

- Attend meetings of the WGB in 2014;
- Co-organize or attend meetings on foreign bribery; and/or
- Engage in technical assistance activities on the issue of implementation and enforcement of the foreign bribery offence;
- Open discussion for Membership in the WGB, with a view to acceding to the OECD Anti-Bribery Convention.

Response: Please see the responses in respect of question 10 above.