(c) Corporate compliance, internal controls and ethics programmes

81. The 2009 Anti-Bribery Recommendation X.C.i asks Parties to the Convention to encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Recommendation X.C.ii adds that Parties should encourage business organisations and professional associations to promote these measures.

82. Costa Rican companies generally do not have adequate anti-corruption compliance programmes. As mentioned at para. 31, at the on-site visit only subsidiaries of foreign multinationals and one US-listed Costa Rican company were aware of the risks of foreign bribery. These are the only companies whose compliance programmes address this crime. Other Costa Rican companies at the on-site visit had limited compliance programmes at best despite having substantial international activities. The problem may be especially acute among SMEs because of their limited resources. Companies were unaware of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (2009 Recommendation Annex II). Private sector representatives at the on-site visit stated more training on corporate compliance is needed.

83. Costa Rica intends to promote anti-corruption compliance programmes by implementing the provisions on corporate models in the Corporate Liability Law (CLL). Corporate models are essentially compliance programmes. As further described in Sections C.3(e) and C.6(b)(i) at pp. 60 and 69, companies that have a corporate model may benefit from sentence reductions under the CLL. The CLL specifies 11 minimum elements for an acceptable corporate model. Additional elements may need to be include if corporate models are to be effective in preventing and detecting foreign bribery. Costa Rica states that it is developing a regulation for this purpose.

Commentary

The lead examiners are concerned about the lack of compliance programmes in Costa Rican companies that are not subject to foreign bribery legislation in other Parties to the Convention. To promote compliance programmes, the CLL provides for sentence reductions for companies that have implemented corporate models. This is a step in the right direction. However, it is unlikely that these legislative provisions and regulations alone will convince companies to implement compliance programmes. A track record of successful prosecutions under the CLL would also be necessary.

The lead examiners therefore recommend that Costa Rica take steps to (a) encourage companies to adopt anti-corruption compliance programmes, including by providing guidance on this issue, and (b) encourage business organisations and professional associations to promote compliance programmes. These efforts should especially target SMEs that are active internationally.

(e) Models of organisation, crime prevention, management and control

231. The CLL introduces the concept of corporate “models of organisation, crime prevention, management and control”. Corporate models are essentially corporate compliance programmes. Article 6 CLL appears to state that corporate models are optional, i.e. companies are not obliged to have corporate models. But those that do at the time of an offence may be entitled to a sentence reduction, as explained below in Section C.6(b)(i) at p. 69. The only exception are state-owned enterprises, which must incorporate the minimum model requirements into their internal control systems (Article 9 CLL).

232. The CLL offers some guidance on the elements of an acceptable corporate model. Article 8(1) CLL provides that corporate models should be commensurate with the size, type of business, complexity and economic capacity of the legal person. They must, however, comprise at least 11 elements listed in Article 8(2). This includes things such as periodic risk analysis; internal and external audit; rules and procedures to prevent unlawful actions in bidding and executing government contracts and in other interactions with the public sector; training; and a disciplinary system for non-compliance. These elements were selected in consultation with several business associations.

233. These provisions on minimum model elements are not particularly onerous. Article 8(2)(c) states that a corporate model must “establish through protocols or procedures, the formation of the legal person’s will in order to adopt and execute decisions of the legal person”. Article 8(2)(g) requires “adequate management models of financial resources” which Costa Rica states merely requires “general models on how to manage financial resource through all of the organisation”. These elements seem trite. One would expect practically all companies to have rules for decision-making and financial management irrespective of the CLL.

234. Other mandatory elements are too general. Corporate models must have codes of ethics, rules and procedures, but there is no guidance on what they must cover. Article 8(2)(f) requires a legal person to determine the scope of its code of conduct and prevention policies for third parties and business partners, “when the possible risks deem it mandatory”. There is no indication that this should include important matters such as properly documented risk-based due diligence pertaining to the hiring of a third party, or appropriate and regular oversight of business partners. Article 8(2)(d) requires a legal person to have “procedures in the area of administration and audit of financial resources”. There is no further requirement to ensure the effectiveness of these measures, such as the independence and resourcing of auditors.

235. The list of mandatory corporate model elements also omit some important measures identified in the OECD’s Good Practice Guidance on Internal Controls, Ethics, and Compliance (2009 Recommendation Annex II). For example, Article 8(2) CLL does not require strong, explicit and visible senior management support for and commitment to the model. There is no duty on employees to report violations internally or on the company to provide reporting channels, as some on-site visit participants pointed out. Whistleblower protection is not mentioned. Nor are corporate models required to include policies in foreign bribery risk areas such gifts, hospitality, entertainment, customer travel, facilitation payments etc.

236. A further concern relates to small- and medium-sized enterprises (SMEs). The corporate model for SMEs may be overseen by the legal person’s owner, partner, shareholder or administrative body, rather than by an independent individual (Article 7(1)). In addition, only 7 of the 11 model elements are mandatory for SMEs (Article 10 CLL). Some of the omitted elements (such as systems for managing financial resources as well as periodic risk analysis and verification) are arguably essential for companies of any size. Furthermore, SMEs are defined using a formula based on an enterprise’s staff size, annual turnover, and net asset value. Some fairly large companies can in fact qualify as SMEs. In any event, the Working Group has noted that a reduction in compliance requirements should not be based on rigid thresholds, but should instead take into account all relevant features of a company, including its risk of committing foreign bribery.

237. When asked about these deficiencies, Costa Rica states that it is expanding the list of mandatory corporate model elements by regulation under Article 8(2) CLL. The Ministry of Economy, Industry and Commerce, together with the Ministry of Justice and Peace (MJP), will also develop and implement a model of organisation, crime prevention, management and control with a view to streamlining its application. The MJP has developed an action plan to raise awareness of the Convention and promote corporate models. These initiatives are commendable, but more steps could be taken to reach out to the private sector. Costa Rica indicates that it consults systematically the public in the legislative process. However, several private sector representatives at the on-site visit stated that they had not be adequately consulted before the CLL was enacted.

Commentary

The lead examiners recommend that Costa Rica (1) expand the mandatory elements of corporate models to include those that are vital to an effective anti-foreign bribery compliance programme, and (2) ensure that the requirements for corporate models for SMEs are based on all relevant features of the company, including its risk of committing foreign bribery.

(f) Corporate models as a defence against liability

238. Whether a corporate model may be a full defence against liability is unclear. As explained in Section C.3(b)(iv), where an offence is committed by a lower level person or an intermediary, liability arises only if company management has gravely breached its duties of supervision, monitoring and control. Put differently, the legal person could escape liability if the senior management had fulfilled its duties of supervision, monitoring and control. The question is then whether a company that has implemented a corporate model will necessarily discharge its duties of supervision, monitoring and control, and hence escape liability. Costa Rican authorities explain that a corporate model cannot be a complete defence and that Article 12 CLL lists exhaustively the benefits of corporate models, which are limited to sentence reductions. Minutes of the Legislative Assembly’s discussion of this provision do not shed light on this issue.

Commentary

The lead examiners recommend that the Working Group follow up whether an effectively implemented corporate model is a defence under the CLL.

(g) Additional liability for failure to prevent foreign bribery

239. Article 2(7) CLL states that a legal person has “the legal duty to avoid the commission of the crimes [covered by the CLL].” Breach of this duty results in criminal liability under Article 18 CC. Costa Rican authorities state that this provision requires legal persons to “adapt their organisational structure to avoid the commission of crimes, and have an internal organisation that is efficient in preventing them, including through the proper establishment of effective and highly effective anti-corruption prevention models, practices and policies”.

240. Article 2(7) CLL could be read to create an additional head of corporate liability. Since the provision imposes a “legal duty to avoid foreign bribery”, it arguably requires a company to have an effective corporate model. Alternatively, the provision could be interpreted to impose corporate liability for foreign bribery which a legal person fails to prevent. But this interpretation would substantially duplicate the corporate liability provisions in Article 4(1) CLL described above.

241. Costa Rica explains that Article 2(7) CLL does not duplicate other CLL provisions but “merely reinforces the idea that the benefit obtained with the crime could be for the legal person who commits it, or for a third party, that could be, also, another legal person”.

Commentary

The lead examiners recommend that Costa Rica take steps to clarify that Article 2(7) CLL does not create a head of corporate liability.

(ii) Fines against legal persons

267. Earlier concerns about the sufficiency of fines against legal persons have been partially addressed. In Phase 1 (para. 37) the available fines were USD 15 500 – 780 000, which were not effective, proportionate and dissuasive. The maximum fines under the CLL are now 1 000 – 10 000 base salaries. In 2019, this translates to CRC 446 million – 4.46 billion (USD 77 000 – 7.7 million).

268. The current fines for SMEs are too low since the definition of SMEs actually covers fairly large firms. The CLL increased the fines for most legal persons but decreased them for SMEs to 30 to 200 base salaries. In 2019, this equals CRC 13.4 million – 89.2 million (USD 23 000 – 154 000). An SME is defined using a formula based on three factors: average employees, annual net revenues and net assets. For example, a firm in the industrial sector with an average of 40 staff, USD 5.0 million in annual net revenues and USD 6.5 million in net assets is considered an SME. The maximum fine under the CLL for such a company would be just 3% of its annual revenue and 2% of net assets. Mitigating factors may further reduce the fine.

269. Costa Rica explained that the Legislative Assembly was concerned that, without this provision, fines would be too onerous for SMEs with just a handful of staff. But the reduced fines in the CLL are not limited to such “micro-SMEs”. But as the example in the previous paragraph shows, the reduced fines also apply to firms with a significant number of employees, annual revenues and net assets. Costa Rica also argues that the reduced fines take into account proportionality and the economic reality for Costa Rican SMEs and that the Legislative Assembly thoroughly discussed the level of the sanctions when the CLL was debated. But it admits that there have not been any rigorous analyses of why the chosen level of fines in the CLL is suitable.

Commentary

The lead examiners welcome Costa Rica’s recent efforts to increase substantially the maximum fines available for legal persons for foreign bribery. However, they regret that Costa Rica decreased the fines for SMEs without rigorously analysing whether chosen level of fines is appropriate. The lead examiners therefore recommend that Costa Rica increase the available fines for SMEs to a level that is effective, proportionate and dissuasive.

(iii) Sentence reductions through corporate models, and prevention and detection measures

270. A legal person that has adopted and effectively implemented a corporate model at the time when an offence was committed can benefit from a sentence reduction of up to 40% (Article 12(1)(d) CLL). A corporate model is essentially a corporate compliance programme (see Section C.3(e) at p. 60). If the offence was committed by senior managers or intermediaries (i.e. liability under (Article 4(1)(a) or (c) CLL), then two additional requirements must be met to qualify for sentence reduction: (i) the model was overseen by an autonomous body that sufficiently exercised its supervisory, monitoring and control functions; and (ii) the crime was committed by “fraudulently evading” the model. These two additional requirements do not apply if the offence was committed by lower-level persons (i.e. liability under Article 4(1)(b) CLL).

271. A second provision allowing sentence reductions for prevention and detection measures may result in overlap. Under Article 12(1)(c) CLL, a legal person is also entitled a sentence reduction of up to 40% if, before the commencement of the oral trial, it adopts “effective measures to prevent and discover crimes that could be committed in the future”. It is difficult to imagine how such “effective measures” would be anything but a corporate model or compliance programme. This ambiguity is similar to the issue of whether a corporate model can be a defence against liability, i.e. the implementation of an effective corporate model necessarily means that company management has fulfilled its duties of supervision, monitoring and control, within the meaning of Article 4(1)(b) (see Section C.3(f) at p. 62).

Commentary

The lead examiners recommend that Costa Rica clarify whether the term “effective measures to prevent and discover crimes” in Article 12(1)(c) CLL is synonymous with corporate models.

D. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

286. Based on its findings regarding Costa Rica’s implementation of the Convention and the 2009 Recommendation, the Working Group (1) makes the following recommendations to Latvia under Part 1 below; and (2) will follow up the issues in Part 2 when there is sufficient practice. Costa Rica will report to the Working Group orally within one year, i.e. by March 2021, on the steps taken to implement recommendations [3, 7(b), 7(d)-(f), 12(a) and 12(c)]. Costa Rica will further report in writing within two years, i.e. by March 2022, on its implementation of all of the recommendations; its foreign bribery enforcement actions; and developments concerning the follow-up issues.

1. Recommendations

Recommendations for ensuring effective prevention and detection of foreign bribery

1. With respect to prevention and awareness-raising, the Working Group recommends that Costa Rica:

(a) adopt a national strategy and action plan for fighting foreign bribery, which could be part of a broader national anti-corruption strategy, and designate a single public body to oversee the implementation of the strategy and action plan [2009 Recommendation II and III(i)];

(b) including the MRE, raise awareness of foreign bribery within the private sector, especially among SMEs that export or invest overseas [2009 Recommendation III(i)];

(c) raise awareness of Article 5 of the Convention among investigators, prosecutors and judges [Convention Article 5 and Commentary 27; 2009 Recommendation III, V and Annex I.D];

2. Regarding the reporting of foreign bribery, the Working Group recommends that:

(a) the MRE (i) train its officials on detecting and reporting foreign bribery, and the advice to be given to Costa Rican companies on bribe solicitation; and (ii) amend its foreign bribery detection and reporting manual to cover all relevant foreign bribery allegations and require direct reporting of allegations to FAPTA [2009 Recommendation III, IX(ii) and Annex I.A].

(b) Costa Rica ensure that Article 281(a) CCP requires public officials to report all suspected acts of foreign bribery, including those reported in the media, and that certainty in the veracity of the allegation is not required [2009 Recommendation ΙΧ(ii)];

(c) Costa Rica maintain statistics on the sanctions imposed against public officials for failure to report crimes under Article 281(a) CCP [2009 Recommendation ΙΧ(ii)];

(d) Costa Rica clarify that preliminary and preparatory investigations in foreign bribery cases may be opened based on anonymous reports [Convention Article 5 and Commentary 27; 2009 Recommendation IX and Annex I.D].

3. Regarding whistleblower protection, the Working Group recommends that Costa Rica, as a matter of priority, adopt legislation that provides clear and comprehensive protection from retaliation to whistleblowers in the public and private sectors [2009 Recommendation III(iv), IX(i) and (iii)].

4. Regarding taxation, the Working Group recommends that Costa Rica:

(a) amend its legislation to (i) expressly deny the tax deduction of all bribes to foreign public officials, and not only those that expedite or facilitate a transaction, (ii) ensure that all Costa Rican companies, including those subject to special income tax regimes, are explicitly prohibited from claiming tax deductions for bribes, and (iii) consolidate its laws, regulations and “institutional criteria” that deal with the non-tax deductibility of bribes [2009 Recommendation VIII(i); 2009 Tax Recommendation I(i)];

(b) ensure that the DGT is routinely informed about foreign bribery convictions in order to re-examine systematically the tax returns of taxpayers who have been convicted of foreign bribery [2009 Recommendation III(iii) and VIII(i)];

(c) train regularly its tax officials on the detection of foreign bribery during audits and disseminate the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors [2009 Recommendation III(iii) and VIII(i)].

5. With respect to accounting requirements, external audit and internal company controls, the Working Group recommends that Costa Rica:

(a) increase the use of external audits, having regard to the individual circumstances of a company, including its size, type, legal structure, and geographical and industrial sector of operation [Convention Article 8; 2009 Recommendation X.B.i];

(b) work closely with the accounting and auditing profession and the CCPA to raise awareness of foreign bribery and provide guidance and training to external auditors on the detection and reporting of this crime [Convention Article 8; 2009 Recommendation X.B];

(c) consider requiring an external auditor to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors who make such reports reasonably and in good faith are protected from legal action [Convention Article 8; 2009 Recommendation III(iv), IX(iii) and X.B(v)];

(d) encourage (i) companies, in particular among SMEs operating abroad, to adopt anti-corruption compliance programmes, including by providing guidance on this issue; and (ii) business organisations and professional associations to promote compliance programmes among their members [2009 Recommendation III(i) and (v), X.C(i) and (ii)];

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

(a) update the assessment of its exposure to corruption-related money laundering and take appropriate measures to address those risks [Convention Article 7; 2009 Recommendation II];

(b) expand its definition of PEPs to include close associates and family members of PEPs, as well as senior officials of international organisations [Convention Article 7; 2009 Recommendation III(ii)];

(c) provide further guidance to reporting entities on identifying suspicious transactions of money laundering predicated on foreign bribery, including typologies that specifically address foreign bribery [Convention Article 7; 2009 Recommendation II];

(d) train officials at UIF, SUGEF, SUGEVAL, SUPEN and SUGESE on money laundering related to foreign bribery [Convention Article 7; 2009 Recommendation II].

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

7. With respect to investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Costa Rica:

(a) ensure that FAPTA (i) continues to obtain all copies of the Working Group’s Matrix of Foreign Bribery Allegations, and (ii) makes full use of available sources of information for opening foreign bribery investigations, including by monitoring not only national but also international media more actively and by systematically consulting the Matrix [Convention Article 5 and Commentary 27; 2009 Recommendation III, V and Annex I.D];

(b) ensure that FAPTA (ii) thoroughly investigates all credible allegations of foreign bribery and proceeds proactively against both natural and legal persons; and (ii) gives investigations and prosecutions of foreign bribery equal priority in practice as those of other serious corruption and financial crimes [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(c) amend Article 16 CCP to give FAPTA exclusive jurisdiction to conduct foreign bribery preliminary and preparatory investigations, and prosecutions [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(d) (i) amend Article 22(d) CCP to allow the termination of cases only if Costa Rican authorities consult with their foreign counterparts and ascertain that a foreign bribery investigation into the same case encompasses individuals and entities that are subject to Costa Rican jurisdiction; and

(ii) ensure that where Costa Rican authorities decide to defer to the foreign investigation, Costa Rican investigation into the case should be suspended and not terminated definitely until the foreign jurisdiction has sanctioned the individuals and entities subject to Costa Rican jurisdiction [Convention Article 4 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(e) clarify that Article 22(a) CCP cannot be used to terminate foreign bribery investigations and prosecutions [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(f) ensure that investigations into foreign bribery committed by Costa Rican nationals outside of Costa Rica should not be systematically declined under Article 282(1) CCP [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D].

8. Regarding non-trial resolutions, the Working Group recommends that Costa Rica:

(a) clarify effective collaboration agreements under Article 22(b) CCP by codifying the requirements for a collaboration agreement, such as that the agreement must be in writing and negotiated in the presence of defence counsel, and that there must be a “rational proportion” between the reprehensibility of the accused’s conduct and benefit from the accused’s collaboration [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(b) issue written guidance to clarify (i) the scope of negotiations between the accused and the prosecution when the abbreviated procedure is used, including whether the charge and alleged facts may be negotiated; and (ii) the factors that a prosecutor considers in deciding to use the abbreviated procedure, and in the choice of the charge, facts and sanctions that form the basis of the abbreviated procedure [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(c) clarify that the application of the integral reparation of damage in foreign bribery cases in not available in foreign bribery cases [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(d) make public, where appropriate and in conformity with the applicable rules, as much information about non-trial resolutions as possible [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D].

9. Regarding statistics, the Working Group recommends that Costa Rica:

(a) maintain statistics on the duration of foreign bribery and domestic corruption cases, as well as cases that have been time-barred [Convention Articles 5 and 6 and Commentary 27; 2009 Recommendation V and Annex I.D];

(b) maintain statistics on the use of confiscation in foreign bribery and domestic corruption cases [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D].

10. Regarding investigative tools, resources and training, the Working Group recommends that Costa Rica:

(a) amend its legislation to make all special investigative techniques, including the freezing of funds and accounts, available in foreign bribery cases [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(b) extend Article 18 of Law 8 754 for lifting bank secrecy in organised crime cases to corruption cases [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(c) amend the CLL to ensure that all investigative techniques are available in investigations against legal persons [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(d) ensure that FAPTA and the OIJ ACU have sufficient resources, and provide further training to FAPTA and the OIJ ACU on foreign bribery investigation and prosecution [Convention Article 5 and Commentary 27; 2009 Recommendation V and Annex I.D].

11. Regarding MLA and extradition, the Working Group recommends that Costa Rica:

(a) consolidate its central authorities for MLA in foreign bribery cases [Convention Article 9; 2009 Recommendation III(ix) and XIII];

(b) amend its legislation to (i) explicitly provide for the types of investigative measures available as MLA; and (ii) ensure that it can provide all types of MLA that are available under a treaty to which it is party [Convention Article 9; 2009 Recommendation III(ix) and XIII];

(c) ensure that it can provide the full range of assistance available in non-criminal matters in conformity with the requirements under the Convention [Convention Article 9; 2009 Recommendation III(ix) and XIII];

(d) use of all available means to secure MLA, in particular through contact with foreign authorities via informal channels, regional networks, and the Working Group [Convention Article 9; 2009 Recommendation III(ix) and XIII];

(e) amend its legislation to eliminate the bar on extradition for foreign bribery offences (i) committed outside Costa Rica, and (ii) not committed in or not having produced effects in the requesting state [Convention Article 10; 2009 Recommendation III(ix) and XIII]

(f) ensure that, when it declines a request to extradite a Costa Rican national solely on the ground of nationality, it submits the case to its competent authorities for prosecution regardless of whether the requesting state has asked Costa Rican authorities to do so [Convention Article 10; 2009 Recommendation III(ix) and XIII].

12. With respect to the foreign bribery offence, the Working Group recommends that Costa Rica:

(a) amend Article 55 LAC, as a matter of priority, to provide liability where an individual accepts that foreign bribery is a possible consequence of his or her actions and hence has “eventual intent” under Article 31 CC [Convention Article 1; 2009 Recommendation III(ii) and V];

(b) ensure that the definition of a foreign public official covers all persons who perform a public function for a foreign state, regardless of whether the state is recognised by Costa Rica [Convention Article 1; 2009 Recommendation III(ii)];

(c) amend its legislation, as a matter of priority, to ensure that bribe solicitation is not a defence or exception to the foreign bribery offence [Convention Article 1; 2009 Recommendation III(ii), V and Annex I.A].

13. With respect to liability of legal persons, the Working Group recommends that Costa Rica:

(a) hold legal persons liable for foreign bribery committed before the enactment of the CLL, by exploring in particular other avenues of liability such as civil action, or prosecutions for laundering the proceeds of bribery-tainted contracts that were generated after the CLL’s enactment [Convention Articles 2 and 3; 2009 Recommendation III(ii) and Annex I.B];

(b) amend the CLL to provide for corporate liability for foreign bribery committed by a lower level person due to a failure by the highest level managerial authority to prevent the crime, regardless of the gravity of the failure [Convention Article 2; 2009 Recommendation III(ii) and Annex I.B and II];

(c) (i) expand the mandatory elements of corporate models to include those that are vital to an effective anti-foreign bribery compliance programme; and (ii) ensure that the requirements for corporate models for SMEs are based on all relevant features of the company, including its risk of committing foreign bribery [Convention Article 2; 2009 Recommendation III(ii) and Annex I.B and II];

(d) clarify that Article 2(7) CLL does not create a head of corporate liability [Convention Article 2; 2009 Recommendation III(ii) and Annex I.B and II].

14. Regarding the money laundering offence, the Working Group recommends that Costa Rica:

(a) consolidate its money laundering offences into a single provision, and ensure that this offence complies with the Convention by covering the laundering of the instruments and proceeds of all acts of foreign bribery envisaged by the Convention [Convention Article 7; 2009 Recommendation II and V];

(b) ensure that the investigative powers available in money laundering investigations under Article 69 MLFT are extended to investigations under Article 47 LAC, including the direct transmission of STRs by the UIF to FAPTA [Convention Article 7; 2009 Recommendation II and III(ii)];

(c) ensure that cases involving the laundering of the proceeds of foreign bribery are vigorously prosecuted [Convention Article 7; 2009 Recommendation II and III(ii)];

(d) amend its legislation to ensure that the laundering of proceeds of foreign bribery does not result in lower sanctions than the laundering the proceeds of other economic crimes [Convention Article 7; 2009 Recommendation II and V].

15. Regarding the false accounting offence, the Working Group recommends that Costa Rica:

(a) amend the CLL to make state and non-state public companies and autonomous institutions liable for false accounting [Convention Articles 2 and 8; 2009 Recommendation III(ii), X.A(i) and Annex I.B];

(b) ensure that FAPTA has exclusive conduct of cases involving corruption-related false accounting, and that future such cases would be prosecuted under Article 368bis CC and not the Law on Tax Rules and Procedure [Convention Article 8; 2009 Recommendation II and V].

16. Regarding sanctions and confiscation, the Working Group recommends that Costa Rica:

(a) increase the available fines for SMEs to a level that is effective, proportionate and dissuasive [Convention Article 3];

(b) clarify whether the term “effective measures to prevent and discover crimes” in Article 12(1)(c) CLL is synonymous with corporate models [Convention Article 3; 2009 Recommendation III(ii) and Annex I.B and II];

(c) amend Article 12(1)(a) CLL so that sentence reductions are available only when a legal person (i) self-reports misconduct that is unknown to Costa Rican authorities, and (ii) there is no investigation by Costa Rican or foreign authorities into the misconduct at the time the self-report was made [Convention Articles 2, 3 and 5];

(d) provide guidance to clarify the nature and degree of collaboration expected from legal persons under Article 12(1)(b) CLL [Convention Articles 2 and 3];

(e) amend the CLL to ensure that the factors forbidden by Article 5 of the Convention do not influence sanctions against legal persons [Convention Articles 2, 3 and 5, and Commentary 27; 2009 Recommendation Annex I.C];

(f) provide for confiscation of property the value of which corresponds to that of such proceeds, or for monetary sanctions of comparable effect [Convention Article 3];

(g) create a public authority to oversee public procurement policies, and ensure through this body that procuring authorities enforce the debarment provisions in the CLL and the Administrative Contract Law [Convention Article 3; 2009 Recommendation II, III(ii)].

2. Follow-up by the Working Group

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

(a) whether Costa Rica has created an export credit programme [2009 Recommendation XII and 2019 Export Credit Recommendation];

(b) whether Costa Rica has created an ODA programme [2009 Recommendation XI(ii) and 2016 ODA Recommendation];

(c) whether the abbreviated procedure under Articles 373-375 CCP results in effective, proportionate and dissuasive sanctions in foreign bribery cases [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];

(d) whether the foreign bribery offence under Article 55 LAC covers non-pecuniary bribes [Convention Article 1];

(e) whether legal persons in Costa Rica can be held liable when a person with the highest level managerial authority directs or authorises a lower level person to commit foreign bribery [Convention Article 2; 2009 Recommendation III(ii) and Annex I.B];

(f) whether a legal person is liable under Article 4(2) CLL when natural persons commit foreign bribery to their advantage or that of a third party, and the legal person only benefits coincidentally from the crime [Convention Article 2; 2009 Recommendation III(ii) and Annex I.B];

(g) whether the burden of proof for successor liability under Article 3 CLL is too onerous [Convention Article 2; 2009 Recommendation III(ii) and Annex I.B];

(h) whether an effectively implemented corporate model is a defence under the CLL [Convention Articles 2 and 3; 2009 Recommendation III(ii) and Annex I.B].