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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

BULGARIA: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions (CIME) on 6 June 2003.

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A. INTRODUCTION

a) Nature of the on-site visit

Bulgaria ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 22 December 1998. It is a member of the OECD Working Group on Bribery in International Business Transactions, but is not a member of the OECD. In July 1999 the Working Group reviewed Bulgaria in Phase 1 of the follow-up process. A team from the Working Group visited Bulgaria in November 2002 to carry out the on-site visit under Phase 2.

The team from the OECD Working Group was composed of lead examiners from Norway and Poland as well as representatives of the OECD Secretariat[1]. The meetings took place over the course of four days, mostly at the offices of the Ministry of Justice in Sofia, and brought together officials from the following Bulgarian government departments and agencies: the Ministry of Justice (Inspectorate, Directorate of International Legal Co-operation and International Legal Assistance, and Centre for Training of Magistrates), the Ministry of Finance (Bureau for Financial Intelligence, Public Internal Financial Control Agency, General Tax Directorate, and Customs Agency), the National Audit Office, the Ministry of Interior (National Service on Combating Organised Crime, Directorate of Inspection, National Police Service, National Border Police Service, International Co-operation Directorate, and Co-ordination and Analysis Directorate), the Ministry of Economy (Trade Promotion Agency, Internationally Controlled Trade Directorate, Directorate of Multilateral Trade Policy and Regional Co-operation), the National Investigation Service, the Privatisation Agency, the Public Procurement Directorate, judges, public prosecutors, and the Commission for Co-ordination of Activities in the Fight Against Corruption.

The OECD team visited the offices of the Delegation of the European Commission to Bulgaria. The OECD team also met with representatives of the Institute of Certified Public Accountants in Bulgaria, the Centre for the Study of Democracy, the Open Society Institute, Transparency International Bulgaria and the law firm of Maximova & Ventcharska, and with a journalist from the national daily press. Part of the examining team met with representatives of the Bulgarian Business Leaders' Forum and the Confederation of Independent Trade Unions in Bulgaria, and also with a Member of the Bulgarian Parliament.

Pursuant to the procedure agreed to by the Working Group for the Phase 2 self and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in Bulgaria to enforce the laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor Bulgaria's compliance in practice with the 1997 Recommendation. In preparation for the on-site visit, Bulgaria provided the Working Group with answers to the Phase 2 Questionnaire, together with copies of relevant

1. Norway was represented by Ms. Anne-Mette Dyrnes, Deputy Assistant Secretary General, Ministry of Justice; Mr. Per Olav Gjesti, International Tax Counsel, Tax Law Department, Ministry of Finance; and Ms. Ellen Gjemdal, Senior Adviser, Ministry of Finance. Poland was represented by Mr. Jacek Garstka, Judge, Department of International Cooperation and European Law, Ministry of Justice. The OECD Secretariat was represented by Mr. Frederic Wehrlé, Co-ordinator, Anti-Corruption Initiatives, Anti-Corruption Division, Directorate of Financial, Fiscal and Enterprise Affairs; Ms. Christine Uriarte, Monitoring Expert, Anti-Corruption Division, Directorate of Financial, Fiscal and Enterprise Affairs; Ms. Frances Meadows, Monitoring Expert, Anti-Corruption Division, Directorate of Financial, Fiscal and Enterprise Affairs; and Ms. Elena Miteva, Corporate Affairs Division, Directorate of Financial, Fiscal and Enterprise Affairs.

legislation, which were reviewed and analysed in advance by the visiting team. Both during and after the on-site visit, the Bulgarian authorities continued to provide the visiting team with follow-up information.

b) Methodology and structure of the report

The Phase 2 review mainly reflects an assessment of information obtained from Bulgaria's responses to the Phase 2 Questionnaire, the consultations with the Bulgarian government and civil society during the on-site visit, a review of all the relevant legislation, and independent research conducted by the lead examiners and the Secretariat.

The report is structured as follows: the Introduction, Part A, gives the background to the review, and explains its scope and objects. Part B focuses on the mechanisms in place for the prevention and detection of foreign official bribery, and discusses ways in which their effectiveness could be enhanced. Part C deals, in a similar manner, with the effectiveness of mechanisms for prosecuting the offence of foreign bribery and the related accounting and money-laundering offences. This part also includes a detailed examination of the most recent legislative amendments adopted to comply with the recommendations of the Working Group under the Phase 1 Evaluation of Bulgaria. Part D sets forth the specific recommendations of the Working Group, based on its conclusions both as to prevention and detection, and as to prosecution. It also identifies those matters which the Working Group considers should be followed up or further reviewed as part of the continuing monitoring effort.

This report seeks to measure the effectiveness of the mechanisms in place in Bulgaria in complying with the specific requirements of the OECD Convention. The report takes account, where appropriate, of the conclusions and recommendations of studies and evaluations carried out by other bodies, and, where possible, it endeavours to build on them. The present evaluation must be fair within the terms of the objective standards laid down in the Convention, including that of functional equivalence; it must apply the same broad criteria and standards as have been employed in other Phase 2 Reports to date. However, it must also take account of the realities of Bulgaria's situation as a country still in the throes of rapid and radical political, economic and legal transition. Thus, the report seeks to offer Bulgaria not only an appraisal of its achievements to date, but also, more importantly, a set of constructive and realistic recommendations which will assist it in fulfilling its broader commitments as well as those it has specifically undertaken by ratifying the Convention.

c) Institutional, political and economic framework

Bulgaria held its first parliamentary elections after the collapse of the Communist regime in June 1990. A new Constitution was adopted the following year which provided for a multiparty system with the government elected on the basis of proportional representation. A rapid economic deterioration in 1996 was followed by a period of severe political upheaval. This in turn led to sweeping measures of economic stabilisation and institutional reform. Bulgaria's economic transition has been made more difficult by its high dependence on trade with the former Soviet Union and other Council for Mutual Economic Assistance (CMEA) countries which once accounted for more than two-thirds of Bulgaria's foreign trade. The loss of these markets led to a serious decline in exports. Among the declared priorities of the present coalition government are free-market reform and the fight against corruption.

Formal negotiations for accession to the European Union began in March 2000, and 2007 is now regarded as the earliest date for accession. Of the candidates for EU accession, Bulgaria has the lowest GNP per capita. The average monthly salary is estimated at 238 Leva (EUR 122) per month, and the cost of living has been estimated by the United Nations Development Program at 257 Leva (EUR 132) per month. In almost half of the administrative regions the rate of unemployment exceeds 20 per cent.

Furthermore, real incomes have been decreasing since the beginning of the 1990s as the social security burden has been increasing[2].

It is widely acknowledged that Bulgaria suffers from a very high incidence of domestic corruption that pervades many of its State institutions, and this has been characterised by the European Commission as an urgent problem. The measurement of corruption in Bulgaria has depended mostly on indexes of perception, whose results must be interpreted with caution. Indexes of perceived corruption produced by Transparency International show Bulgaria rated 66th out of 85 countries studied in 1998 and 45th out of 102 in 2002. There are few statistics available, however, and consequently little fact-based research or analysis. In fact, the lack of statistics and research has also been cited as a factor spurring the institutionalisation of corruption in Bulgaria. Perhaps the most comprehensive attempt at analysis, the Corruption Assessment Report produced by Coalition 2000[3], describes itself as 'a general evaluation of the state and dynamic of corruption in Bulgarian society'. It is significant for the fight against foreign and domestic bribery that there is perceived to be a high level of corruption among the enforcement agencies themselves. This has obvious implications for the credibility and effectiveness of the enforcement effort.

There is little reliable information as to what are the areas of particular risk for the bribery of foreign public officials, or how great that risk actually is. Although Bulgaria has reached an advanced stage in its programme of privatisation, it currently has relatively few large companies engaged in the export of products or services. This is an area of activity that will inevitably gather momentum. Bulgaria is keen to attract investment, foreign as well as domestic, at a level which will significantly increase its export capacity. Yet, many Bulgarian small- and medium-sized companies are already engaging on an increasing scale in international business, and a big part of it is done in countries where bribery is an acknowledged risk. As more Bulgarian companies enter the export market, there will be a corresponding increase in the risk of bribery of foreign public officials in the course of international business transactions.

In 2001, according to Bulgarian official sources, foreign trade with OECD countries accounted for 63.5 per cent of the total turnover. Within the OECD countries, the EU countries were Bulgaria's largest trade partners, accounting for 54.8 per cent of total exports. The largest trade partner within the EU was Germany, followed by Italy, Greece, France, Belgium and the UK. South East European countries (Albania, Bosnia and Herzegovina, Croatia, FYROM, and Serbia and Montenegro) presented the second major market, accounting for 7.2 per cent of total exports. The Common Independent States (CIS) and Baltic countries (the former USSR countries) presented the third major market for Bulgarian trade, accounting for 5.9 per cent of total exports. The main trading partners from this group were the Federation of Russia and Ukraine. The share of the CEFTA countries (Poland, Czech Republic, Slovak Republic, Hungary, Romania and Slovenia) accounted for 4.8 per cent of total exports, while other countries accounted for 11.7 per cent.

Another risk factor is that Bulgaria is situated on major routes for trafficking activities such as drugs, the illegal arms trade, stolen cars and human trafficking, all of which are activities that necessarily involve corrupt transactions and many of which cannot take place without the bribery of foreign public officials[4]. According to the CIA World Fact Book, Bulgaria is the main European transhipment point for

2. Rebecca Dale, "UNDP and other Anti-Corruption Efforts in Bulgaria: A Case Study Prepared by the Donor Standards in Anti-Corruption Project", September 2002.

3. An initiative of Bulgarian non-governmental organisations launched in the spring of 1997 aimed at limiting corruption in Bulgarian society through a partnership between state institutions, non-governmental organisations and individuals.

4. The link between corruption and trafficking in Bulgaria is the subject of a recent publication of the Center for the Study of Democracy: *Corruption, Trafficking and Institutional Reform* (Sofia, 2002).

south-west Asian heroin and is the main transit point for drugs transported from Afghanistan into Russia and then out to European countries. The size of Bulgaria's shadow economy has been estimated at 32 to 35 per cent of GDP by the Centre for the Study of Democracy (2001) and 25 to 40 per cent by the Collaborative for Development Action (CDA)[5]. One NGO expressed the view during the on-site visit that the same individuals and groups involved in organised crime were also behind many international smuggling and trafficking activities. This prompts the concern that foreign bribery might occur as part of a broader pattern of corrupt transactions.

d) Measures to fight against corruption

Bulgaria has embarked upon a wide range of reform initiatives. Some of these measures have particular relevance or a specific role in the fight against bribery of foreign public officials. Legislative measures designed to combat corruption in Bulgaria have included the amendments to the Criminal Code specifically required to implement the OECD Convention. In 2000 and 2001 Bulgaria ratified the Council of Europe's Civil Law and Criminal Law Conventions on Corruption. In 1998 a new Law on Measures against Money Laundering (LMML) was enacted to provide a framework for fighting money laundering, and this was amended in 2001. The Bulgarian Parliament also enacted significant amendments to the Law on the Control of Foreign Trade Activity in Arms and Dual-Use Goods and Technology in November 2002 to impose legal controls on arms brokers, who were previously not subject to any regulation. An invitation for Bulgaria to join NATO is awaiting ratification by the current members of the Alliance.

Recent institutional reforms have attempted to introduce internationally-accepted standards of transparency and objectivity into major areas of government administration. As part of Bulgaria's sweeping reforms of its public institutions, amendments to the law governing the judiciary (Judicial Systems Act) were adopted by the National Assembly on 17 July 2002 (but subsequently challenged before the Constitutional Court – see Part C of the present report). A Law on Access to Public Information, whose objective is to increase transparency in the administration, came into force in July 2000. In May 2001, the Bulgarian Government entered a 3-year contract with a British firm with expertise in curbing contraband and illegal trafficking, to introduce reforms to the Customs Agency.

Bulgaria has also adopted a National Anti-Corruption Strategy. Established by a decision of the Council of Ministers in October 2001, the Strategy includes among its goals the creation of a common institutional and legal environment for curbing corruption ; anti-corruption measures within the Ministry of the Interior; anti-corruption reform of the legislation on criminal law and on the judicial system; efforts to curb corruption in the economy by increasing transparency and public accountability; and anti-corruption co-operation between government institutions, non-governmental organisations and the mass media. An Action Plan was adopted in February 2002 in order to implement the Strategy and a Commission on Co-ordination of the Activities in the Field of the Fight against Corruption was established with responsibility for the enforcement of the National Strategy[6]. Continued technical assistance from the World Bank to the Commission is conditional on the successful implementation of the anti-corruption strategy and the Action Plan[7].

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5. Transparency International, "Practical Dimensions of the Economic Corruption in the Period 1990-1998", *Corruption in Contemporary Bulgaria*, 1998, and Rebecca Dale, *op. cit*.

6. In addition, the National Assembly established the Committee on Fighting Corruption on October 29, 2002. It is a cross-party committee composed of 24 Members of Parliament, and is responsible for the control and co-ordination of the anticorruption activities of the various institutions.

7. Rebecca Dale, "UNDP and other Anti-Corruption Efforts in Bulgaria".

The Action Plan provides for several measures that are directly related to the implementation of the Convention, notably fulfilment of Bulgaria's obligations under the OECD Convention, including harmonisation of national legislation with its standards. The Action Plan also prescribes the implementation of the Revised Recommendations. Other measures to be carried out under the Action Plan include provision of special training courses for police officers and magistrates on the new offence, compilation of police and judicial statistics on corruption, and the exchange of information between the domestic authorities on Convention-related anti-corruption activities.

The far-reaching nature of many of the reforms just described illustrates a real willingness on the part of the Bulgarian government to acknowledge the problem of widespread corruption in Bulgaria, and to take practical measures to address it. In the view of the lead examiners, the extensive programme of reforms introduced by Bulgaria in its campaign against corruption should increase the effectiveness of prevention and detection of bribery of foreign public officials despite being much more broadly targeted.

Many important building blocks are in place to enable Bulgaria to develop a coherent system of prevention and detection of foreign official bribery. The introduction of widespread reforms in public administration, designed to increase accountability and ethical standards, can be expected to result, over time, in more offences being reported. Structural reforms of vulnerable institutions, and the introduction of systems of internal audit and control in the major ministries, for example the Inspectorate at the Ministry of the Interior, should contribute both to deterrence and detection. Foreign bribery occurring in the context of money-laundering activities should become more difficult to conceal as a result of the enactment of reporting requirements for suspicious transactions and the establishment of the Bureau for Financial Investigation. The re-establishment of the National Investigation Service provides an opportunity for a specialist investigation agency to develop expertise in the area. The ongoing reforms in the processes of privatisation and public procurement, coupled with the review and auditing functions of the National Audit Office and the Public Internal Financial Control Agency, should bring further preventive safeguards.

The reforms overall must ultimately be judged by their results. The degree of political will and commitment that manifested itself at the time of the adoption of the National Anti-Corruption Strategy in 2001 may not be capable of being sustained at the same level throughout the period of implementation of the reforms, especially as their concrete effects begin to be felt. But the examining team noted with appreciation the willingness of the Bulgarian government to open up controversial areas to serious debate, and to enter into co-operation with non-governmental as well as intergovernmental organisations in an effort to harness the resources necessary to fight corruption effectively.

B. DOES BULGARIA HAVE EFFECTIVE MEASURES FOR PREVENTING AND DETECTING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS?

a) Awareness

i) Public awareness

There is a high level of awareness in Bulgaria about corruption. According to the Centre for the Study of Democracy's March 2001 Corruption Index, 37.5 per cent of Bulgarians see corruption as "the main problem" in the country. The problem of corruption and its specific manifestations are now at the centre of public debate and civic criticism. Political confrontation often focuses on this issue and the possible instruments for dealing with it. The public perceives that the phenomenon of corruption is widespread in Bulgarian society, but, by now, a positive tendency towards higher moral standards and lower public tolerance towards corruption has begun to emerge, according to Coalition 2000's Corruption Assessment Report for 2001. Several of those in positions of influence in the fight against foreign bribery either expressed or demonstrated in their meetings with the examining team a real willingness to accept

sometimes radical changes to their institutional environment or to adopt additional measures for prevention or awareness-raising within their respective organisations.

That said, the examining team found very little evidence of awareness of the fact that bribery of a foreign public official has been a criminal offence under Bulgarian law since the beginning of 1999. Foreign bribery is not, nor is it likely to become, the most urgent priority facing the Bulgarian population, including its law enforcement agencies, who are understandably much more concerned about domestic corruption. Nonetheless, the risks to Bulgaria's international trading partners should not be underestimated.

While the area of awareness raising is one in which NGOs and civil society generally can make an important contribution and in which they have been quite active in Bulgaria, to date, there is little evidence of government initiatives in this field. The need for government action becomes particularly pressing where a succession of legislative reforms has taken place during a short period, creating new criminal offences, and where the offence concerned, as with foreign bribery, is perceived as remote from the everyday experience of most of the public.

An obvious starting point for targeting awareness raising might be the professions – those most directly involved in advising companies considering doing business internationally. According to one member of the Bar, the content and purpose of the Convention is not widely understood among the legal profession, and there is little interest shown in promoting ethical standards and codes of conduct generally. Nor does the auditing profession appear to be sufficiently informed about how to identify the types of transaction typically used to mask corruption, or what should be regarded as suspicious for the purposes of reporting under the money-laundering law. According to the representative of the Instituted of Public Certified Accountants (ICPA), no guidelines had been issued by that body to assist in identifying bribery.

The examining team found some tentative but encouraging signs of initiatives taking place in the corporate sector. A representative of a major business grouping told the examiners that simplified codes of conduct had been devised and promoted among member companies, including small and medium-sized enterprises, aimed at bringing about a gradual but profound shift in mindset from acceptance of corruption to its rejection as a business practice. Such initiatives, launched on a small scale, are expected to build in influence over time. Similarly, the growing presence in the Bulgarian market of respected multinationals with well-established and widely enforced codes of business conduct is beginning to have a positive influence by reducing tolerance of corruption. The Confederation of Independent Trade Unions expressed its willingness to promote awareness of the offence and of the Convention in its high-level contacts with industry management, and also among its members working in relevant sectors. The Bulgarian Corporate Governance Initiative, started in 1999, is a coalition of NGOs one of whose main objectives is the promotion of best practices in corporate governance.

The Bulgarian Trade Promotion Agency (BTPA) was set up in early 2002 with the aim of providing support, through trade shows and other promotional assistance, to small and medium sized Bulgarian companies entering foreign markets. This body, together with the Export Insurance Agency, functions through close contacts with Bulgarian businesses that it advises in the course of their dealings abroad. It is thus ideally placed to promote both awareness and deterrence of the offence of foreign bribery as Bulgaria's export trade expands. The examining team was encouraged by the willingness expressed by the BTPA representative to make it part of the function of Bulgaria's 65 commercial attachés and counsellors posted abroad to advise Bulgarian companies that it is now an offence under Bulgarian law to bribe a foreign public official. This might develop in the future into more detailed advice on compliance.

Commentary

The lead examiners encourage Bulgaria to initiate measures to raise awareness of the foreign bribery offence among the accounting, auditing and legal professions, by working with their respective professional bodies to develop seminars and other forms of training, so that these bodies can in turn take a proactive role in transmitting knowledge to their clients. Existing initiatives among the business community should be actively supported, including the introduction of codes of conduct and compliance policies, as prevention needs to begin before the practice of foreign bribery has a chance to take hold. Steps should be taken to develop the role and capacity of the Bulgarian Trade Promotion Agency in education and deterrence. Measures could be adopted to ensure that public funds are not spent on assistance, or official support given, to companies involved in foreign bribery.

ii) Government Awareness

The examining team found that there was often a lack of knowledge of the offence of bribing a foreign public official among the representatives of Bulgarian government agencies it met. Clearly, in the case of foreign bribery, it is premature to expect the offence to be thoroughly understood. But, as noted above in the context of public awareness, where the offence in question is perceived as remote from common experience, the need for training is all the greater if the law is not to become a dead letter. The representative of the Commission on the Co-ordination of Activities in the Fight against Corruption indicated that Bulgaria had a practice of providing training with regard to amendments to the Penal Code through the Centre for the Training of Magistrates and the Police Academy. For formal purposes, the relevant authorities considered it sufficient to publish all amendments in the State Gazette, which is available on the internet. Some additional publicity is sometimes produced by the government's media services.

Typical of the observations made to the examining team was that there had been no cases of foreign bribery, and that this was why there was no knowledge of the offence. In reality, the reverse proposition is equally likely to be true. Where the offence was understood, suspected cases had been encountered and reported. The Public Internal Financial Control Agency, in addition to auditing the spending of budget appropriations and European Union funds, also audits commercial enterprises where the state holds more than 34 per cent of the shares. In the course of inspecting the records of foreign subsidiaries of such companies, the examiners were told, they had found expenditures which were not satisfactorily substantiated, and which gave rise to suspicions of foreign bribery. By contrast, there appeared to be little awareness on the part of the Customs Agency of the potential link between bribery of foreign officials and international trafficking. Nor did the National Audit Office appear to be conscious of the risk of bribery of European Commission officials –identified as a risk area by at least two civil society interlocutors -- though part of its function is to audit the expenditure in Bulgaria of European Union funds. In short, the understanding of risk areas and suspicious fact patterns is generally low across government agencies, and this seemed to be coupled with a tendency on the part of investigators to adopt a reactive approach and wait for leads rather than engage in deterrence or active detection.

As to the enforcement agencies, one prosecutor believed that foreign official bribery became an offence only in 2002. The representative of the National Investigation Service, which would be expected to play a major role as its responsibility includes investigating crimes committed by Bulgarian nationals abroad, admitted that awareness was insufficient. He knew of no examples of the offence. While he stated that 'If we found it, we would follow up', he did not expect to launch any investigations unless information

was received from a source abroad.[8] Judges do not as yet receive mandatory training on the offence of foreign bribery, though there will be an opportunity to remedy this when the National Judicial Institute comes into being.[9] Its training programme will include corruption.

Commentary

The Bulgarian government is encouraged to raise the level of awareness of the foreign bribery offence among those agencies that could play a role in detecting and reporting it, including guidance as to the situations in which the offence might arise, and how to recognise it. Bulgaria should also put in place practical training, using outside resources where possible, for those actively involved in enforcement, including the development of guidelines and typologies. This should ideally form part of the overall training effort on international economic crime, the more so as foreign bribery will often occur in the context of other criminal activities such as trafficking and money-laundering, and should therefore not be treated as an isolated offence.

b) Statistics and information about corruption

At every level of the fight against corruption, Bulgaria appears to suffer from the lack of detailed statistics, data, qualitative analysis and fact-based research on the subject. Attempts to assess the extent of the problem depend on perception indexes and surveys, which can only indicate the general dimensions of the problem[10]. The GRECO evaluation reports themselves, though they have so far covered only some of the Council of Europe's 20 Guiding Principles, have been described as 'the nearest thing in existence to analysis based on consistent standards, producing evaluations that can be used on a comparative basis' in the field of corruption[11].

The lack of factual information impacts the fight against corruption at two levels. First, in general terms, reliable research, including detailed statistics about economic activity, is necessary in order to analyse and understand the incidence of corruption, including foreign bribery – where and how it occurs, what techniques are used, and which areas present especially high risks. Without this, it is difficult to assess the effectiveness of the systems of prevention, detection and enforcement, and to devise and target the necessary countermeasures. Furthermore, the capacity to analyse fact patterns is a precondition for devising the typologies, guidelines and training necessary for effective and pro-active detection and enforcement. The second level at which this issue should be addressed, in the view of the examining team, is the handling by the enforcement system as a whole of corruption cases, including foreign bribery. There is no systematic publication of reports of criminal cases, including those involving bribery, except for those

8. It should be noted that the current staffing level of the entire NIS is about 80 people, 15 of whom are investigating magistrates in the specialist division investigating corruption and other economic crime.

9. This was scheduled for 2003. Timing must now be regarded as uncertain as the creation of the NJI was one of the reforms contained in the new Judicial Systems Act. The Constitutional Court ruled on 16 December 2002 that this new entity should not fall under the Ministry of Justice. The practical implications of this decision are not yet known.

10. An example is the 1999 EBRD/World Bank Business Environment and Enterprise Performance Survey (BEEPS), from which it appears that, of those enterprises in Bulgaria taking part, 74 per cent claimed that firms like theirs would expect to pay up to 2 per cent of annual revenue in 'unofficial payments' to public officials.

11. "Monitoring the EU Accession Process: Corruption and Anti-corruption Policy" (Open Society Institute, EU Accession Monitoring Program), 2002 Report, p.65. (OSI EUMAP)

heard on appeal by the Supreme Court of Cassation, though each individual court decision is handed down in public.

At present, only rudimentary statistics are available showing the numbers of corruption-related cases dealt with by regional and district courts, and these do not clearly distinguish between active bribery offences under articles 304, 305 and 305a of the Criminal Code, and passive bribery offences under articles 301-303. A representative of the Ministry of Justice confirmed that differentiated reporting would be introduced in the future. From 1 January 2003, in accordance with new requirements introduced by the Ministry of Justice, statistics will distinguish between active bribery of domestic officials under Articles 304, paragraphs 1 and 2, and active bribery of foreign public officials under Article 304, paragraph 3. Up to the present time, the different services involved in fighting corruption – the police, the National Investigation Service, and prosecutors -- have been responsible for their own statistics and there has been no overall co-ordination by the Ministry of Justice. Bulgaria recognises the need for statistics: one of the measures envisaged in the Action Plan on the Implementation of the National Strategy for Combating Corruption is the compilation of police and judicial statistics on corruption. A new model for the integrated gathering of statistics has recently been proposed by the Centre for the Study of Democracy, which, if adopted, would provide a breakdown of the numbers of investigations initiated, and information on how these are handled at every stage of their progress through the system by the different agencies responsible.

Such a model would ideally be incorporated into the proposed Unified Information System for Combating Crime, which is currently in the early stages of software implementation. This system, to be maintained by the Ministry of Justice in co-operation with the processing functions of the National Statistical Institute, will set standards for the collection and exchange of information between the different agencies, enable access to summaries of information on the progress of criminal proceedings and the enforcement of judgements, and thus, it is expected, increase the clear-up rate and facilitate crime prevention. However, since the proposal is contained in the draft Judicial Systems Act, which has been the subject of challenge before the Constitutional Court, its realisation is likely to be delayed at least partially. It must also be acknowledged that a project of such magnitude will consume substantial resources, both in terms of software implementation and the purchase and deployment of hardware, and also of staff training.

Commentary

The lead examiners endorse the twofold recommendations in the 2002 GRECO report on Bulgaria as to statistics in the context of Bulgaria's implementation of the Convention: that Bulgaria should 'establish a system of collection and processing of data with regard to the investigation, prosecution and adjudication of corruption offences as well as with regard to mutual assistance in cases of corruption' and, second, that Bulgaria should 'promote objective research on corruption with a view to developing a precise picture of the situation in the country and in particular institutions'. To address the needs of judges, lawyers, researchers, the media and the public, the lead examiners encourage Bulgaria to make available information about all convictions, acquittals and interpretations of the law on foreign bribery as a matter of public record.

c) Reporting

Reporting of alleged cases of foreign corruption by competitors, corporate employees, companies, subcontractors or journalists, as well as by Bulgarian public officials, can play a significant role in the detection of violations of Bulgaria's anti foreign bribery legislation. Under article 174, paragraph 1, of the Criminal Procedure Code, every individual citizen is under an obligation to report crimes to the public authorities. Paragraph 2 of the same article imposes an obligation on every public official to do likewise, as well as to take the necessary measures to preserve evidence of the crime.

i) Reporting by members of the public

Whistleblower and witness protection

One disincentive to the reporting of alleged cases of corruption is the absence of whistleblower protection legislation in Bulgaria[12]. Representatives of the trade unions who met with the lead examiners at the on-site visit cited the lack of whistleblower protection as the main obstacle to the reporting of bribery by employees, particularly in companies where the union organs are weak. Employees most often fear retaliation in the form of dismissal by their employers as well as prosecution for insult and defamation (see below). The trade unions indicated that collective labour agreements in Bulgaria do not provide for whistleblower protection. With respect to civil servants, it is reported that the Code of Conduct for Civil Servants, approved by the Minister of State Administration in December 2000, may prove a disincentive to whistle-blowing, because of the absence of clear rules on conflicts of interest and the imposition of a duty of loyalty to the government[13].

In addition, Bulgaria does not have a comprehensive witness protection programme. Article 97a of the Criminal Procedure Code provides measures which may be used in corruption cases: keeping the identity of a witness secret, or providing physical protection to the witness and their family or close personal contacts. These measures are put in place at the commencement of criminal proceedings and may continue afterwards. The Prosecutor's Office acknowledged that the lack of a comprehensive programme poses real risks for witnesses. At the same time, it is their opinion that this would be impossible to implement in Bulgaria, as the small size of the country limits the scope of secrecy available and therefore the practicability of changing a witness' identity and address.

An encouraging development, in the view of the examining team, is the Prosecutor General's support for the creation of a Regional Agreement on Witness Protection as drafted by the Regional Centre of Southeast European Co-operative Initiative for Trans-border Crime (SECI). The resulting document, which is apparently consistent with European Union legislation, conventions and best practices documents, consists of simple recommendations that can be incorporated into domestic legislation to establish the infrastructure necessary both to protect a witness in a criminal case and to enable a specific country to participate in witness protection on an international or regional basis. Under these recommendations it would be possible to protect the safety of a co-operating witness by providing a new identity and allowing that witness to assume residence in another SECI country. The Prosecutor's Office views mutual assistance between the SECI countries in this respect as the most effective way of protecting witnesses in Bulgaria from retaliation.

Commentary

The lead examiners recommend that Bulgaria adopt whistleblower protection measures to ensure that employees in the public and private sectors can report suspected foreign bribery without fear of dismissal or prosecution. Additionally, they encourage the Bulgarian government to review the Code of Conduct for Civil Servants to ensure that it is clear that the duty of loyalty to the government does not override the duty to report suspicions of foreign bribery.

12. *Ibid*.

13. *Ibid*.

Criminal defamation laws

Employees, journalists and individuals may also be reluctant to report cases of corruption, fearing retaliation in the form of prosecution for insult and defamation. Article 148 of the Bulgarian Penal Code establishes the offence of defamation of a government official or representative of the public for which the penalty is a fine of a maximum of 15,000 Leva (EURO 7,650) and public reprobation. Article 146 establishes the offence of insult and the penalty is a fine of up to 3,000 Leva (EURO 1,530). Insult involves stating or doing something that humiliates "the honour or dignity of another in his/her presence". A further offence of defamation is established under article 147, and involves the divulging of "an ignominious circumstance regarding another or fastening a crime on him/her". The penalty for this offence is a fine of up to 7,000 Leva (EURO 3,570) and public reprobation (the deprivation of liberty as a punishment for these offences was abolished by amendments made to the Criminal Code in 2000).

Representatives of both the judiciary and the media indicated that there has been a practice of charging journalists with defamation, although the representative of the media indicated that this trend has declined in recent years and that currently the press feels "relatively free" to reveal corruption in Bulgaria. Proceedings under articles 146 – 148 may be instituted only upon private complaint, and are not subject to the rule of mandatory prosecution. Public prosecutors are not always involved. Still, prosecutors are often perceived as wielding an intimidating influence over journalists who are critical of the judicial process, by charging journalists under the Penal Code with libelling the person or body criticised. Representatives of the judiciary confirmed in this regard that they have had to consider thousands of accusations that particular members of the judiciary are corrupt.

Commentary

The lead examiners note that the deprivation of liberty has been abolished as a penalty under the Penal Code for defamation and insult, and commend the Bulgarian authorities for having reduced the penalties for these offences. They are encouraged that the number of cases of defamation brought against members of the media appears to have decreased in recent years.

Access to Information

In 2000, the Bulgarian Parliament enacted the Access to Public Information Act (APIA) for the purpose of establishing broader public access to government information. It is considered the most significant initiative that has been taken for the purpose of regulating the relationship between the Bulgarian government and citizens[14]. However, the implementation of the law has reportedly been uneven, and has been criticised by some civil society organisations and certain journalists for being vague and enabling discretionary denials of information. According to a US Department of State 2001 Report, some journalists believe that the APIA actually impedes rather than eases public access to information, and Coalition 2000, in its 2001 Corruption Assessment Report, has criticised the new system as being overly dependent on administrative discretion and failing to provide a guarantee of adequate transparency in the activities of the administration.

During the on-site visit, the Delegation of the European Commission of Bulgaria explained that the Law on the Access to Public Information is being used increasingly, but that it is burdened with problems, in particular the need for sufficiently trained and responsible people to handle the requests within a reasonable time frame. A representative of the media indicated that the new law is more useful to civil society organisations than to the media, because the media often have their own sources of information. The Open Society Institute (OSI) confirmed the importance of the new law to civil society

14. OSI EUMAP Report, 2002.

organisations, particularly for the purpose of obtaining information concerning public procurement and privatisation. Representatives of the Institute felt that it was too early to assess the effectiveness of the new law, but explained that problems in accessing information about public procurement and privatisation had been encountered. For instance, in respect of requests for information about privatisation transactions, information is rarely provided about the entities to whom the company was sold, or what assets were sold.

In the view of the lead examiners, some aspects of the Law on the Access to Public Information might present obstacles to obtaining information about foreign bribery related to public procurement and privatisation transactions in Bulgaria. In particular, pursuant to article 37(1) 2, one ground for refusing access to information is if "the access affects the interests of a third person and he/she has not given explicit written consent for disclosing the requested public information". It would appear that this ground of refusal would often apply to information sought about public procurement and privatisation, since more than one party would invariably be involved in the bidding process. Furthermore, Article 5 states that exercising the right of access to information "cannot be directed against the rights and the good name of other persons" Under article 8, according to the explanation of the language given by the Bulgarian authorities, the Law on Access to Public Information shall not apply in respect of information that "should be obtained through a mechanism provided in some other law", for example the laws on the provision of administrative services to citizens and to corporate bodies.

Commentary

The lead examiners commend the Bulgarian government for having enacted the Access to Public Information Act. The lead examiners feel that the public needs reasonable access to information as a tool for detecting foreign bribery in some transactions, including public procurement and privatisation. Until now, access has been uneven, and it appears that in many cases information has been withheld. The lead examiners therefore recommend that the Bulgarian authorities ensure that adequately trained officers are employed for the purpose of processing requests for information. In addition they recommend that the Law on the Access to Public Information is reviewed to determine whether certain grounds for refusing access to information might create obstacles to effective access or require to be clarified.

Hotlines and anonymous tip-offs

Hot lines to enable individuals to file complaints or provide information about offences, including foreign bribery, have been established in several public institutions, including the Prosecutor's Office, Ministry of Interior and Ministry of Finance. Anonymity is guaranteed to users. When confronted with an anonymous tip-off, the police or investigators must pursue further enquiries in order to secure corroborating evidence or an identifiable source before the information can be used.

During the course of the on-site visit, the lead examiners did not gain the impression that hot lines have been an important source of information about bribery offences. In some ministries, the hot lines are answered once a week and the representatives from one ministry were not aware of how the hotline was being used. Information was not provided about how many reports made to hot lines have led to prosecutions, or for what offences reports had been made.

ii) Reporting by public authorities

Tax authorities and the reporting of foreign bribery

Disclosure of foreign bribery by Bulgarian tax officials can be another important source of detection of violations of anti-bribery legislation. There is a clear legal obligation on the tax authorities to inform the law enforcement authorities of suspected criminal offences, including the bribery of foreign

public officials. Pursuant to article 174 of the Criminal Procedure Code, all officials are obligated to inform the criminal law enforcement authorities of suspected criminal offences, including bribery. In addition, pursuant to article 87 (4) of the Tax Procedure Code, the tax authorities "should" inform the public prosecutor about document falsifications. From the discussion with the tax experts who addressed the examining team, it appears that, so far, tax authorities have not come across foreign bribes.

It became clear to the lead examiners during the on-site visit that there is little, if any, focus among the tax authorities on the anti-bribery component of the tax law. Bulgarian tax officers, in general, lack training to implement new tax policies and are often unable to provide clear interpretations of tax rules[15]. Special procedures have been established for the implementation of the Tax Code by the tax authorities, but these do not deal specifically with the identification of bribe payments, including bribes to foreign public officials. Additionally, the representatives of the General Tax Directorate indicated that the Bulgarian government has not issued guidelines or provided training on the identification of bribe payments.

There is no provision in the Corporate Income Tax Code expressly denying the deductibility of bribes paid to foreign public officials. Instead, article 23 (3) of the Corporate Income Tax Code lists items that may be deducted from the financial accounting results. This list includes donations to, for example, educational and healthcare institutions, religious faith societies, and scholarships to students. It also provides deductions for items such as dividends received as a result of the distribution of profits by legal persons and unregistered partnerships. All the categories of deductions are quite specific, and there is no broadly worded category of deductions such as social or entertainment expenses, under which it might be relatively easy to hide bribe payments. In addition, the examining team was told by representatives from the General Tax Directorate that disincentives to attempting to obtain unjustified deductions are contained in article 23 (13) of the Code, which provides that the financial result shall be increased where a tax payer is unable to prove an expense with primary documents, and in articles 35 and 36, which provide that entertainment and social expenses shall be subject to a final tax. Representatives of the private Bar who met with the lead examiners confirmed that the Tax Code is given a very restrictive interpretation, and that it is very difficult in Bulgaria to obtain a deduction for an unjustifiable expense, as invoices are always required. They were aware of many companies having been subject to tax audits. However, they also stated that it is a fairly easy matter to purchase fraudulent invoices. The Bulgarian authorities have stated that methods exist for cross-checking the issuers and beneficiaries of invoices, and that the Tax Directorate has a system of criteria which it uses to determine whether an invoice is false. There is, nonetheless, some concern on the part of the lead examiners that if, on the face of the documentation submitted, an expense appears *prima facie* to fall into one of the categories of allowable deduction, there is little discretion or incentive for the tax examiners to pursue further inquiries.

Commentary

The lead examiners believe that the clear obligation in the law on the tax authorities to inform the criminal law enforcement authorities of suspected criminal offences, including the bribery of foreign public officials, is a significant step in the fight against foreign bribery. Ideally, Bulgaria should consider introducing into the Tax Code an express denial of deductibility of bribes coupled with a clear definition of what constitutes a bribe. The Bulgarian authorities have observed that the established principles of their national legal system would not permit the introduction of an express denial of deductibility, nor of a definition of a bribe in the tax legislation. As the present system of allowing deductions is drafted, the lead examiners are concerned, however, that the supporting measures for the detection of suspicious transactions

15. "Bulgaria: Administrative Barriers to Investment" (Foreign Investment Advisory Service, International Financial Organisation and World Bank, February 2000)

may be too weak for the reporting obligation to have a meaningful impact. They therefore recommend, as a first step, that the Bulgarian authorities issue guidelines prescribing the types of inquiries to be made in order to detect payments of bribes to foreign public officials, and provide training on the implementation of those guidelines as soon as possible. They further recommend that the Bulgarian authorities consider the OECD Bribery Awareness Handbook for Tax Examiners in designing the guidelines and awareness activities. In addition, they recommend that the criminal law enforcement authorities provide regular feedback with respect to information transmitted by the tax authorities concerning suspicions of bribe payments in order that the Tax Directorate is able to formulate effective policies, and evaluate the actions taken for the detection of bribe payments. The lead examiners also recommend that the Bulgarian authorities consider strengthening the measures in respect of suspicions of document falsifications, in order that there is a clear and specific obligation to report suspicions of falsified invoices and that the tax examiners have sufficient training to identify falsified invoices.

Reporting of money-laundering

The Bulgarian regime designed to prevent money laundering provides an additional tool that can serve both as a deterrent to foreign bribery and a mechanism for its detection. In 1998 the Law on Measures against Money Laundering (LMML) was enacted to provide a framework for fighting money laundering and the Bureau for Financial Intelligence (BFI) was established for the purpose of implementing the law. Several changes have taken place since then to reinforce the Law. Amendments to the LMML came into force on 6 January 2001 for the purpose of harmonising the Bulgarian legislation with the Directive of the Council of the EC on the Prevention of the use of the Financial System for Money Laundering (91/308/EEC). Most recently, the Bulgarian government has adopted and presented to the National Assembly a Law on Amendments and Supplements to the LMML, to bring Bulgarian law completely into conformity with the requirements of Directive 2001/97/EU (which deals with the categories of reporting entities to be covered).

Significantly, pursuant to article 3 of the LMML as amended, 27 categories of persons/bodies are currently subject to the obligation to report suspected money laundering to the BFI. These categories include financial institutions such as banks, insurers, investment companies, and exchange brokers, as well as bodies involved in the privatisation process, persons organising the award of public commissions, chartered accountants and specialised auditing enterprises[16], tax authorities, customs authorities, traders selling automobiles by profession, dealers in weapons and petroleum products, and traders dealing in alcohol and cigarettes. The only significant omission at the present time would appear to be lawyers and companies dealing in real estate (despite a recommendation from the FATF and the European Union Committee on Crime Problems regarding the coverage of real estate companies).

According to the Bulgarian authorities, statistics in the 2001 annual report of the BFI indicate that there were 301 reports made to it during that year.[17]The Bulgarian authorities have not however given any

16. The official representing the BFI stated that the reporting requirement under the LMML in respect of auditors and accountants does not conflict with their secrecy obligations because pursuant to article 15 of the LMML the disclosing of information does not result in liability for violating obligations under other laws.

17. The representative of the Institute of Certified Public Accountants indicated that 15 suspicious reports have been made to the BFI to date by accountants and auditors. The Privatisation Agency indicates that it has forwarded 18 reports of suspicious transactions to the BFI to date, which include 10 reports concerning 17 Bulgarian legal persons, one report concerning one Bulgarian natural person, one report concerning one foreign natural person/owner of a Bulgarian legal person, 5 reports concerning 7 foreign legal persons, and one report concerning one foreign/permanent resident of Bulgaria.

examples of cases where financial institutions have provided information to the competent authorities about suspicious transactions involving the proceeds of bribing public officials, foreign or domestic.

To assist reporting bodies and individuals in detecting suspicious transactions, the BFI has issued guidelines which reporting entities (i.e. the Customs Agency, the General Tax Directorate and the Gambling Supervision Commission) are required to incorporate into their own internal rules. These guidelines cover the identification of suspicious transactions in terms of the nature of the transactions themselves, suspicions about the customers and suspicious sources of funds. At the on-site visit, the representative of the BFI explained that guidelines for the banks are issued by the Bulgarian National Bank, and that gambling bodies are required to submit their guidelines to the BFI. According to the Bulgarian authorities, the General Tax Directorate has guidelines for the purpose of identifying money laundering transactions, approved by the Director of the BFI in November 2001, and also an established practice including a procedure for carrying out specific inquiries. The Institute of Public Certified Accountants (ICPA) also has internal rules, approved by the BFI in 2001. However, representatives of two agencies indicated to the lead examiners during the on-site visit that the BFI does not always provide feedback on reports they have submitted; they thought this would be helpful.

Article 23 of the Act provides for administrative (financial) penalties for breach of the statutory obligation to keep records of, and report on, suspicious transactions where the failure to report does not itself constitute a crime. Any person who fails to report a suspicious transaction to the BFI in accordance with article 11 shall be punished by a fine of 5,000 to 20,000 Leva (EURO 2,550 to 10, 200) and where the offence is committed by a legal person, it shall be liable to a fine of 2,000 to 50,000 Leva (EURO 1,020 to 25,500). This may build a further safeguard into the system of detection and deterrence.

Overall, the changes signalled in the Act could facilitate the deterrence and detection of foreign bribery. Under article 11, those persons/bodies subject to the reporting obligation shall forthwith notify the BFI of a "suspicion of money laundering prior to carrying out the operation or transaction", and to hold up its completion for as long as is legally permissible. The Article acknowledges the overriding need to ensure that funds are not transferred in such situations. If a delay in the operation or transaction is "objectively impossible", the notification shall be made immediately after its performance.

Article 11 of the Act imposes an obligation to report suspicious transactions forthwith to the BFI. In such a case, the Minister of Finance may, upon a proposal by the Director of the BFI, suspend a certain transaction for a period of up to 3 working days by an order in writing. In turn, the BFI shall immediately notify the Prosecutor's Office about the suspension while submitting all necessary information (but maintaining the anonymity of the person who made the report to the BFI). Under article 12 (4) of the LMML, where the BFI possesses information about a "committed crime" (i.e. a predicate offence to the offence of money laundering, including the offence of bribing a foreign public official), the BFI is obligated to notify the Prosecutor's Office of the offence, while maintaining the anonymity of the person who made the report to the BFI. Such a notification is required to be made immediately, prior to carrying out a financial intelligence analysis[18].

There is some room for concern that the law leaves a residual category of transactions that could amount to a loophole: suspicious transactions that are not suspended, and that do not amount to evidence of a 'committed crime' under Article 12(4), might never come to the attention of a prosecutor. In practice, according to the Bulgarian authorities, 90 - 92 per cent of cases notified to the BFI are reported to the

18. With respect to information received concerning suspicions of an actual offence of money laundering, the BFI is required to perform a financial investigation before submitting a report to the Prosecutor's Office. In practice, according to the Bulgarian authorities, a financial intelligence analysis is carried out in all cases reported to it.

Prosecutor's Office, and the remainder are dropped because of lack of evidence that money laundering or some other offence has taken place.

Commentary

The lead examiners commend Bulgaria for creating the Bureau of Financial Investigations (BFI) and for the amendments to the Law on Measures against Money Laundering (LMML) which significantly broaden the categories of reporting individuals/entities and consolidates the authority of the BFI in the form of an agency within the Ministry of Finance. The lead examiners welcome the recent initiative before Parliament for the purpose of further broadening the categories of reporting individuals/entities, and encourage the Bulgarian authorities to extend coverage to lawyers and companies dealing in real estate as soon as possible as recommended by the FATF and the European Committee on Crime Problems.

With respect to guidelines on detecting money laundering transactions, the lead examiners recommend that the BFI take steps to verify whether reporting entities have adequately incorporated the BFI's guidelines into their own internal rules as is required. Feedback to the reporting institutions, both generally and with regard to specific cases, is a valuable tool in promoting better and more targeted reporting, and should be encouraged.

iii) Disclosure by accountants and auditors

Books and records violations can be another important source of information leading to the detection of foreign bribery. The Institute of Certified Public Accountants (ICPA), established in 1990, is the only institution representing the accounting profession in Bulgaria, and is thus responsible for the development of accounting and auditing standards. It is a member of the Working Group for the Development of a Regional Accounting and Audit Reform Initiative in South Eastern Europe, which has as its goal the promotion of internationally recognised accounting and auditing practices, accountability and improved corporate governance.

An encouraging development is that, since the beginning of 2002, all Bulgarian companies --with the exception of those worth less than 70,000 Leva which are exempted from the accounting rules – are required to follow international standards of audit. In the view of the lead examiners, the main challenge ahead for the Bulgarian accounting profession is the implementation of the International Accounting Standards in practice, and also compliance with the anti-bribery provisions of Bulgaria's legislation. As noted earlier in this report, it appeared to the lead examiners that there is little focus within the accounting profession on the foreign bribery offence. In particular, it seems that accountants and auditors have not been provided with training to increase awareness of the offence of bribing a foreign public official, detecting the offence in the course of preparing or auditing the financial statements of an enterprise, or of their reporting obligations in respect of the offence.

Of particular relevance to the issue of foreign bribery are the rules for ensuring the independence of auditors. Pursuant to article 28 (1) of the Law on the Independent Financial Audit, a registered certified public accountant is prohibited from executing an independent audit of the financial statements of an enterprise where he/she is "related" to the enterprise in question ; where he/she is directly or indirectly involved in or participates in transactions of the enterprise "and these transactions differ from the transaction of the independent audit and violate his/her independence" as an auditor ; and where he/she provides accounting services on the accrual of the operations and the preparation of the financial statements of the enterprise in question, or where he/she is involved in management decision-making or provides services related to the assessment of the assets of the enterprise. In response to the concerns expressed by the examining team that the rules concerning conflicts of interest may be too vague, and that

it is not clear that they cover persons including partners, a member of the Board of Directors or the Supervisory Board, the Managing Director, a shareholder of the parent or affiliates, an employee, and spouses of all of the aforementioned as well as former partners, the representative of the ICPA explained that all of these categories, except for *former* partners, etc. are intended to be covered by the prohibition.

As to breaches of the accounting rules, the penalties provided for in the law are imprisonment or a fine. Forgery of an official document and forgery of a securities document are both offences punishable by up to three years' imprisonment under article 316 of the Criminal Code. Under article 260, a certified accountant who knowingly endorses an untrue annual report on the accounts of a business is liable for up to one year's imprisonment and a fine of up to 500 Leva (EURO 255), as well as the revocation of certain rights. As to audits, under the Law on the Independent Financial Audit, failing to comply with the requirements of the International Auditing Standards or failing to comply with the Professional Code of Ethics adopted by the ICPA can result in a fine of up to 3,000 Leva (EURO 1,530) or deprivation of the right to execute an independent audit for two years for a first offence, and up to three years for each subsequent offence, for an individual. For a specialised auditing enterprise, failure to comply with the rules can result in a fine of up to 5,000 Leva (EURO 2,550) or deprivation of the right to execute an independent audit for two years for a first offence, and three years for each subsequent offence.

In the absence of information about the penalties which have actually been handed down for breaches of the accounting rules or non-compliance with the Law on the Independent Financial Audit, it is difficult to draw conclusions about whether the level of sanctions is in practice sufficiently effective, proportionate and dissuasive.

With regard to reporting obligations, pursuant to article 33.3 of the Law on the Independent Financial Audit, a registered auditor is under the obligation to inform the management of the client enterprise about "material offences under the law", etc. According to Bulgaria, this obligation applies in relation to indications of possible bribery or fraud contrary to the Penal Code. The lead examiners were concerned that the reporting requirement on auditors lacks enforceability as, under Chapter Nine of the Law on the Independent Financial Audit on Offences and Penalties, no penalty is provided for a failure to report under article 33.3. Moreover, the management of the client enterprise is not expressly obligated to inform the competent authorities of suspected offences. Pursuant to article 34 (1), auditors are liable for any material damages that they may cause to their client if such damages are a direct and immediate consequence of their actions or failure to take action. Additionally, pursuant to Article 57(1) (a) of the Accounting Act, there is a prohibition against an accountant making public any information relating to the activity of an enterprise that damages its prestige.

The representative of the ICPA stated that accountants and auditors are obligated under the rules of the ICPA to report suspicions of bribery of foreign public officials to the competent authorities in parallel with informing the management of the enterprise. He stated further that although this obligation has not yet been tested, it is his opinion that it does not contradict the requirement under the Law on the Independent Financial Audit that such reports be made to the management of the enterprise (in the absence of an obligation on management in turn to report to the competent authorities), or the provisions under the same legislation respecting the liability of auditors for material damages caused to their clients and the prohibition under article 57(1)(a) of Accounting Act.

Commentary

The lead examiners note that vital information concerning foreign bribery that has taken place is likely to be found in a company's accounts, and accountants are the first to see it. They encourage the Institute of Certified Public Accountants (ICPA) in its implementation of International Accounting Standards. They also welcome the rule of the ICPA obligating

accountants and auditors to report suspicions of offences, including foreign bribery, to the competent authorities, and view it as more effective in the prevention and detection of foreign bribery than the obligation under the Law on the Independent Financial Audit that such reports be made to the management of the enterprise (in the absence of an obligation on management to report in turn to the competent authorities). However, they are concerned that the rules issued by the ICPA might be viewed as contradicting the provision in the Law on the Independent Financial Audit, as well as the legislative provisions providing for the liability of auditors for material damages to their clients, and the prohibition against the accountant making public any information damaging the prestige of the enterprise. Thus, the lead examiners recommend that the Bulgarian authorities clarify, under the law or in guidelines, the reporting obligations for accountants and auditors, and consider requiring auditors to report indications of possible illegal bribery to the competent authorities.

Additionally, with respect to the rules on the independence of auditors, the lead examiners encourage the Bulgarian authorities to clarify the categories of persons considered "related" to the enterprise in question, and encourage the Bulgarian authorities to ensure that the prohibitions are sufficiently broad. The lead examiners also recommend that the Bulgarian authorities periodically review the sanctions for accounting and auditing offences to ensure that they are sufficiently effective, proportionate and dissuasive, in particular in respect to auditing companies.

d) Privatisation, public procurement and the arms trade

(i) Privatisation

The process of privatisation is a major engine of Bulgaria's transition from an economy dominated by loss-making State enterprises to a free market economy. At this point, over 80 per cent of the State assets which were destined for privatisation have now been sold. The lack of accountability and transparency in the process, coupled with the obvious potential for abuse in a system where a high level of decision-making power resides at ministerial level, prompted the government to identify privatisation in its National Anti-Corruption Strategy as an area 'particularly vulnerable to corruption'. A series of radical reforms was recommended. Since 2000, safeguards have been introduced into the process, the legislation amended, and the Privatisation Agency restructured. Decision-making processes have been reformed. Regulations providing for post-privatisation supervision have been adopted under the Law on Privatisation and Post-Privatisation Control. The examining team was told that international consulting firms advise on the process of evaluating prospective purchasers.

Recent experience has been mixed. The sealed-bid public auction for the grant of Bulgaria's second GSM mobile telephone network, in which bidders from Greece, Turkey, Finland and the Netherlands, as well as Bulgaria, took part, was described as the most transparent public bidding process seen in South Eastern Europe. However, criminal investigations involving a senior government minister and the former head of the Privatisation Agency have begun in connection with the privatisation of various entities, all in different sectors. The Commission on Co-ordination of Activities in the Fight Against Corruption has ordered the Privatisation Agency to submit a report on post-privatisation experience with regard to numerous companies where it is suspected that the purchasers may have defaulted on their contractual obligations. Techniques alleged to have been employed to undermine the legitimacy of the privatisation process include sales at undervalue; withholding of information from prospective bidders until deadlines have passed; and bribing candidates to withdraw their bids.

Foreign buyers, including State-owned enterprises, may bid. The potential for bribery of foreign public officials in the actual privatisation process could have damaging consequences. Furthermore, once

an entity is privatised, the risks of abuse are magnified: a representative of the National Investigation Service commented that the possibilities for State-owned entities to bribe were much more limited as the accounting controls to which they were subject were much stricter than those in the private sector.

Section 7 of the Law on Privatisation and Post-Privatisation Control allows all natural and legal persons to participate on equal terms. Participants are required to submit a statement as to the origin of the funds they propose to use for the purchase. The law does not contain any exclusions or restrictions on eligibility based on conviction for, or a history of involvement in, corruption. The examiners were told that a participant whose background gave rise to suspicion would 'in practice' be excluded, but it was not clear on what basis. The Privatisation Agency has a unit whose responsibility is to verify the eligibility of prospective purchasers, but it does not carry out systematic screening. There are very few checks designed or built into the system to deter or detect corruption, including foreign bribery. This is coupled with a seemingly low level of awareness of the risks involved or the forms such abuse might take. The approach of the authorities appears to be essentially reactive. It relies upon an after-the-fact obligation to report suspicious circumstances to the Bureau of Financial Investigations or the prosecuting authorities. The obligation to report suspected foreign bribery did not appear to be clearly understood within the Agency.

Commentary

In the view of the lead examiners, the remaining privatisations present Bulgaria with a significant opportunity for prevention, by introducing more stringent screening measures and perhaps requiring a declaration of compliance with the law to be made by purchasers of entities likely to become involved in export. There is also scope for increasing the level of awareness of the foreign bribery offence and its detection among the personnel concerned. The possibility for post-privatisation control provides a further opportunity for detection and prosecution of corruption associated with the privatisation process.

(ii) Public Procurement

The Public Procurement Act, which came into force in 1999, is an important step in increasing accountability in the field of public procurement. However, it is reported that major deficiencies in the law, including insufficient transparency of the procedures for public procurement, create suspicion of corrupt practices[19]. The establishment in 2001 of the Public Procurement Register, which includes information on all public procurement tenders (with certain exceptions[20]) is a major step towards transparency.

Concerns have been expressed about the efficacy in practice of the mechanisms for review and enforcement[21], and corruption is still regarded as a major concern in the public procurement context. According to data provided by the Ministry of Justice, between 1 January 2001 and 10 December 2002, the PIFCA forwarded to the prosecutor's office 73 audit reports which gave rise to suspicions of criminal activity – not necessarily corruption – having taken place in the public procurement process. The examiners were told of cases where procurements were cancelled because of suspected misuse of funds.

Foreign companies – which could include foreign State-owned enterprises -- are now permitted to bid for public procurement contracts without having to register as a legal entity in Bulgaria. The major

19. In Coalition 2000's Corruption Assessment Report 2001.

20. It should be noted that procurement relating to national defence and security, which would include military procurement, is outside the scope of Bulgaria's public procurement regime.

21. Concerns have been expressed in particular in view of the continued absence of a dedicated Public Procurement Agency. See e.g. OSI/EUMAP Report (2002), p. 119.

risk perceived by the Bulgarian authorities is that bidders might seek to bribe Bulgarian public officials in an attempt to win business. The view was expressed to the examining team that circumstances were unlikely to occur in the public procurement process which could give rise to bribery of foreign public officials. The possibility of bribery of officials of international organisations in connection with aid-funded projects was however mentioned by civil society representatives.

In terms of preventing corruption, including foreign bribery, inadequacies appear in the current system at the level of eligibility and screening. Under the Public Procurement Act, all companies who have paid their taxes are, in principle, eligible to bid. The only evidence of good business reputation required is a certificate stating that none of the current managers or members of the board of directors, if any, has been convicted of an economic crime. Such convictions operate as a disqualification under Article 24 of the Act. This can easily be circumvented by changing the management structure of the company. Foreign bidders have to provide similar documentation from the authorities in their country of establishment, legalised by a Bulgarian consular official. There is no provision for temporary suspension from eligibility of those under investigation.

The failure to impose stricter requirements for eligibility, coupled with a lack of focus on screening, means that the onus for detecting and reporting corruption falls on those responsible for post-procurement auditing and enforcement, who are at present ill-equipped to discharge this role effectively. As to reporting, the examiners were told that the Public Procurement Office reports suspected offences, including bribery, to the Court of Auditors and the Public Internal Financial Control Agency. Only if, and when, it receives the results of the inspection from one of these bodies will the Public Procurement Office report the matter to the Prosecutor's Office, though the PIFCA itself refers to the Prosecutor's Office any findings in an audit report containing evidence of criminal activity with respect to public procurement (see above, para. 69).

Commentary

There is a need for proactive measures to be adopted to reduce the risks of foreign official bribery as well as other types of corruption in the procurement process. As a starting point, steps could be taken to increase the levels of awareness of the offence among the officials responsible for screening and enforcement. More stringent requirements could be imposed to disqualify individuals and companies whose directors or officers have previous involvement in corruption from eligibility for government contracts. As to reporting, the present system appears to be lengthy, inefficient and in need of clarification.

(iii) The Arms Trade

International trade in arms and weapons is important for the Bulgarian economy, though precise statistics in this regard are not available. Because of military modernisation, which is a requirement of NATO entry, a large number of older, surplus weapons have become available on the open market in Bulgaria, creating increased incentives to export arms[22]. This is an area which is widely acknowledged to carry a high risk of bribery of foreign public officials: it has been estimated that world-wide, nearly one-tenth of turnover in the international arms trade is paid in bribes[23].

The enactment in October 2002 of changes to the Law on the Control of Foreign Trade Activity in Arms and Dual-Use Goods and Technology on Arms Trade, provides a practical mechanism for the

22. "International Action Network on Small Arms", *Weekly Defense Monitor*, 2 December 1999, vol. 3, issue # 46.

23. A Global War against Bribery, *The Economist*, 16 January 1999.

deterrence and detection of foreign bribery. Under the new law, an inter-departmental council established by the Council of Ministers must review applications for brokering licenses for arms dealers. A party granted a license must then apply to the second decision-making level, an inter-departmental commission at the Ministry of the Economy, to obtain a permit for every single contract to be carried out. The inter-departmental commission is required to submit an annual report on the implementation of the revised legislation to the Council of Ministers.

Under article 10 of the new law, persons shall be issued a license if they "are reliable and economically stable", and they have certified "that they have created conditions and the necessary organisation for work with the goods and/or technologies indicated by them…"[24] Intermediaries in the foreign arms trade also require a license, and must meet criteria of reliability of performance and economic stability, though they apparently do not require a permit for each individual contract. Grounds for refusing to issue a permit include the lack of necessary documents, and incomplete data. The law does not require the decision-making bodies to consider whether an applicant has been involved in foreign bribery, or whether there are grounds to believe it will be with respect to the transaction in question. However, according to the representative of the Ministry of Justice, no license or permit would be issued to a person or body known to have been involved in foreign bribery, and any existing license or permit would be withdrawn if such a fact were subsequently discovered.

e) Sanctions for the offence of bribing a foreign public official

(i) Availability of Fines

Since September 2002, fines have been made available for the offence as an additional sanction to imprisonment. Now, pursuant to articles 304 and 305a of the Penal Code, offering, promising or giving a bribe and mediating an offer, etc, can result in a fine of up to 5,000 Leva (EURO 2, 550), in addition to the prison term prescribed. In the view of the lead examiners, the relatively low average income in Bulgaria should be taken into account in drawing conclusions from the penalties that can be imposed. More important, in the view of the lead examiners, is the fact that only an insignificant number of persons convicted of corruption have actually been sent to prison - less than one per cent according to the Interior Ministry[25].

An encouraging development is that plea-bargaining, which was introduced as a result of the January 2000 amendments to the Criminal Procedure Code and came into force in May 2001, is not applicable to serious intentional crimes under several chapters of the Penal Code, including Chapter Eight on "Bribery".

(ii) Availability of Confiscation

A potentially stronger deterrent to the bribery of foreign public officials is the availability of confiscation under various legal provisions. Pursuant to article 156a of the Criminal Procedure Code, the investigating authorities may obtain an order from the "first instance court" (one person in a closed session) for the securing of the fine and confiscation under the rules of the Civil Procedure Code as a pre-trial measure. The same preliminary measures may be requested by the prosecutorial authorities during the trial phase pursuant to article 185 of the Criminal Procedure Code.

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24. Under article 5 of the new law, foreign trade in arms may only be carried out by trading companies registered under the Company Law.

25. Ivo Indzhev, "Bulgaria: Corruption Problems Call for Action", *Radio Free Europe*, 8 December 1997.

Confiscation is available as a punitive measure upon conviction pursuant to article 53(2) of the General Part of the Penal Code. The judges present at the on-site visit explained that confiscation pursuant to this provision is available regardless if the property in question is related to the crime in question. Furthermore, pursuant to article 307a of the Penal Code, the "object of the crime" in respect of crimes under the section on business crimes (which includes the foreign bribery offence) "shall be forfeited in favour of the state or, where it is missing, a sum equal to its value shall be adjudged". The Bulgarian authorities have no information concerning the application of this provision to cases of foreign bribery. The Council of Europe's Economic Crime Division has criticised the implementation of article 52(3) as not being in compliance with the requirements of the 1990 Strasbourg Convention and the 1988 Vienna Convention for the following reasons : the term "proceeds" is not sufficiently broad and applied according to the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime; financial investigations are not routinely undertaken in conjunction with criminal investigations; inter-agency co-operation and multidisciplinary approaches need to be improved; and specialised training regarding confiscation issues is limited[26].

With regard to article 307a of the Penal Code, the Prosecutor's Office referred to the availability of confiscation under this provision as of limited value: once a bribery transaction has been completed, the proceeds are concealed and thus it is difficult to prove a link between the proceeds and the crime. Officials from the Prosecutor's Office stated that confiscation under article 34 of the Law on Citizen's Property is more effective than under article 307a of the Penal Code. Pursuant to article 34, civil confiscation is available where the owner of property is unable to prove the origins thereof. However, the representative of the Ministry of Justice explained that this form of confiscation has been criticised because it results in damages to persons who have no connection with the offence in question, since a relationship between a crime and the owner of the property is not required.[27] Moreover, the judges met at the on-site visit indicated that this provision is rarely applied.

Confiscation from bona fide third parties is not available pursuant to the Criminal Procedure Code or the Penal Code. Thus, where the proceeds of a crime are in the possession of a third party, according to the Prosecutor's Office, the efforts of the prosecutors must be focused on proving that the third party was aware of the unlawful origins of the property. A major limitation on the use of confiscation is that it is not available in any circumstances against legal persons: once the proceeds of a crime are transferred to a legal person, there is no possibility of confiscation.

Commentary

The lead examiners note the introduction of fine penalties as an additional sanction for the offence of foreign bribery. The lead examiners consider that the level of the fines appears low, but recognise that due to the low level of income per capita in Bulgaria, it is difficult to evaluate at this stage whether they are sufficiently effective. In the light of this, and of the reportedly low rate of imprisonment in Bulgaria, they therefore recommend that the issue of the adequacy of sanctions be followed-up when data on their application to the foreign bribery offence becomes available.

The lead examiners recommend that where foreign bribery is concerned, the Bulgarian authorities focus on obtaining the confiscation of the proceeds thereof pursuant to article 307a

26. Confiscation of Proceeds from Crime in South Eastern Europe: Final Project Report 2001 (Council of Europe, Economic Crime Division, 22 November 2001).

27. Pursuant to article 34 of the Law on Citizens' Property, property and income that clearly exceed the legal income of a person are presumed to be illegal, and pursuant to article 36 illegal incomes are forfeited to the State.

of the Penal Code, which was introduced specifically for the purpose of confiscating the proceeds of bribery. They are of the opinion that confiscation under article 53(2) of the Penal Code appears unreliable, and confiscation under the Law on Citizens' Property is rarely applied. The lead examiners also recommend that the Bulgarian authorities routinely undertake financial investigations in order to enhance the prosecutors' ability to prove the link between the proceeds and the foreign bribery offence for the purpose of confiscating under article 307a of the Penal Code, and to ensure that where the proceeds are no longer available as, for instance, in situations were they are in the possession of a bona fide third party, the prosecution can prove the amount of the proceeds in order to obtain a monetary sanction of an equivalent value.

C. DOES BULGARIA HAVE ADEQUATE MECHANISMS FOR THE EFFECTIVE PROSECUTION OF FOREIGN BRIBERY OFFENCES?

a). The issue of the absence of liability of legal persons

At the time of the Phase 1 examination, Bulgaria was in contravention of Article 2 of the Convention, which requires each Party to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official. The Bulgarian authorities informed the Working Group that they would be considering the possibility of introducing civil and/or administrative measures to address the issue and the Working Group recommended that Bulgaria take steps to rectify the situation. However, no legislative changes have been made since then, and during the on-site visit, the majority of officials interviewed were of the opinion that it is always possible to pursue the natural person(s) behind the acts of a legal person.

In the view of the lead examiners, the Bulgarian authorities have not given due consideration to the problems of attributing liability to specific individuals in increasingly large, decentralised, complex corporate structures where corporate operations and decision-making are diffuse. Corporate entities are frequent vehicles for the payment of bribes, and are readily adaptable to the purpose. The use of elaborate financial structures and accounting techniques to conceal the nature of transactions is commonplace. At the same time, it will often be difficult to identify any one individual decision-maker within a management chain comprising several levels. Failure to take proper account of the role of legal entities in foreign bribery could result in insufficient attention being paid to them in detection efforts, as well as in targeting measures of deterrence and prevention. In addition, the absence of liability of legal persons may present a significant obstacle to the effective implementation of Bulgaria's obligations under the Convention, in particular in respect of money laundering, mutual legal assistance and confiscation.

As to the impact on the detection of money-laundering offences, a representative of the Bureau for Financial Intelligence (BFI) stated that the concerns of the examiners were not legitimate, because there are always natural persons behind legal persons. The lead examiners remain doubtful, however, that cases of money laundering would be reported to the BFI, as well as by the BFI to the prosecutorial authorities, where the individuals responsible for laundering the proceeds of foreign bribery could successfully hide behind the corporate veil.

With regard to whether the money-laundering offence would be used where the predicate offence has been committed by a legal person (i.e., in a jurisdiction which attributes criminal liability to legal persons), a representative of the Prosecutor's Office was of the opinion that where the predicate offence of bribing a foreign public official is committed abroad by a legal person, the laundering of the proceeds by a natural person would not be an offence in Bulgaria. On the other hand, a representative of the Ministry of Justice was of the view that the competent authorities would consider only whether money laundered in Bulgaria was the proceeds of a crime, regardless of whether a legal or natural person had committed the

predicate offence. The lead examiners still doubt whether the money laundering offence would be invoked in cases where the proceeds had been obtained through a legal person committing the offence under another legal system of bribing a foreign public official.

With regard to the provision of mutual legal assistance in respect of legal persons, the Bulgarian authorities confirmed that they would be able to respond to requests for mutual legal assistance concerning legal persons where the requesting country has established the administrative or criminal responsibility of legal persons. A representative of the Ministry of Justice went further by stating that Bulgarian legislation provides for full co-operation on the basis of the principle of reciprocity, thus enabling Bulgaria to provide mutual legal assistance in relation to such requests. It remains however unclear at this stage whether in practice Bulgaria would be able to provide mutual legal assistance in this situation, as Bulgaria has not yet had to deal with such requests.

The usefulness of confiscation in cases of foreign bribery is severely undermined, in the view of the lead examiners, by the absence of liability of legal persons. Confiscation is not available in respect of legal persons as, under the Bulgarian Criminal Procedure Code, confiscation is available upon conviction for a criminal offence, and thus is only available in relation to natural persons. As a result of this, corporate vehicles could be used to protect the proceeds obtained from bribing a foreign public official from confiscation.

On 18 February 2002, the Minister of Justice ordered the establishment of a Working Group for the purpose of preparing a draft amending the Law on Administrative Offences and Sanctions aimed at introducing the administrative liability of legal persons (including monetary sanctions) for active bribery, money laundering, trading in influence, organised crime and some other offences committed by officials for their benefit. According to the Bulgarian authorities, as a result of the work of this Group, draft amendments are expected to be submitted to Parliament this year. However, at the on-site visit, no indications were given that the Bulgarian government was close to establishing such liability. The Bulgarian authorities seem to continue to struggle with the notion of attributing responsibility to an artificial entity, which they view as incapable of possessing a culpable state of mind. In fact, members of the Bulgarian private Bar and of the business community were not aware of any initiatives to establish the administrative liability of legal persons.

Commentary

The lead examiners have serious concerns about Bulgaria's continued contravention of Article 2 of the Convention, and the significant obstacle that the absence of the liability of legal persons for the foreign bribery offence would appear to present to the effective implementation of Bulgaria's obligations under the Convention, including obligations in respect of money laundering and confiscation. They therefore urge the Bulgarian authorities to establish the liability of legal persons for the offence of bribing a foreign public official at the very earliest opportunity, taking into consideration the lead examiners' comments and observations, and to provide sanctions that are effective, proportionate and dissuasive, including, in particular, the ability to confiscate proceeds of crime that have been transferred to a legal entity. Additionally, the lead examiners recommend that this issue be revisited within one year of the Phase 2 examination of Bulgaria by the Working Group to determine whether Bulgaria has taken the necessary steps to fulfil its obligations under Article 2.

b) The foreign bribery offence

Several amendments to Bulgaria's anti-bribery legislation have been made since the Phase 1 evaluation. They address many of the concerns of the Working Group at that time, thus providing the

Bulgarian authorities with a solid legal framework for prosecuting individuals for the foreign bribery offence. Yet, any assessment of the implementation of the offence is influenced by two overriding issues. Firstly, as noted earlier, there have been no cases involving foreign bribery with the result that at this time an interpretation of the Convention and the implementing legislation has not been developed by legal science. Although the courts have considered numerous[28] cases involving domestic bribery, the Bulgarian authorities are not able to provide detailed information about these cases for the purpose of enabling the lead examiners to make certain conclusions about how the foreign bribery offence would be applied in practice. The lead examiners recognise that, with respect to the recent amendments concerning the elements of the foreign bribery offence, it is premature to expect case law to have emerged in this area. The second issue relates to the low level of awareness of the offence itself. As noted earlier in this report, it is essential that the key officials involved in prosecuting the foreign bribery offence are provided with adequate overall knowledge about the offence, as well as specific knowledge about amendments to it that have taken place over the past two years.

The elements of the offence

Exemptions from punishment

Among the recent changes in Bulgaria's legislation are those repealing two exemptions from punishment that were contained in the Penal Code prior to its amendments in 2000 and 2002. Previously, Article 306(b) of the Penal Code provided that a person who has given a bribe shall not be punished if he/she has voluntarily informed the authorities. Also, Article 307(2) of the Penal Code provided an exemption from punishment in the case where a person was provoked into giving or receiving a bribe "for the purpose of unmasking" the person who gives or receives the bribe. At the time of Phase 1 there was no case law on this defence and the Bulgarian authorities explained that it would normally be invoked in relation to entrapment by the police. These two exceptions were repealed in June 2000 and September 2002, respectively.

Offering and promising a bribe

Another important legislative change that recently took place addresses the offering/promising component of the offence. At the time of the Phase 1 examination, no offence had been established for this situation. In the Phase 1 Evaluation, the Working Group recommended that the Bulgarian authorities expand the scope of the offence to cover these acts. Through amendments to the Penal Code made in June 2000, article 304a (1) and (2) were added for the purpose of establishing the offences of offering or promising a bribe to a domestic and a foreign public official respectively. The punishment for these offences was up to 1 year of imprisonment. Through the amendments made to the Penal Code in September 2002, the provisions on offering and promising were further amended so that now article 304 covers offering, promising and giving, and all three acts are subject to the same penalty, i.e. up to six years of imprisonment and a fine of up to 5,000 Leva (EURO 2,550).

Nature of the benefit

As to the nature of the benefit, at the time of the Phase 1 examination, article 304 of the Penal Code applied to the providing of "a gift or any other material benefit". In September 2002, this language

28. Representatives of the Prosecutor's Office indicated that in the last one-and-a-half years, 79 indictments involving corruption under articles 301 to 307 of the Penal Code have been brought before the courts, and currently before the courts are cases related to the performance by domestic officials of official duties as well as offences involving corruption in the privatisation process (involving an ex-minister, ex-director, and ex-deputy minister in the previous Privatisation Authority).

was amended to "gift or any other kind of advantage", due to the concerns of the Working Group in Phase 1 that non-pecuniary and intangible benefits were not covered.

Mediation

With regard to mediation, previous to the amendment made to the provision in September 2002, there was no indication in the Penal Code that the offence of bribing a foreign public official applied where the person mediated the offering or promising of a bribe. Article 305a of the Penal Code establishes a penalty of up to 3 years of imprisonment and a fine of up to 5,000 Leva (EURO 2,550) for the person who mediates "any action under the preceding articles" (i.e. the offering, promising, giving or receiving of a bribe), if the perpetrated act does not represent a graver crime.

Definition of a foreign public official

Article 93, paragraph 15c of the Criminal Code, which previously stated that a foreign official was any person exercising "duties of an office or mission assigned by an international organisation", was amended in September 2002 by extending the definition to a person exercising the "duties of an office in an international parliamentary assembly or international court".

Uncertainty with regard to some elements of the offence

If recent changes in Bulgaria's legislation have brought several important elements of the offence of bribing a public official in line with the standards under the Convention, some concerns remain. These concerns relate to the fact that there are no litigated cases which would test the outer limits of Bulgaria's legislation and resolve questions about the treatment of payments to third party beneficiaries, bribes that are made through intermediaries or the scope of the exception for "blackmail". These issues were explored in the Phase 1 review but continue to give rise to uncertainty mostly because their effect has not been tested in court.

Bribery made through intermediaries

Bribery through an intermediary is apparently a common practice in Bulgaria, according to representatives of the private Bar that the lead examiners met during the on-site visit. Article 304 of the Penal Code does not expressly cover the situation where a bribe is made through an intermediary. The representative of the Ministry of Justice explained that where an element of an offence is not expressly covered in the Penal Code it is not possible under Bulgarian law to attribute the missing element by, for example, referring to an international Convention. He assured the lead examiners that bribes through intermediaries are however covered by article 304 because article 20 of the Penal Code provides for the criminal liability of accomplices (which would include intermediaries) and the offence of receiving a bribe by a domestic official (passive bribery offence) expressly covers the case where the bribe is transmitted through an intermediary. Following this explanation, the lead examiners were satisfied that it was the intention of the legislators to cover the bribery of foreign public officials through intermediaries, but would have been reassured by practical examples involving domestic bribery cases that the offence would be implemented in practice in this manner. However, the Ministry of Justice was only able to provide examples of court decisions where the intermediary was held responsible for his/her role as an accomplice in the bribery transaction.

Payments to third party beneficiaries

An area of uncertainty is the situation where a benefit is directed to a third party by a foreign public official. Bulgaria's legislation does not expressly cover the situation. At the on-site visit, the Bulgarian authorities stated that the offences are intended to apply where there is a third party beneficiary,

including a political party, and supported their contention by referring to article 303 of the Penal Code, which establishes the liability of an official for passive bribery in the case where with his/her consent the gift or material benefit has been given to another person. There are however no cases supporting the position of Bulgaria that it would be covered in practice.

Blackmailing

Another area of uncertainty relates to the defence of blackmail. Pursuant to article 306 of the Penal Code (previously 306a), a person who has given a bribe shall not be punished if he/she has been "blackmailed" by the official, *arbitrator* or expert to do so *and if he/she has informed the authorities without delay and voluntarily* (words in *italics* were added by amendment in September 2002). With the addition of the latter part of the wording, this exception has been limited to a certain extent. However, doubts remain about the need for such an exception, since the giving of a payment, etc., could not be considered a bribe if it were obtained through the crime of blackmail (which involves the unlawful demand of money, etc. under threat to do bodily harm, etc.) as the intent to bribe would not be present. The question therefore arises whether the notion of something broader than "blackmail" in its normally understood sense is contemplated by the provision, and whether in practice it might create a loophole in the implementation of the Convention. In response to the concerns expressed by the lead examiners, the Bulgarian authorities explain that the exception for blackmail does not apply to the active bribery of a foreign public official, because the term "official" in article 306 covers only domestic officials. It remains however unclear at this stage whether in practice the interpretation favoured by the Ministry of Justice would be followed by the courts as Bulgaria has not yet brought prosecutions in such circumstances.

Commentary

The lead examiners congratulate the Bulgarian authorities for their efforts to bring the elements of the offence of bribing a foreign public official in line with the standards under the Convention, in particular with respect to the deletion of certain exceptions from punishment, and the broadening of the offence in respect of offers and promises to bribe, non-pecuniary and intangible benefits and the definition of a foreign public official. The lead examiners recommend that the Bulgarian authorities provide awareness and training activities as soon as possible with respect to the matters identified herein. The lead examiners also recommend that the Bulgarian authorities consider making explicit, in guidelines or elsewhere, that the exception for blackmail does not apply to the foreign bribery offence, in particular. With respect to bribing a foreign public official through an intermediary, the lead examiners are satisfied that it was the intent of the legislators to cover such bribery. However, in the absence of supporting examples from the case law concerning domestic bribery, they recommend follow-up to assess whether the law is sufficiently clear to be used in practice in cases where the benefit is directed to a third party.

c) The money laundering offence

Sixteen cases of suspected money laundering were under investigation by the National Investigation Service at the time of the on-site visit, four of which were about to be completed and transferred to the Prosecutor's Office. In 2002, more than 150 preliminary investigations concerning suspicions of money laundering had been undertaken. No examples were provided of cases prosecuted where employees or officers of financial institutions assisted in money laundering.

The money laundering offence under article 253 of the Penal Code applies to the concluding of "financial operations and dealings with funds or property". The lead examiners were concerned that this language could be interpreted narrowly, thus providing a loophole for forms of money laundering that

could not be specifically brought within the definition (e.g. the concealing of funds in a safety deposit box, the transporting of currency out of the country or any kind of concealing of funds or property that does not involve the conduct of business between two or more persons). The representative of the Minister of Justice at the on-site visit assured the lead examiners that the language in article 253 covers all forms of money laundering, and explained that seizures of money stored in safety deposit boxes have been carried out, although there have not been any prosecutions of money laundering arising from such a situation.

According to the FATF, although article 253 does not expressly apply to the laundering of one's own proceeds, the Bulgarian authorities claim that a person can be convicted of both the predicate offence and money laundering. The FATF has said that amendments to clarify this point should be considered. The FATF also identified as a problem the strict interpretation in some quarters of the need for a conviction for the predicate offence before proceedings could be brought for money laundering, and felt that this was a major potential obstacle to the overall effectiveness of the offence. Representatives of the Prosecutor's Office present at the on-site visit indicated that a conviction for the predicate offence is not required, but that firm evidence must exist that the transaction in question involved proceeds of crime. They provided as an example a recent case before the Sofia courts involving a group of foreign nationals arrested for carrying millions of dollars on their persons at the Sofia airport. The money laundering trial is proceeding regardless of the absence of a conviction for the predicate offence in the foreign jurisdiction.

Article 253 of the Penal Code does not make negligent or reckless money laundering an offence: a crime is committed only where the person concluding the financial transaction 'knows or supposes' that the funds or property have been acquired by criminal means. At present, entities or persons under a duty to report under the LMML whose failure to report amounts to negligent or reckless money laundering, are liable only for administrative sanctions under Article 23 of the LMML. Entities or persons who have no duty to report under the LMML but who commit negligent or reckless money laundering are not currently liable for any sanctions, administrative or criminal. The Bulgarian authorities indicated that a draft amendment has been presented to Parliament for the purpose of criminalising negligent money laundering, which would provide for imprisonment of up to three years and a fine of between 5,000 Leva (EURO 2,550) and 10,000 Leva (EURO 5,100).

Commentary

The lead examiners welcome the assurances of the Bulgarian authorities that the offence of money laundering under article 253 of the Penal Code applies to all forms of money laundering, and that its language does not, for example, exclude the concealing of property in a safety deposit box or the transporting of currency out of Bulgaria. The lead examiners support the FATF's recommendation that the Bulgarian authorities should amend the Penal Code to make it explicit that article 253 applies to the laundering of one's own proceeds. They welcome the fact that prosecution of money laundering has proceeded in one case in the absence of a conviction for the predicate offence. Furthermore, the lead examiners welcome the initiative to establish an offence of negligent money laundering, and urge the Bulgarian authorities to enact it as soon as possible.

d) Working of the main enforcement agencies

(i) Authorities responsible for investigation and prosecution

Several authorities have responsibility for the investigation of foreign bribery cases in Bulgaria. Investigating magistrates, the Police and the Prosecutor's Office all have investigative powers. Allocation of types of criminal case between the police and the investigation services is governed by the Criminal Procedure Code. The police handle about 70 per cent of crimes overall and only the more complex and

important are dealt with by the investigation services. The National Investigation Service (NIS) has jurisdiction over crimes committed by Bulgarians abroad. Within the National Service for Combating Organised Crime, there is a specialist unit for fighting corruption, whose resources were increased in November 2001 to 22 people. Currently, 80 per cent of cases investigated by the NSCOC reach the courts. Within the Prosecutor's Office, there is a specialist unit which co-ordinates and supervises the handling of corruption cases. Neither the police, the investigators nor the prosecutors have a specifically designated section with exclusive centralised responsibility for all corruption offences.

The police are required to transmit information collected on crimes to the prosecutors and investigating magistrates. The Prosecutor's Office may assign preliminary inspection responsibilities to the police, such as the collection and verification of certain information, and may also order the police or investigators to carry out certain specific procedures as part of an investigation, or order that certain specific evidence be collected. It is the prosecutor who decides, on the basis of the evidence collected, what offence, if any, should be charged. Otherwise, the investigation services have a high degree of autonomy in deciding when to open or close an investigation. Joint teams of police officers, investigating magistrates and prosecutors are established for the purpose of investigating serious cases involving corruption.

The representative of the NIS told the examining team that the service enjoyed a very good level of day-to-day co-operation with the prosecutors. The representative of the NSCOC thought that, in practice, duplication of investigations was almost impossible. At a formal level, however, co-operation between police, investigators and prosecutors is governed by the Criminal Procedure Code rather than by internal working guidelines. The code is widely acknowledged to be excessively formalistic and ill-suited to this purpose, as it does not allow much scope for the exercise of practical professional judgement. It appeared to the lead examiners that its rigid application might result in duplication or repetition of work, especially where minor procedural deficiencies require to be rectified in order for a case to go forward (see below).

Prosecutors interviewed spoke of difficulties in identifying the sources of backlogs in the system, and of the need to reform case management procedures. The comment was made that criminals are becoming increasingly sophisticated at using procedural devices to exploit the delays and other shortcomings of the enforcement system. It must also be acknowledged that allegations of corruption have been levelled at both police and prosecutors in Bulgaria, which could undermine the integrity and effectiveness of the enforcement effort.

(ii) Special Investigative Techniques

Generally

The legal framework for the investigation of offences provides many useful tools for the investigation and prosecution of the foreign bribery and money laundering offences. Pursuant to the Criminal Procedure Code and the 1997 Law on Special Investigative Means, in investigating corruption cases, including the bribery of foreign public officials, the following measures may be employed: the electronic recording of conversations ("bugging") in private or public premises, wire-tapping of telephones and interception of other communications (i.e. mail, fax, e-mail), video-surveillance, observation, controlled delivery, anonymous informants and searches. However, the Bulgarian authorities did not provide examples of the application of any of these measures in the investigation of bribery cases.

These measures are applied where the court approves their use in a particular case upon the request of the police or the prosecutor's office. After obtaining the court's approval, permission must also be obtained from the Minister of Interior. A representative from the Ministry of the Interior explained that

although the courts are required to provide a decision concerning a request for the application of a special investigative technique within 24 hours, courts can take up to one month to decide. The lead examiners are concerned that cases might be lost due to this delay, and feel that it is important that preventive measures, such as the temporary freezing of bank accounts, are available during the interim.

According to its mandate, the BFI performs financial intelligence analysis, and does not undertake investigation activities of the sort which would involve special investigative techniques. The lead examiners formed the view during the on-site visit that the BFI lacks adequate resources to undertake complicated financial analyses.[29]

Access to bank information and lifting of bank secrecy

As to access to bank information, the Bulgarian authorities explained at the on-site visit that, pursuant to article 52(4) of the Law on Banks, banks may normally give information on the transactions and account balances of individual clients[30] to all other authorities only by the clients' consent or by a court ruling.[31] The same article, however, allows for an exception in the case of the BFI, which may be given access to such information on request, in the course of its money laundering investigations. With respect to bank information in the possession of the BFI, when the BFI reports a suspicion of a money laundering transaction to the Prosecutor's Office, it is only authorised to provide preliminary data (i.e. the name of the company involved, amount of the transaction, date of the money movement, number of the bank account and reason for the suspicion). It is then up to the Prosecutor's Office to decide whether to request the court to lift bank secrecy. No information about cases where the authorities have requested access to bank records or other financial records held by a financial institution for the purpose of obtaining information, searching and seizing, or freezing property in relation to the bribery of foreign public officials was however available to the examining team at the time of the on-site visit.

A significant obstacle frequently encountered by other investigative bodies pursuing financial investigations is the delays that occur when they request the courts to provide an order for the lifting of bank secrecy. A representative of the Ministry of the Interior told the lead examiners that the courts do not observe any deadlines provided by law. The representatives of the National Investigation Service (NIS) further indicated that the Banking Act provides a 24-hour time limit for the courts to decide whether to lift bank secrecy, but that it usually takes one week for the courts to provide their decision. One of the authorities interviewed stated that the decision of the court in this respect is not subject to an appeal, while another believed that an appeal is available, albeit it is a very lengthy process. According to the latter, the delays involved in obtaining the lifting of bank secrecy jeopardise the outcome of investigations. They stated that the courts request more and more information, prolonging the decision-making process, with the result that in the end the obtaining of the lifting of bank secrecy is pointless. Representatives of the Prosecutor's Office stated that the courts normally make their decisions on whether to lift bank secrecy within 3 days. They further stated that, pending the court's decision, it is possible to block the bank account in question, subject to confirmation by the court. If the court does not make its decision within the time limit the bank is required to unfreeze the account.

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29. A lack of sufficient resources was cited by the FATF in its Annual Report (1999-2000) as well.

30. The Ministry of Justice stated that where companies are fifty per cent or more state-owned (or municipal-owned), it is not necessary to obtain a court order for the lifting of bank secrecy. Instead, the request in writing is forwarded to the bank by the competent pre-trial authority (e.g. NIS, Police Service).

31. Regional Court judges preside over decisions regarding the lifting of bank secrecy.

Commentary

The lead examiners believe that the Bulgarian authorities have at their disposal a broad range of special investigative techniques, and encourage the Bulgarian pre-trial authorities to use them to the greatest extent possible for the purpose of investigating and prosecuting foreign bribery cases. They recommend that the Bulgarian authorities review the time frame within which the courts have been approving the use of these techniques, to ensure that cases are not lost due to delays, and that preventative measures are available pending the court's decision.

Furthermore, the lead examiners are concerned about the court delays in rendering decisions concerning the lifting of bank secrecy, and believe that these delays could prove a major obstacle to the investigating of offences of bribing foreign public officials. They therefore recommend that the Bulgarian authorities undertake a review of the rules applicable and the manner in which they are currently applied, with a view to determining whether increased resources are required and whether there are unnecessary procedural obstacles built into the process for lifting bank secrecy.

(iii) Co-ordination, co-operation and sharing of information

As a number of agencies are involved in the detection, investigation and prosecution of the offence of bribing a foreign public official, co-operation among them is essential. On the whole, there appeared to be a high level of practical co-operation at day-to-day working level among the newer agencies – in particular, the Bureau for Financial Intelligence, the National Service for Combating Organised Crime, and the recently re-established National Investigation Service – which have specialised areas of responsibility and clearly defined roles. The National Audit Office also expressed satisfaction with its experience of co-operation with the judiciary and with the Public Internal Financial Control Agency. The examiners were told that information-sharing mostly worked well. The advent of the Unified Information System, to which all enforcement agencies will have appropriate levels of access, will place this co-operation on a sounder footing and contribute to the efficiency of case management and the sharing of information. The exchange of information between domestic authorities on Convention-related anti-corruption activities is part of Bulgaria's Action Plan.

Within the major agencies, officials routinely pass information about suspected corruption to the Prosecutor's Office, as they are required to do by law. The efficacy of this source of reporting with regard to foreign bribery depends on an adequate level of knowledge of the offence. It was mentioned on a number of occasions that feedback is not always given to the originator of the information as to what happens to the case. The possibility of closer computer-based tracking should make this easier to do in the future.

As a result of recent amendments to the Criminal Procedure Code, information or allegations about suspected crime coming from members of the public may be directed to any part of the police service, as well as to the prosecutors themselves. The prosecutors interviewed were strongly of the view that, in cases of foreign bribery, as with other complex or high-profile cases, prosecutors alone should have responsibility for directing the investigation. They pointed out that a large proportion of pre-trial proceedings are currently handled by police officers who lack the necessary specialist expertise, and that there is a high risk that the whole investigation will be jeopardised if the correct procedures are not observed from the beginning. This view was endorsed by senior judges, who believed that prosecutors should be more closely involved in the supervision of prosecutions, and could benefit from greater experience of working in teams with investigators. Both prosecutors and judges appeared to share the concern of the examining team that so many cases are referred back by judges on the grounds of defects in procedure, thus adding to the already onerous workload of the prosecution service. The burden of work

currently being shouldered by the prosecution service is causing delays in the processing of allegations and the preparation of cases for trial.

Commentary

In the view of the lead examiners, Bulgaria should consider streamlining and simplifying the systems in place for the investigation and prosecution of foreign bribery, by clarifying the respective roles of the agencies involved. Control of investigations of foreign bribery should be centralised as much as possible in the hands of those with specialist expertise. Consideration should be given to strengthening the capacity, expertise and resources of the prosecution service in order to achieve this.

iv) Working of the judiciary

An independent, strong and respected judiciary is an absolute precondition for the success of Bulgaria's programme of anti-corruption measures, including its efforts to implement the Convention. The judiciary forms the institutional bedrock of any system based on, and functioning in accordance with, the rule of law. If it goes beyond the scope of the present Report to enter into the general discussion about judicial reform in Bulgaria[32], it is at the same time appropriate to review recent developments in this area because of their direct relevance to the effectiveness of the legal and institutional framework for enforcing the law against foreign official bribery.

Generally

It is generally accepted that the judiciary in Bulgaria is understaffed, that it sometimes lacks independence, and that the criteria for appointment and promotion of judges in the past have not always been objective. Wages for judges are inadequate, as is training. Working conditions, resources and case management systems are archaic. Cases are backlogged, giving rise to delays that can sometimes be severe, and undermining the deterrent effect of the criminal law. Furthermore, there is a deeply entrenched perception that corruption in the judiciary is widespread. A 1997 Gallup survey showed that two-thirds of Bulgarians do not trust the judiciary[33]. It was reported more recently in the Centre for the Study of Democracy's Corruption Indexes of March 2001 that 22 per cent of Bulgarians perceive the "ineffectiveness of the judicial system as a factor in influencing the spread of corruption in Bulgaria". The lack of institutional credibility of the judiciary is further compounded by the extent of the immunities available to its members.

Judicial immunity from prosecution

The immunities from prosecution enjoyed by members of the judiciary pursuant to Article 132 of the Bulgarian Constitution could prove an obstacle to the effective prosecution of the offence of bribing a foreign public official[34]. First, because members of the judiciary are immune from prosecution for offences of bribery they themselves commit unless the Supreme Judicial Council (SJC) lifts the immunity. Second, the current level of immunity undermines the credibility and authority of the judiciary (which in Bulgaria includes judges, prosecutors and investigating magistrates) as an institution. Investigations into cases of

32. See, on this subject, "Judicial Independence in Bulgaria", Open Society Institute, 2001.

33. "Bulgaria: Freedom in the World Ratings, 1989-1998".

34. Similar immunities are enjoyed by Members of the National Assembly, the President and the Vice-President.

corruption are often lengthy, complex and difficult, and depend at every stage on a judiciary which can be relied upon to act impartially and with authority.

Under the Judicial Systems Act, immunity may be lifted in relation to investigations into any offence that is subject to the rule of mandatory prosecution. In order to arrest someone with immunity for a serious crime that carries a term of imprisonment of over 5 years (a category which would include the foreign bribery offence), the consent of two-thirds of the Supreme Judicial Council must be obtained. A request for the lifting of immunity must be submitted by the Chief Prosecutor to the SJC. This requirement remains in effect due to the recent ruling of the Constitutional Court that the amendment whereby a request could also be made by one-fifth of the Supreme Judicial Council[35] was unconstitutional. The request is considered in closed session (decided by secret ballot), although the decision is made public. Requests to lift immunity in respect of members of the judiciary are rare in Bulgaria. The process itself makes a decision to lift immunity difficult to obtain. In some cases, the deployment of special investigative techniques may be necessary in order to obtain the very evidence on which the request for the lifting of immunity is based. According to the authorities with whom this question was discussed at the on-site visit, there is continuing controversy as to whether the use of such techniques at the initial investigation stage is allowed, and practice on this point has varied.

The examiners believe that a system based on functional immunity – i.e., immunity only in respect of acts carried out in the performance of the judge's duties -- would be sufficient to ensure the independence of members of the judiciary and protect them from retaliation in the form of unfounded and malicious prosecutions (e.g. for insult) connected with the carrying out of their duties. The prosecutors and judges interviewed at the on-site visit were of the opinion that functional immunity would be sufficient to protect their independence.

It has also been rare and difficult for judges to be removed or replaced, virtually regardless of performance. Once appointed by the 25-member Supreme Judicial Council (SJC) and after serving for 3 years, judges cannot be removed except under limited specific circumstances. This has often been cited as a hindrance to effective law enforcement[36]. With respect to the appointment of judges, the recent amendments to the law on the judiciary establish the principle of competition, mandatory training of junior judges for one year, a probationary period and evaluations in all areas of promotion. The lead examiners consider that increasing the standards for the appointment and training of judges is of the utmost importance, particularly in light of the broad immunities they continue to enjoy.

Commentary

Within Bulgaria's constitutional principles, the lead examiners would strongly favour a review of judicial immunity to ensure that it does not impede the effective investigation, prosecution and adjudication of foreign bribery cases. They note in this regard that the prosecutors and judges interviewed during the on-site visit believed that immunity limited to acts done in the performance of judicial duties ('functional immunity') would be sufficient to safeguard their independence. The lead examiners are concerned that the rules on making requests for the lifting of immunity have not been consistently applied, in particular as to the availability of special investigative techniques at the preliminary investigation stage.

Furthermore, it is essential that where members of the judiciary enjoy immunities from prosecution the highest professional and ethical standards for the appointment, training and

35. The Supreme Judicial Council includes judges, prosecutors, investigators, Parliamentary appointees, the President of the Supreme Administrative Court and the President of the Supreme Court of Cassation.

36. Bulgaria: Country Reports on Human Rights Practices—2001 (US Department of State).

evaluation of judges are established and applied, and that judges that do not meet these standards are removed. They therefore recommend that the Bulgarian authorities review the rules in this regard to ensure that new as well as previously appointed judges are required to meet the highest standards of conduct at all stages.

Amendments to the Law on the Judiciary

As part of Bulgaria's sweeping reforms of its public institutions, amendments to the law governing the judiciary (Judicial Systems Act) were introduced in Parliament by the Council of Ministers in May 2002 and were adopted by the National Assembly on 17 July 2002.

The amendments included a number of measures designed to address the problem of corruption in the judiciary, such as the introduction of the obligation for magistrates at all levels to declare their income and property ; the simplification of the procedure for lifting the immunity from prosecution for judges, prosecutors and investigating magistrates, allowing for immunity in respect of "serious crimes" to be lifted on the request of one-fifth of the members of the Supreme Judicial Council; the introduction of the principle of competition for newly appointed magistrates; the establishment of a government-run training institute for the professional training of magistrates and clerks; the establishment of a Unified Information System for Combating Crime (UISCC) by the National Assembly and various ministries to ensure co-operation in combating crime through information and data exchange, summarising information on the development of criminal proceedings and the enforcement of judgements, etc, with the National Statistical Unit to perform the statistical processing of the data held; and the establishment within the National Investigation Service of specialised departments for the investigations of cases of particularly high factual and legal complexity, crimes committed abroad, requests for legal assistance, etc.

Other measures included the following : increased accountability for the courts, requiring the Minister of Justice to report on the activities of the judiciary to the Supreme Judicial Council, and to report to the National Assembly on the status, structure and dynamics of crime, including the measures taken; increased accountability for prosecutors, requiring the Chief Prosecutor to report on the activities of the Prosecution to the Minister of Justice; and the training of junior judges and prosecutors, as well as increased qualifications for judges, investigators and prosecutors.

The lead examiners were informed during the on-site visit that in September 2002, the Supreme Court of Cassation had submitted the amendments to the Constitutional Court for the purpose of determining the constitutionality of the entire package of amendments. The Constitutional Court directed that the amendments should not be implemented while the challenge was pending and, in its ruling of 16 December 2002, several provisions, including the following, were determined to be in contravention of the Constitution : the amendment concerning the simplified procedure for the lifting of immunity from prosecution for members of the judiciary; the amendment placing the National Judicial Institute for training magistrates under the auspices of the Minister of Justice ; the amendments requiring the Minister of Justice to submit an annual report on the activities of the judiciary to Parliament, and requiring the Chief Prosecutor to prepare and submit a similar report on the activities of the Prosecutor's Office; and the amendments related to the procedure for nominating magistrates.

The amendments concerning the establishment of a Unified Information System for Combating Crime and the introduction of the obligation for magistrates at all levels to declare their income and property were ruled not to be in conflict with the Constitution. In addition, the Court ruled that the Supreme Judicial Council has the constitutional authority to approve codes of ethics for magistrates but not for judicial staff. The decision was not unanimous --three members of the Court expressed dissenting opinions.

v) Practice of referring cases back to pre-trial authorities

Although there already has been a major overhaul of the Criminal Procedure Code, there is a widespread feeling among prosecutorial and judicial authorities that it remains as a whole overly cumbersome. The Bulgarian government itself has identified "antiquated procedures" as a weakness in the judicial infrastructure in the context of the Strategy for the Reform of the Bulgarian Judiciary. In effect, most cases are returned to the pre-trial authorities on the grounds that procedural mistakes have occurred[37]. The reason given for this practice is that, in most instances, the rights of the defendant have been abused in the preliminary investigative stage by, for example, not having informed him/her about some procedural act, or irregularities in search and seizure. In the opinion of the judges that the examining team met with during the on-site visit, these breaches are normally caused by the investigative authorities or the police, and are due to a lack of supervision by the Prosecutor's Office as well as the demands of excessive paperwork. In particular, the police do not have an established practice of working in teams with investigative authorities and, for this reason, the judges felt that it would be useful to have joint training and seminars for the police and investigative authorities on such matters as the collection of evidence, in order to avoid these problems in the future.

An encouraging development, however, is the interpretative decision of the Supreme Court of Cassation on 7 October 2002 regarding the circumstances in which it would be appropriate for judges to refer cases back to the pre-trial authorities. The Court significantly narrowed the grounds for referring cases back, limiting this to situations where "substantial breaches of procedural rules" occurred that led to "restrictions of the procedural rights of the accused person, civil claimants, civil defendants and their defence counsels". The Court stated that such a breach would occur, for example, where "the presentation of charges is not performed" or "the relevant body does not have the competence to perform certain actions". According to the representatives of the NIS, since the Court gave this decision, the trend of referring back cases has been decreasing.

Commentary

The lead examiners commend the Bulgarian authorities for the wide-ranging measures they have started to put in place in the context of the Strategy for the Reform of the Bulgarian Judiciary. They welcome indications that the trend for the courts to refer cases back to the pre-trial authorities has been decreasing since the Supreme Court of Cassation provided its interpretative decision on 7 October 2002.

vi) Overall monitoring of the enforcement effort

The government of Bulgaria is highly conscious of the need for co-ordination of the different anti-corruption initiatives it has launched, and for effective co-operation between the agencies involved. One of the main stated goals of the National Anti-Corruption Strategy adopted in October 2001 is the creation of a common legal and institutional environment for curbing corruption. Another is co-operation between governmental institutions, non-governmental organisations, and the mass media. It is beyond the scope of this Report to evaluate the overall effectiveness of measures taken in this regard. It is, however, essential that there be some overall monitoring of the enforcement of the new foreign bribery legislation by the different agencies involved. Bulgaria has been criticised in the past for not paying adequate attention to monitoring the implementation and enforcement of new laws once they have been enacted.[38]

37. Representatives of the National Investigation Service indicated that less than one per cent of the cases referred back to the pre-trial authorities is ultimately dropped.

38. European Union Commission Regular Report on Accession to the European Union, 2001.

In the wider context of Bulgaria's anti-corruption effort, the lead examiners note the creation of the Commission for Co-ordination of Activities in the Fight Against Corruption, set up in February 2002. Chaired by the Minister of Justice and directly responsible to the Council of Ministers, its membership consists of high level representatives of all the significant ministries and agencies with a role in combating corruption. It is assisted by a Secretariat, currently of four people, working at the Ministry of Justice. Its stated priority is the co-ordination and monitoring of the activities of all the agencies entrusted with specific responsibilities under the anti-corruption Action Plan. It submits reports on a regular basis to the Prime Minister, summarising achievements to date and making proposals and recommendations for further action where needed. With regard to the implementation of Bulgaria's obligations under the Convention, the representative of the Commission characterised its role in terms of ensuring that the legislation met international standards. The actual implementation of the foreign bribery laws was not, he admitted, 'a major preoccupation'.

Although it was never intended that the Commission should function as an additional investigation agency, it receives, by virtue of its high profile and the level of its membership, numerous allegations and 'tip-offs' from members of the public concerning not only suspected corruption, but other offences such as tax evasion. While examination of these allegations is, formally, beyond its remit, the Commission is mindful of the increase in public sensitivity about corruption, and will never in practice refuse to look at an allegation, though it assumes this role with reluctance. It therefore conducts an initial examination, and passes the matter to the authorities concerned for a report. If the allegation appears to be well founded, the matter is referred to the investigating or prosecuting authorities.

Commentary

In the view of the lead examiners, Bulgaria should put in place a centralised mechanism for the periodic review and evaluation of the work of the different agencies involved in the fight against foreign bribery. The lead examiners also note the setting up of the Commission for Co-ordination of Activities in the Fight against Corruption. If it appears, over time, that a disproportionate amount of the Commission's time and resources is being devoted to receiving and filtering individual allegations of crime, consideration should be given to separating this activity from its core functions.

e) Mutual legal assistance

Bulgaria can provide mutual legal assistance in criminal matters in relation to requests submitted to Bulgaria under bilateral or multilateral conventions, or special arrangements. The Department of Mutual Legal Assistance as been set up by the Ministry of Justice for the purpose of managing foreign requests.

Bulgaria has established a record of generally responding to requests for MLA within 3-4 months (conversely, it usually takes about 4-6 months for Bulgaria to receive a reply for a request for MLA from another country), and in some cases as little as one month following receipt of a request. Pursuant to Bulgaria's treaties, MLA can be provided without proof of dual criminality, and the Bulgarian authorities emphasise that the absence of dual criminality cannot be considered a ground for rejecting a request for MLA received from a Party to the Convention even in the absence of a treaty. Where there is no applicable treaty, Bulgaria is able to provide MLA pursuant to the principle of reciprocity. The Bulgarian authorities have not received any requests for MLA regarding the foreign bribery offence since the coming into force of the Convention in Bulgaria. In addition they have not received any requests for MLA for the offence of money laundering where the predicate offence was the bribery of a foreign public official.

In principle, Bulgaria cannot deny the provision of MLA on grounds of bank secrecy. As long as the relevant standard can be met, courts in Bulgaria can order the production of banking records. Yet, in

light of the delays –noted earlier in this report-- that often occur with respect to the obtaining of court orders for the lifting of bank secrecy, requests for MLA involving bank information would undoubtedly be met with similar if not longer delays, in part due to the necessity for translating the requests into Bulgarian.

As to foreign confiscation orders, it has been reported that Bulgaria cannot enforce them[39]. The representatives of the Department of Mutual Legal Assistance at the Ministry of Justice, with whom the lead examiners met at the on-site visit, indicated that they were anxious to change this perception, and provided information about a decision of the Bulgarian Court of Appeal on 26 July 2000, where the proceeds of money laundering (in the form of agricultural vehicles) were ordered to be forfeited upon the request of a German court.

As to money-laundering, article 21 of the LMML provides that the Bureau of Financial Intelligence (BFI) shall share information concerning both predicate offences and money laundering offences with the authorities abroad via the bodies of the judiciary and the Ministry of Justice, in the framework of mutual legal assistance. The authority to share information under this article only applies in respect of crimes 'to which the Bulgarian Criminal Code does not apply' which, according to the Bulgarian authorities, means those which are outside the scope of the criminal jurisdiction of the Bulgarian authorities themselves. Further, under article 22 of the LMML, the BFI may, on request or on its own initiative, exchange 'information about cases relating to suspicion of money laundering' directly with the corresponding international and foreign authorities. The Bulgarian authorities have confirmed that such direct exchanges of information with foreign financial intelligence units occur on a daily basis. Bulgaria's BFI is a member of the Egmont Group of Financial Intelligence Units, one of the principal goals of which is to promote the exchange of financial intelligence between FIUs.

Commentary

The lead examiners are confident that Bulgaria has established a fully adequate legal framework for the purpose of replying to requests for MLA. Problems could however arise in responding to requests for the provision of bank information and the enforcement of foreign confiscation orders, and for this reason they recommend that, in reviewing the problem of delays in providing access to bank information, the Bulgarian authorities take account of the implications for requests for MLA.

39. "Confiscation of Proceeds from Crime in South Eastern Europe: Final Project Report" (Council of Europe, Economic Crime Division, 22 November 2001).

D. RECOMMENDATIONS

In conclusion, based on the findings of the Working Group with respect to Bulgaria's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Bulgaria. In addition, the Working Group recommends that certain issues be revisited as case-law develops.

a) Recommendations

Recommendations for Ensuring Effective Mechanisms for Preventing and Detecting Foreign Bribery

With respect to awareness raising with a view to promoting the implementation of the anti-bribery legislation, the Working Group recommends that Bulgaria:

1. Take measures to raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it and undertake effective public awareness activities for the purpose of educating and advising the private sector on the offence. (Revised Recommendation, Article I)

2. Develop the role of the Bulgarian Trade Promotion Agency in awareness-raising and in deterrence, by considering measures which prevent public funds being spent on assistance, or official support given, to companies involved in foreign bribery. (Revised Recommendation, Article I)

3. Work proactively with the accounting, auditing and legal professions to establish training and awareness-raising activities about the foreign bribery offence in order to maximise the opportunities for prevention and deterrence within the business community. (Revised Recommendation, Article I).

4. Maintain statistics as to the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and consider ways of making sufficient information available as a matter of public record on cases of bribery heard by the courts, including acquittals, convictions and interpretations of the law, to meet the needs of judges, lawyers and those engaged in research, as well as the media and the public. (Revised Recommendation, Article I).

With respect to other preventive measures, the Working Group recommends that Bulgaria:

5. Encourage the introduction of codes of conduct and compliance policies in corporations. (Revised Recommendation, Article VI).

6. Consider operating a policy of excluding any individuals, or any entities whose directors or officers have been found to have been involved in foreign bribery from eligibility for government contracts (Convention, Article 3; Revised Recommendation, Article VI).

With respect to the reporting of foreign bribery to the appropriate authorities, the Working Group recommends that Bulgaria:

7. Consider the introduction of measures of whistleblower protection sufficient to protect employees, both in the public and private sectors, from dismissal in order to encourage

individuals to report suspected cases of foreign bribery without fear of retaliation. (Convention, Article 5).

8. Bearing in mind the vital role of accountants in uncovering and reporting foreign bribery, consider measures designed to encourage increased reporting by members of the profession; and consider requiring auditors to report indications of possible illegal bribery to the competent authorities. (Convention, Article 8, Revised Recommendation, Article V B 4).

9. Encourage the enforcement agencies to provide appropriate feedback on reports that are made, in order to assist the tax and other authorities in improving their detection and reporting capabilities with regard to foreign bribery. (Revised Recommendation, Articles I and II (ii)).

With respect to detection, the Working Group recommends that Bulgaria

10. Provide all officials having a role in the detection, reporting and enforcement of the foreign bribery offence with detailed and regularly updated training about the content of the offence, and guidance, in the form of guidelines or typologies where appropriate, on the circumstances in which it occurs and how to recognise it. (Revised Recommendation, Article I)

11. Establish clear guidelines for the tax authorities to encourage the detection of foreign bribery, and consider introducing an express denial of deductibility in order to strengthen the mechanisms available for detecting and deterring the offence. (Revised Recommendation, Article IV).

12. Take steps to ensure that the officials responsible for processing requests for information under the Access to Public Information Act are properly trained so that information necessary for the detection and reporting of foreign bribery is available to the fullest extent allowed by that statute. (Revised Recommendation, Article I).

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Money-Laundering Offences

13. The Working Group noted Bulgaria's non-compliance with Article 2 of the Convention and therefore encourages it to proceed diligently with the recently instituted measures aimed at fulfilling the requirements of the Convention by establishing the liability of legal persons for the bribery of a foreign public official, and put in place sanctions that are effective, proportionate and dissuasive, including, in particular, confiscation in cases where the proceeds or assets are in the hands of a legal entity. (Convention, Articles 2, 3).

The Working Group recommends that Bulgaria:

14. Consider putting in place a centralised mechanism for the periodic review and evaluation of the effectiveness of the enforcement efforts of the different agencies involved in the fight against foreign bribery. (Convention, Article 5).

15. Employ special investigative techniques in respect of the foreign bribery offence where needed, and: (i) ensure that they are available in cases involving requests to lift judicial immunity and (ii) clarify the procedures for applying for authorisation to use such techniques, in order to ensure that these are consistently applied and the time-limits respected. (Convention, Article 5).

16. Examine the rules applicable to the lifting of bank secrecy in the course of financial investigations and the manner in which they are currently applied, to ensure that the process is simple and consistently implemented. (Convention, Articles 5, 9).

17. Consider, within the constitutional principles of the State, measures that may be taken in order to ensure that judicial immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases. (Convention, Article 5).

b) Follow-up by the Working Group

The Working Group will follow up on the issues below, as the case-law on the foreign bribery offence develops, to assess:

18. The application of sanctions, in particular the fines now available under Articles 304 and 305a of the Penal Code, in order to determine whether they are sufficiently effective, proportionate and dissuasive to deter and penalise the offence of foreign bribery. (Convention, Article 3).

19. Whether the existing language defining the elements of the offence of foreign bribery is sufficiently clear to be used in practice in cases where a benefit is directed to a third party. (Convention, Article 1).

The Working Group will furthermore monitor developments in the following area:

20. Whether the proposed Law on the Amendment and Supplements to the Law on Measures Against Money Laundering is passed by the National Assembly (Convention, Article 8).