



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

**HUNGARY: 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**

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## INTRODUCTION

1. Hungary signed the Convention on 17 December 1997, ratified it on 29 September 1998 and deposited its instrument of ratification on 4 December 1998. Amendments to the Hungarian Criminal Code to implement the Convention entered into force on 1 March 1999. The 1999 Phase 1 review of Hungary expressed satisfaction with Hungary's prompt implementation of the Convention and introduction of the offence of bribery of foreign public officials into Hungarian law, but recommended a number of changes to Hungarian law. A 2003 Phase 1bis report welcomed several changes to Hungarian law in accordance with the Phase 1 recommendations, but noted that concerns remained with regard to the definition of foreign public officials and the responsibility of legal persons. As detailed below, laws have been amended or have entered into force in both these areas since the Phase 1bis review.

2. A team from the Working Group visited Hungary in October 2004 to carry out the Phase 2 on-site visit. Composed of lead examiners from Austria and Denmark as well as representatives of the OECD Secretariat, the team conducted meetings over five days.<sup>1</sup> Pursuant to the agreed Phase 2 procedure, the purpose of the on-site visit was to study the structures in place in Hungary to enforce the laws and regulations implementing the Convention and the 1997 Recommendation and to assess their application in practice. In preparation for the on-site visit, Hungary responded to the Phase 2 Questionnaire and supplementary questionnaire, and provided copies of certain legislation, which were reviewed and analysed in advance by the visiting team. Both during and after the on-site visit, the Hungarian authorities continued to provide the examining team with additional information and legislation. The Phase 2 review mainly reflects an assessment of information obtained from Hungary's responses to the Phase 2 Questionnaire and Supplementary questionnaires (the "Responses" and "Supp. Responses"), consultations with the Hungarian government and civil society during the on-site visit, a review of translations of relevant legislation and other legal documents, and independent research conducted by the lead examiners and the Secretariat.

3. The report is structured as follows. The Introduction first discusses the political and economic framework for the fight against corruption in Hungary, and then provides an overview of trends relating to corruption. Part A of the Report addresses the level of awareness of the foreign bribery offence and methods of detection of the offence, including the existence and application of reporting obligations. Part B focuses on the investigation, prosecution and sanctions for the bribery offences and related offences, including accounting and auditing offences, money laundering offences and tax-related offences. This part also includes a review of the most recent legislative amendments adopted in response to the Working Group's recommendations in the Phase 1bis Report. Part C sets forth the specific recommendations of the

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<sup>1</sup> The on-site examining team was composed of two lead examiners from Austria (Helmut Beitzl, Federal Ministry of Finance, Division of International Tax Law; and Christian Manquet, Head of Department on Criminal Law, Ministry of Justice), two lead examiners from Denmark (Flemming Denker, Deputy Director, Office of the Public Prosecutor for Serious Economic Crime; and Joern Gravesen, Detective Chief Superintendent, Office of the Public Prosecutor for Serious Economic Crime), and three members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs at the OECD Secretariat: David Gaukrodger, Principal Administrator – Coordinator Phase 2 Examination of Hungary; France Chain, Administrator – Legal Expert; and Silvia Cerchia, Administrator – Legal Expert. In addition, Andrea Spacek of the Austrian Ministry of Justice provided assistance to the Austrian lead examiners. The people and organisations that participated in the on-site panel discussions are listed in Annex 3. The meetings, which were largely in Hungarian with consecutive translation provided by the Hungarian authorities, took place principally at the offices of the Ministry of Justice in Budapest.

Working Group, based on its conclusions. It also identifies the matters that the Working Group considers should be followed up or further reviewed as part of the continuing monitoring effort.<sup>2</sup>

## **1. Political and economic framework**

4. Hungary is a parliamentary democracy that has been led by alternating centre-right and centre-left coalition governments since the end of communist rule in 1990. The national government centres on a powerful position of prime minister. Individual ministers in the government are not subject to parliamentary votes of confidence, but only to the prime minister's authority. The head of state is the president, but power rests mainly with the prime minister and Parliament. In October 2004, a new Prime Minister and cabinet, including a new Minister of Justice, were sworn in. Hungary joined the European Union in May 2004.

5. Hungary's economy is the third-largest in east-central Europe. Hungary is often cited as an example of successful transition from state-owned to a functioning market economy and it is commended for having established an investment friendly regulatory regime and an operative democracy. State enterprises in manufacturing and services have largely been sold off and operate in regular markets. For the network industries, the initial steps have been taken to open them up to competition.

6. Hungary is also one of the region's most open economies, with significant sectors now tied closely to Western Europe via trade and foreign investment. Hungary has also been praised for its successful creation of one of the strongest financial systems in the region.<sup>3</sup> The government, in agreement with the central bank, has announced its intention to join the euro area in 2010.

7. Since 1997 the Hungarian economy has achieved strong growth, averaging 4¼ per cent annually, although growth has recently slowed somewhat. This good performance has principally relied on a dynamic export sector largely made up of foreign-owned firms, and a rapid integration into European production networks.<sup>4</sup> Export growth slowed considerably in 2002-2003, however, although it is expected to return to higher levels in 2004-2005.<sup>5</sup>

8. Foreign trade has been substantially redirected towards Western markets since 1991. EU countries accounted for almost three-quarters of exports and 55 per cent of imports in 2003. Imports have risen even more rapidly than exports, reflecting Hungary's emerging role as an industrial processing economy. Imports were equivalent to 56 per cent of GDP in 2003, up from just 26 per cent in 1991. Germany is the country's most important trading partner, accounting for over one-third of exports and one-quarter of imports in 2003. Austria and Italy are also important trading partners. Russia is a key import source; its place in Hungary's overall ranking tends to vary with the price of oil. China entered the ranks of Hungary's major trade partners in 2003, as the electronics sector sources increasingly from Asia, and Chinese companies are setting up production facilities in Hungary.

9. On a per capita basis Hungary has accumulated since the early 1990s among the highest net FDI inflows among OECD countries. Foreign-owned companies now account for more than one-third of GDP and 30 per cent of private-sector employment. The leading investors come from Europe (Germany, the

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<sup>2</sup> A list of the principal acronyms and abbreviations used in the report is included in Annex 1. Translations of the principal legislative and other legal provisions are reproduced in Annex 2.

<sup>3</sup> See *Changing Hands: A Case Study of Financial Sector Governance in Hungary's Market Transition*, Meagher Patrick, 2000, OECD economic survey 2002

<sup>4</sup> See 2004 OECD Economic Surveys: Hungary ("OECD 2004") at 3.

<sup>5</sup> OECD 2004 at 27.

Netherlands, Austria, UK) and the USA. Hungary's principal competitors for FDI within the region are the Czech Republic, Poland and, more recently, Slovakia.<sup>6</sup> After an extensive series of privatisations after the end of the communist era, the pace of privatisations slowed in 1998-2002, but has recently restarted. According to the privatisation plan for 2004, the state privatisation agency expects to reduce the number of stakes it has in companies from 157 to 86.

10. Many of Hungary's exporting companies provide intermediate industrial products to manufacturers in the EU;<sup>7</sup> the nature of their products involve relatively little exposure to risk scenarios for the corruption of foreign public officials. However, the country businesses do participate in sensitive industries and markets, such as the defence industry. In terms of geographical distribution, approximately half of Hungary's military exports are to European countries, and one third to Asian countries. Since the country joined NATO, the main buyers of its military exports have also changed: currently NATO countries are the recipients of nearly half of Hungarian military exports. Another area of potential concern is smuggling. Various scandals, linked mainly to the energy industry and in particular oil smuggling, have broken out over the last 10 years. Allegedly, several politicians, together with some organised criminals, had a role in oil and alcohol smuggling.<sup>8</sup>

11. Outward FDI has grown significantly in recent years and is largely focused on countries in the region. A number of major Hungarian companies have made substantial investments in neighbouring countries in the region including Slovakia, Croatia and Russia. In addition, according to the Ministry of Economy and Transport 2003 Portfolio Review, the Ministry considers Russian, Ukrainian, Chinese and Indian markets a priority. Its objectives are to build markets, increase production relations, promote investments, and co-operate in infrastructure development.

12. Recently, Hungary has become an emerging donor of official development assistance (ODA). The United Nations Development Programme (UNDP) has noted that "[e]merging donors in Central and Eastern Europe are playing a growing role in development process, particularly in the countries of the Western Balkans and Commonwealth of Independent States." The UNDP also notes that the status of Hungary has changed from a recipient to a provider of ODA.<sup>9</sup> At the same time, the country is expected to receive substantial funds from the European Union, which are estimated to amount to approximately 0.7 percent of GDP annually.

## 2. *Overview of corruption trends*

13. Independent assessments have generally ranked Hungary among the less corrupt of the post-communist countries. [See, e.g., Open Society Institute (2002), "Corruption and Anti-Corruption Policy in Hungary".] However, recent evidence suggests continuing problems. The Hungarian authorities have made serious and commendable efforts to learn more about corruption and its citizens' experience of corruption. The government, in the context of the UN's Global Programme Against Corruption, commissioned the Gallup market research organisation to conduct a number of surveys in this regard. While the government's initiative in seeking to learn more about corruption was commendable, the survey results

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<sup>6</sup> OECD 2004 at 26.

<sup>7</sup> Id. at 24.

<sup>8</sup> According to some observers the situation has since changed, the country has stabilised and at present, Hungary is progressively eliminating the opportunities for corruption generated by its important social changes. See The organised crime situation in the SEE countries and the illicit activities repatriated by organised criminal groups, Hungary, Transcrime, January 2003

<sup>9</sup> See UNDP Regional Bureau for Europe and the CIS, Emerging Donors, [http://rebc.undp.org/index.cfm?wspc=CP\\_Emerging\\_Donors](http://rebc.undp.org/index.cfm?wspc=CP_Emerging_Donors).

generally revealed that corruption remains widespread in Hungarian society. After a major set of surveys in 2000, additional surveys were carried out in 2003. They reveal little improvement and showed for example that mistrust had risen since 2000 with regard to people working in medicine, the private business sector, customs offices, Parliament and officials of the Ministries.<sup>10</sup>

14. Other recent analysis similarly suggests that the government and civil society need to redouble their anti-corruption efforts. Hungary's score in recent (2002-2004) Transparency International Corruption Perception Index (CPI) surveys (which evaluate the perceived level of corruption within the Hungarian public sector) has declined from its scores from 1997-2001.<sup>11</sup> Similarly, an October 2002 study by the Hungarian State Audit Office (SAO) determined that anti-corruption programs have still not achieved their objectives and that the risk of corruption in the Hungarian public sector continues to be high. According to the study, corruption is strongly present in public procurement, in party financing and in internal financial control. A Gallup poll in 2000 of 520 small-and medium-sized enterprises in Budapest indicated that nearly one-third of companies surveyed consider bribery a general or relatively general phenomenon in their business sector, and 69 percent of the companies claimed that corruption was a very strong or a moderate obstacle to business.<sup>12</sup> Favouritism in the awarding of public procurement contracts is also regularly reported in the media.<sup>13</sup> Several dramatic allegations of political corruption have involved conflict of interests of members of the government, major corporations exerting influence on political decision making, scandals of illegal party financing and embezzlement of public money by government officials.<sup>14</sup>

15. The Hungarian health system is widely recognised as having a high degree of relatively petty corruption, with medical staff routinely seeking and receiving complementary payments or benefits from patients.<sup>15</sup> The Hungarian authorities consider that side-payments in the health system do not constitute corruption, do not have direct implications for the implementation of the Convention, and that there is no causal link between the tolerance of such side-payments and the foreign bribery offence. The lead examiners, however, consider that this situation in the health system can contribute to a climate in which corruption, including the bribery of foreign public officials, is more likely to be tolerated.

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<sup>10</sup> See Gallup Research on Corruption in Relation to UN's Global Programme Against Corruption (2000, 2003), [http://monitor.gallup.hu/en/gsurveys/summary\\_2003.pdf](http://monitor.gallup.hu/en/gsurveys/summary_2003.pdf)

<sup>11</sup> The CPI is based on the perceptions of a selected group of non-resident experts, non-resident business leaders from developing countries and resident business leaders evaluating their own country. The sources evaluate the overall extent of corruption (frequency and/or amount of corruption) in the public and political sectors and provide a ranking of countries. The data is then subjected to statistical analysis. For a more complete description of the CPI methodology, see [http://www.transparency.org/cpi/2004/dnld/method\\_note\\_en.pdf](http://www.transparency.org/cpi/2004/dnld/method_note_en.pdf).

<sup>12</sup> See Gallup Monitor, Corruption in the Sphere of Small and Medium sized Private Enterprises, [http://monitor.gallup.hu/en/gsurveys/010129\\_business.htm](http://monitor.gallup.hu/en/gsurveys/010129_business.htm)

<sup>13</sup> See GRECO monitoring report 2003.

<sup>14</sup> See *TI Global report on corruption*, 2003; *Ministry of scandal*, *The Budapest sun online*, 12 June 2003; *BBC Monitoring international reports*, 5 October 2002 ; *Pressure grows over alleged corruption*, *The Budapest Sun online*, 6 June, 2002.

<sup>15</sup> See EU Comprehensive Monitoring Report on Hungary's Preparation for Membership 2003 ("*the practice of 'gratuities' [in the health care field] is so common that many Hungarian citizens consider it a cultural phenomenon rather than hard corruption*"); see also Gallup Researches on Corruption in Relation to UN Programme on Corruption 2000, 2003 (indicating that 78% of over 1000 poll respondent in Hungary in 2003 indicated that it is likely that one will have to give gifts or favours to physicians or nurses, up from 70% in 2000, and indicating that less than a fourth of the population consider the gratuities paid to physicians as corruption.). Panel participants also regularly referred to the problem during the on-site visit.

16. The government has been actively pursuing the fight against corruption on a number of fronts. Among other changes, the Criminal Code (CC) and the Act on Criminal Proceedings (CPA) were amended to subject bribery and corruption to higher penalties and to facilitate the reporting of bribery cases. Since 2000 Hungary has been running a pilot project with the UN Office for Drug Control and Crime Prevention to apply the UN's Global Programme against Corruption. In connection with this project, the government adopted a National Anti-Corruption Strategy in 2001 which led to the unanimous April 2003 adoption by Parliament of the "*glass pocket programme*", a package of changes to 19 laws. The glass pocket programme has sought to make the use of public funds more transparent by, *inter alia*, strengthening the role of the State Audit Office; balancing the need to protect trade secrets with the need for publicity of official documents; making the finances of public bodies more transparent; requiring declarations of assets by officers and directors of certain state-owned enterprises; and improving public procurement processes. Some of these changes are addressed further in the relevant parts of the report below.

17. With the recent entry into force of legislation introducing the criminal liability of legal persons and additional legislative changes with regard to foreign bribery in accordance with the Phase 1 and 1bis recommendations, the legislative framework is now essentially complete. In addition, the decision to centralise both investigative and prosecutorial jurisdiction in a specialised branch of the Prosecutor's Office should assist, although the change should be better publicised and implemented. Despite these achievements, the lead examiners remain concerned after their review of relevant materials and consultations with numerous panellists during the on-site visit. In particular, they consider that without strenuous government and civil society efforts focused on publicising, actively implementing and enforcing the new rules – and on providing the necessary resources – the now largely-completed legislative and institutional framework will lead to few changes in actual business practices. In contrast to the legislative and institutional changes referred to above, the Hungarian government has done relatively little to publicise the offence and related offences, to facilitate or require the reporting of suspicions to the enforcement authorities, or to demonstrate its intent to give the offences adequate priority, including with regard to large and well-connected companies. Now that the framework is largely in place, the lead examiners consider that such efforts would be both effective and important in order for Hungary to achieve full compliance with the Convention. As set forth below, since the on-site visit, the Hungarian authorities have begun to take some additional measures in this regard.

## **A. AWARENESS AND DETECTION**

### **1. Awareness and prevention**

#### ***a) Government awareness and efforts to prevent foreign bribery***

18. Although domestic corruption is a high-profile issue in Hungary, the examining team found limited evidence of efforts so far to publicize or explain the foreign bribery offence within the government. For example, representatives of the Ministry of Justice indicated that they have no role in raising public or governmental awareness about new legislation including in the area of foreign bribery. Little effort is made to publicise new laws once they are adopted because the MOJ is responsible only for preparing legislation and has no competence in this area. Legislation, legal documents and explanatory memoranda are available in a variety of formats including widely distributed and reasonably inexpensive CD-ROMs compiled by private companies. MOJ representatives considered that the availability of the laws and explanatory memoranda in a CD-ROM format made them sufficiently accessible, and indicated that other agencies, such as the Prosecutor's Office and the Prime Minister's Office Secretariat Responsible for Public Assets (the "Secretariat") were competent with regards to additional awareness raising efforts. The Secretariat, which was created in 2002, carried out a number of training efforts with regard to corruption generally although none were focused specifically on foreign bribery.



19. As described below, the Secretariat has now been disbanded. Subsequent to the on-site visit, in December 2004, the responsibilities of the Secretariat were taken over by the Ministry of Justice, and its former activities are currently part of the duties of the Deputy State Secretary responsible for Criminal Matters. As to the enforcement agencies, little training has been provided. Representatives of the prosecutor's office present at the on-site visit and with exclusive competence over the foreign bribery offence (PPO) indicated that they do not generally conduct training and have not done any with regard to foreign bribery or with regard to the new regime of liability of legal persons. Following the on-site visit, the PPO indicated that some training had in fact been organised by the United States Department of Justice for Hungarian prosecutors and judges in 2003 and 2004 on bribery and money-laundering, focusing in part on issues of foreign bribery. The police receive training with regard to crime generally, but it does not specifically address bribery. As discussed further below, there was considerable uncertainty over competence to investigate the foreign bribery offence; both prosecutors and police thought that they had exclusive competence.

20. The examiners note that judges and others interviewed by the panel identified the absence of clear, stable and well-understood laws as a significant obstacle to the fight against bribery generally in Hungary. The Hungarian authorities note that the foreign bribery offence has remained largely stable and that changes in the law have been prompted by commitments to implement the OECD Convention and other international instruments. The examiners accept the Hungarian authorities' point about the stability of the laws, but urge them to better explain them in more user-friendly formats. This could be done, for instance, through materials that address their application in specific fact patterns. In addition, changes in the rules governing competence over investigation of the offence could be explained more effectively. 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.

21. The Ministry of Foreign Affairs does not have any specific training related to foreign bribery for its agents and awareness appeared to be poor. A representative of the Ministry of Foreign Affairs indicated that it would "*not be the job of a diplomat*" to deal with a complaint from a Hungarian company about alleged bribery by a competitor. The Hungarian authorities have not supplied information about whether foreign economic counsellors receive any training relating to foreign bribery. The examinations for senior members of the Ministry and for consular agents include questions relating to money laundering and bribery. A representative of the Ministry of the Economy indicated that he had personally benefited, early in his tenure at the Ministry, from a very useful three-day course on bribery (including foreign bribery). However, he noted that the training he received was a special occurrence and that there was no generalised program of training in his Ministry. Since the on-site visit, the Hungarian authorities have indicated that the Ministry of the Economy and Transport (and its predecessors) have made efforts to publicise the OECD Guidelines for Multinational Enterprises, which include references to the Convention. Such efforts have included press releases, conferences and inclusion of the Guidelines in Hungarian on the Ministry website.

22. Trade promotion and export credit agencies have a key role in raising awareness because of their close contacts with exporting and investing companies. The Hungarian Investment and Trade Development Agency (HITDA) provides support, through trade shows and other promotional assistance, to Hungarian companies entering foreign markets. The examining team was concerned by statements by a HITDA representative indicating that that bribery is "*the only way to do business in certain countries*" and that in such countries, "*formally, it is not a bribe because it takes the form of a commission*" based on a percentage of the transaction. At the time of the on-site visit, HITDA had not carried out any training with regard to foreign bribery; after the on-site visit, the director of HITDA launched a training program based on the OECD Convention in order to better comply with awareness raising expectations. Since the on-site visit, the Hungarian authorities have also indicated that HITDA has put some information about the Convention on its website. The examiners, however, consider that sustained efforts are required with a

particular focus on the nature and importance of the fight against foreign bribery. HITDA ceases to assist at the stage of drawing up contracts; it maintains a list of advisors who have references to assist with the contracting stage. Such advisors do not appear to receive any training about foreign bribery or to be required to make any legal commitments with regard to foreign bribery. Subsequent to the on-site visit, the Hungarian authorities also indicated that they consider that the comments referred to above represented the personal views of the individual.

23. The examining team frequently heard that there had been no cases of foreign bribery, and that this was why there was little awareness of the offence. In reality, the reverse proposition is equally likely to be true. For example, a HITDA representative indicated that employees had been fired after bribery-related problems had emerged with regard to advisors for trade transactions. Lack of knowledge about the foreign bribery offence may well explain the apparent absence of consideration of any criminal proceedings in such cases. In short, the understanding of the application of the criminal law provisions implementing the Convention to risk areas and suspicious fact patterns is generally low across government agencies, which may help explain the absence of any investigations or prosecutions in the five years since the law was adopted.

24. Nonetheless, there were some important exceptions. The judges with whom the examiners met had personally been involved in bribery-related issues over a number of years and demonstrated a high degree of awareness and thoughtfulness about those issues. The National Judicial Council (NJC) has training programs that include issues relating to the fight against bribery. The NJC has also participated in drafting the anti-corruption legislation. The examining team was also favourably impressed by the relatively high degree of awareness of the foreign bribery offence among the export credit agencies in Hungary. Significant internal training efforts, including efforts related to compliance with relevant OECD instruments such as the Action Statement on Bribery and Officially Supported Credits, appeared to have resulted in a substantially higher degree of awareness about bribery-related issues among the staff at those agencies.<sup>16</sup>

25. The fight against corruption has also been characterised by the creation of multiple governmental institutions whose jurisdiction is not always apparent and whose lifespan is frequently short. For example, the 2003 EU Report (at 16) noted the need to clarify the roles of three bodies created in 2002-2003: the then-new Secretariat; an anti-corruption advisory body comprising 18 members from professional organisations; and an Ethical Council of the Republic. These multiple and short-lived institutions raise issues about follow-through and implementation of the numerous initiatives in the anti-corruption field in Hungary. For example, the Secretariat benefited from the prestige of the powerful prime ministerial office. Among other tasks, it was responsible for developing the government's anti-corruption plans, including the glass-pocket programme. In addition, the Secretariat developed a major anti-corruption programme in consultation with the UN and a wide range of interested parties.<sup>17</sup>

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<sup>16</sup> Action Statement on Bribery and Officially Supported Export Credits, Working Party on Export Credits and Credit Guarantees, Trade Directorate, OECD, TD/ECG/(2000)15 (20 Feb. 2003).

<sup>17</sup> A major "*national integrity meeting*" was held on March 20-21 2003 in Budapest, where between 100 and 150 representatives from key stakeholder groups (Government, parliament, private sector, civil society, media and others) prioritized issues and designed a national integrity strategy and an anti-corruption action plan based on the country assessment (findings from the Gallup surveys and the focus groups); the case studies; inputs from international experts in certain strategic areas; and a programme from the Minister of Justice. The Government appointed an independent National Integrity Steering Committee (NISC) with representatives from the international community, civil society, academe, media, Government, parliament and the private sector. It oversees the development of the national integrity strategy and the implementation of a credible anti-corruption action plan for the criminal justice system. See UN Anti-Corruption Toolkit (2d ed. 2004) at 560 (available at

26. The Responses to the Phase 2 questionnaires did not mention the Secretariat. During the October 2004 on-site visit, a representative of the Secretariat indicated that the new government had decided to discontinue it although the government intended to carry on the fight against corruption.<sup>18</sup> He noted that the Secretariat-developed anti-corruption program had been tabled but not yet adopted by the previous government. He noted that further pursuit of the programme would likely fall to the Ministry of Justice (MOJ), but he considered that some parts of the job required political efforts and personnel, and would be difficult for that Ministry to carry out. At the time of the on-site visit, the government had not given any public explanation for the elimination of the Secretariat.

27. The Hungarian authorities have provided additional information in this respect since the on-site visit. They explain that the Responses did not refer to the Secretariat because at the time they were provided it had already been decided that the Secretariat's responsibilities would be taken over by one of the Ministries. Later, in December 2004, it was decided that the MOJ would take over the role. They consider that competency over the fight against corruption is adequately shared within the government and that the number of agencies is not excessive. The lead examiners accept that a variety of reasons may justify a reorganisation of tasks. Nonetheless, they remained concerned about the short lifespan of key institutions in the fight against corruption. The Hungarian authorities have not explained why the Secretariat was disbanded or whether a Ministry will have equivalent influence to an organisation located in the Prime Minister's Office. The Hungarian authorities have not indicated whether the Secretariat-developed anti-corruption programme has been published or adopted.

28. The Responses referred to a new Advisory Committee for Public Life without Corruption formed in 2004. Although the Advisory Committee was created by the Secretariat in 2004, it will now be overseen by the MOJ. The mandate of the Advisory Committee does not explicitly include foreign bribery, but the program is under review.

### **Commentary**

*The lead examiners take note of the active participation of the Hungarian authorities with the UN in the fight against corruption, and the extensive work in adopting the glass pocket programme and in developing the anti-corruption action programme. In light of the transfer of anti-corruption responsibilities from the Prime Minister's Office Secretariat Responsible for Public Assets to the Ministry of Justice in December 2004, the Hungarian authorities should ensure that the Ministry of Justice has appropriate resources to carry out its new role. While they recognise the need to reorganise government agencies to improve the delivery of services, the lead examiners encourage the Hungarian authorities to consider giving longer-term mandates to interagency anti-corruption bodies.*

*The lead examiners recommend that the Hungarian government take appropriate action 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 by providing guidance as to the situations in which the offence might arise, and about how to recognise it. Given the important role of trade promotion activities in the fight against bribery and the deficiencies perceived during the review, particular attention should be paid to improving the role and capacity of HITDA, the Ministry of Foreign Affairs and economic counsellors in Hungarian embassies abroad. Hungary should also put in place practical training, using outside resources where appropriate, for those actively involved in enforcement.*

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[http://www.unodc.org/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf) ).

<sup>18</sup>

The swearing-in of the new government coincided with the first day of the Phase 2 on-site visit.

**b) Public awareness**

29. The public perceives that the phenomenon of corruption is widespread in Hungarian society and there is a high level of awareness in Hungary about corruption. As noted above, in connection with the UN's Global Program against Corruption, the government commissioned the Gallup market research agency to study public opinion with regard to corruption in Hungary.<sup>19</sup> The Gallup surveys focused more on corruption in the daily life of citizens rather than in business transactions and they did not address foreign bribery. The results indicate that obtaining public contracts through bribes is widely recognised as constituting corruption, whereas side payments to physicians are much less often considered to constitute corruption by the general public in Hungary. A press representative also indicated that she thought that petty corruption is widely accepted by the public.

30. However, the lead examiners noted a positive tendency towards higher ethical standards and lower public tolerance towards corruption. A number of panel participants 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 significant changes to their institutional environment or to take additional measures for prevention or awareness-raising within their respective organisations. At the same time, additional progress is important; an experienced criminologist indicated that bribery is frequently perceived as a "grey area" phenomenon in Hungary rather than a "black and white" one.

31. In the corporate sector, awareness of Hungary's foreign bribery legislation remains relatively low. For example, one business association representative stated that although he had been aware of the US foreign bribery legislation for a number of years, "*there is no such Act in Hungary and we do not plan to have such an Act in Hungary.*" The examiners were also concerned that foreign corruption also still appears to be considered as necessary and even acceptable behaviour for a significant range of companies provided that it is considered to be necessary to compete, particularly against larger or wealthier companies. One business representative noted that a top executive at a leading Hungarian company with substantial investments abroad had stated in a discussion between business leaders that the company had "*significant activity*" with regard to bribery in certain non-EU European countries because that is what the competing Western European companies were doing. Business representatives also affirmed that the relatively small size and wealth of Hungarian companies limited the scope of foreign bribery as a problem. In this regard, a representative of a business association affirmed that "*Hungarian companies, due to their size and the nature of their contracts, are at the borderline with regard to whether it is corrupt or not.*"

32. During the on-site visit, it appeared that relatively few Hungarian companies have developed ethics codes or active compliance policies as part of their internal management. Where they exist, such codes generally do not directly address foreign bribery. One senior business executive with prior police experience opined that "*management of human risk is relatively low in the business sector*". However, some companies with international activities are in the process of setting stricter standards because they perceive that the reputational and other costs of corruption and other unethical business practices are very high and can sharply affect their share price and ability to do business; these trends were encouraged by the arrival of newer recruits, share listings in foreign markets and foreign managers and directors. Company representatives indicated that the introduction of liability of legal persons for criminal acts had not had much impact to date although one company indicated that it had developed new internal rules since May 2004 and had published a list of delegated authority within the company. Generally, the focus on the new law on the importance of management supervision has not yet prompted any management changes, but at least one other panellist suggested that it might do so once there are some cases.

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<sup>19</sup> For an overview of the research, see [http://monitor.gallup.hu/en/gsurveys/summary\\_2003.pdf](http://monitor.gallup.hu/en/gsurveys/summary_2003.pdf)

33. The Hungarian Managers Association, which is an association of high-ranking managers, has developed a code of ethics. However, the code does not address foreign bribery. The Association of Entrepreneurs and Employers has a committee which conducts research into topics such as corruption. Corruption issues are also discussed at a club where managers get together to exchange experiences and discuss issues including how to deal with markets in different countries. Business representatives noted that relatively strong accounting obligations with regard to bookkeeping provided a good basis for the fight against bribery in business.

34. Union representatives indicated that they have had little ability to address issues of corruption because of limited capacity and resources. They have organised some general training and awareness raising with regard to corporate social responsibility, but little has been done with regard to corruption. Union representatives characterised their power as relatively limited, and noted that although they had concerns with regard to corruption in some privatisations in the past, they had focused their energies on issues of job protection.

35. The professions, particularly those directly involved in advising companies considering doing business internationally, can also be key players in raising awareness and preventing bribery. Few lawyers were available to participate in the on-site panels, but they indicated that lawyers do not generally counsel their clients about the risks associated with foreign bribery. Their view was that clients know that bribery is illegal. With regard to accountants, panel representatives noted that the new rules with regard to money laundering and the role of accountants had raised significant concerns in the profession and were widely publicized. The Association of Accounting Professionals in Hungary organised numerous conferences and produced brochures and other materials on money laundering issues. In contrast, no such materials have been produced concerning foreign bribery. A representative of the organisation indicated that it generally places a great deal of emphasis on training and awareness, including knowledge of relevant legislation, and that it emphasises the types of accounting systems that can be used to limit corruption.

36. Awareness raising is one area in which NGOs and civil society generally can make an important contribution. However, the NGO sector in Hungary appeared relatively inactive in this area. Numerous commentators have indicated that the severe political polarisation referred to above also seriously hampers the development and activities of NGOs in Hungary because they have difficulties in operating in a polarised and divided environment. This was felt by some to exacerbate the distinction between a relatively good set of anti-corruption laws – largely imposed by external pressure from the EU and elsewhere – and weak implementation due in part to a lack of a domestic constituency. Overall, NGOs appeared to have little engagement with the problem of foreign bribery by Hungarian companies. For example, the representative of the Hungarian branch of an international NGO frequently in the forefront of the fight against bribery appeared to adopt a largely uncritical attitude towards governmental and corporate policy in this area; she suggested that bribery by foreign companies in Hungary was a more serious problem than bribery by Hungarian companies abroad. It is clear that the press reports widely on issues of corruption and on corruption scandals. However, panellists noted that even high-profile investigative reporting rarely appears to result in proceedings leading to the application of sanctions to high-level officials. Several civil society representatives expressed the view that the media, including those covering corruption scandals, is highly politicised.

37. Government action with regard to public awareness is essential where a succession of legislative reforms has taken place and where the offence concerned, as with foreign bribery, is perceived as remote from the everyday experience of the public. Numerous panel participants underlined the broad scope of recent changes in Hungarian law and the difficulties in keeping up with the changes. Furthermore, the overwhelming majority of the panellists agreed that the foreign bribery offence occupies an insignificant place in the current anticorruption strategy. The Hungarian authorities communicated a substantial list of events generally related to corruption, but few if any of these conferences and events appeared to include

the problem of foreign bribery by Hungarian companies within their scope. The examining team was informed that the list was supplied by the now-disbanded Secretariat. While the examiners recognise the importance of issues of domestic corruption in Hungary, it is important for Hungary, in light of its international commitments and need to contribute to a level-playing field, to also make efforts with regard to its now five-year old foreign bribery offence. In many cases, such efforts can be combined with materials and events that deal with domestic corruption.

### *Commentary*

*The lead examiners encourage Hungary to take 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 members of these professions can better avoid involvement in suspicious transactions and transmit knowledge to their clients. As noted above, given the complexities of the offence and its broad scope, the government should consider producing and distributing widely a brochure or other guide to explain the foreign bribery and related offences, and the new principles of corporate liability, using a series of concrete examples to explain their operation. 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.*

## **2. Detection and reporting of the foreign bribery offence**

### *a) Detection and reporting within the public administration in general*

38. Hungarian law requires public officials to report crimes about which they become aware to the law enforcement authorities. [See art. 171(2) CPA.]<sup>20</sup> Public officials must either attach any relevant evidence to their report or preserve it. The lead examiners, however, are concerned about the effectiveness of article 171(2) with regard to foreign bribery.

39. For domestic bribery cases, the Hungarian authorities have supplemented article 171(2) with a much stronger provision. Article 255B of the Criminal Code (CC) provides for criminal sanctions of up to two years imprisonment for failure of a public official to report domestic bribery cases to the competent authorities. But by its terms this provision applies only to the domestic bribery offences in articles 250-255 CC and not to foreign bribery under article 258/B. The Hungarian authorities stated that, as far as domestic bribery is concerned, “*the obligation (to report) was created by judging various interests usually taken into account in the course of the criminal justice system*”. Creating a similar obligation with regards to foreign bribery reporting would, in their view, have required the Hungarian legislature to go beyond creating a level playing field. (See Supp. Responses at 5.)

40. Public officials do not benefit from any specific legal provisions on whistleblowing protection for reports of suspicions of foreign bribery. Similarly, no code of conduct for civil servants refers specifically to whistleblower protection.

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<sup>20</sup> Article 171(2) provides that “*members of the authority and official persons, further, if prescribed by law, public bodies shall be obliged to lodge a claim for investigation – also identifying the offender, if the person is known – for all criminal offences that they become aware of while acting in their scope of competence*”. The obligation thus does not apply to members of “public bodies”, ie. legal persons referred as such in their governing legislation, unless the law so provides. Public bodies include professional boards; chambers with some independence from government but that provide public services; and representative institutions for some professions. Examples include Chambers of commerce, the Academy of Arts and Sciences and the Bar Association.

## *Commentary*

*In light of the apparent absence of any reports by public officials of foreign bribery offences since the introduction of the foreign bribery offence, the lead examiners invite the Hungarian authorities to consider measures to improve reporting from public officials, such as expanding the scope of article 255B CC to provide sanctions for the non-reporting of foreign bribery offences. In addition, the examiners invite the Hungarian authorities to consider improving whistleblower protections applicable to public officials.*

### **b) Reporting and sharing of information by the tax authorities**

41. Pursuant to article 53 of Act XCII of 2003 on the Rules of Taxation ("Rules of Taxation"), tax officials are under a general duty to keep information they gather during the course of their duties confidential. Tax officials can transmit information to law enforcement authorities only upon a formal request of the judicial or prosecution authorities approved by the District Attorney and establishing the necessity of the requested information for instituting or conducting criminal proceedings. [See id. art. 54(5)(b).] When urgent action is required at the request of an investigating authority, however, the tax authorities may transmit information without the District Attorney's approval, providing the requested data are "*in connection with (an open investigation) case*". [See id. art. 54(6).] Thus, under the Rules of Taxation, tax officials can only disclose information upon the request of judicial, prosecution or investigative authorities. The authorities and the agencies entitled to receive information about tax matters under limited conditions are also under a general obligation to keep all received information confidential. [See id. art. 53(3).]

42. The representatives of the Tax Administration stated that the general disclosure obligation set forth in article 171(2) of the CPA which obliges all public officials to report offences of which they become aware in the course of their activities applies to tax officials. This obligation of spontaneous disclosure thus co-exists with the disclosure upon request permitted under the Rule of Taxation. The Hungarian authorities have explained that there is no contradiction between the Rules of Taxation and the reporting obligation of the CPA because article 54(1) of the Rules permits disclosure if it is required or permitted by law and the CPA requires such disclosure. They further explain that article 54(5)(b) of the Rules of Taxation applies only when tax officials do not have any suspicions and merely receive a request from the law enforcement authorities.

43. From a practical point of view, the Hungarian authorities indicated that "*if the examination reveals facts leading to well-founded suspicions of crime, the leader of the competent local authority informs the investigating authorities*". Practice in this area thus appears to be consistent with the explanation provided by the Hungarian authorities.

44. The Hungarian authorities have not supplied statistics about reports of foreign bribery or other white collar crime by tax officials, explaining that such data is not collected because the relevant database does not refer to the person who submitted the report.

45. Subsequent to the on-site visit, the Hungarian authorities indicated that the OECD Bribery Awareness Handbook for Tax Examiners would be made available to appropriate officials of the Tax Administration and that the authorities were considering its inclusion in the training programmes of the tax administration.

46. With regard to the sharing of tax information with authorities in other jurisdictions, the Commentary on article 26 (2) of the OECD Model Tax Convention was recently amended to contemplate possible expanded international cooperation by tax authorities with law enforcement authorities in cases

involving corruption. The amended Commentary includes an option for Contracting States to allow the sharing of information with law enforcement agencies and judicial authorities under certain conditions and on certain high priority matters including corruption.<sup>21</sup> The Hungarian authorities are considering whether Hungary will seek to modify its bilateral treaties in light of the amended Commentary to the Model Convention; they have not indicated Hungary's practice in this regard with regard to negotiation of its future bilateral treaties.

### *Commentary*

*The lead examiners welcome the decision of the Hungarian authorities to make the OECD Bribery Awareness Handbook for Tax Examiners available to appropriate officials of the Tax Administration and encourage Hungary to include it in the training programmes of the tax administration. The lead examiners recommend that the Working Group follow-up with regard to the reporting of suspicions of foreign bribery by tax officials and with regard to the issue of Hungary's tax treaty practice in light of the recent revisions to the Commentary to Article 26 of the OECD Model Tax Convention.*<sup>22</sup>

#### **c) *Prevention and reporting in the context of export credit aid and other state-funded subsidies and contracts***

47. Hungary is a full participant of the OECD Export Credit Group and has agreed to the OECD Action Statement on Bribery and Officially Supported Export Credits (the "Action Statement"). Both MEHIB<sup>23</sup> and Eximbank<sup>24</sup> have adopted new internal procedures to implement the Action Statement. Under the new procedures, all applicants requesting official export credit support are informed, at the time of the application, about the criminal laws provisions on domestic and foreign bribery. In addition, both the insured party and the exporter or borrower must complete a declaration which requires them to certify that (1) neither the applicant nor its employees, legal or other representatives has been involved in any act of bribery in order to conclude a foreign trade or loan contract subject to requested MEHIB credit insurance or Eximbank credit; (2) neither the management or its authorised representatives, nor the supervisory body or its representatives have been involved in such offences; (3) there is no legal proceeding for foreign bribery against the applicant, the members of its management, supervisory staff or employees. According to the text of the mandatory declaration, applicants are also obliged to report any legal proceeding subsequently initiated in this respect.<sup>25</sup>

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<sup>21</sup> See OECD web site, "Changes to the Model Tax Convention approved by the Committee on Fiscal Affairs on 1 June 2004" § 12.3, <http://www.oecd.org/dataoecd/28/4/33614065.pdf>

<sup>22</sup> In light of the recent nature of the change to the Model Convention, the examiners recognise that this latter issue is a horizontal issue applicable to all or practically all members of the Working Group. In addition, given the voluntary nature of the Model Convention, the Working Group is not suggesting that Hungary has failed to comply with the Commentary to Article 26.

<sup>23</sup> The Hungarian Export Credit Insurance Ltd. (MEHIB) was established in 1994 with the aim of sharing the financial risks of export transactions, to encourage and promote the external economic relations and facilitating the credit availability for exporters.

<sup>24</sup> Eximbank's mission is to increase the competitiveness of Hungarian export of goods and contribute to realisation of the export-orientated economic policy taking the obligations originating from OECD membership.

<sup>25</sup> Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – Situation as of 8 October 2004, OECD, TD/ECG(2004) 15/PROV, 12 October 2004.



48. Eximbank and MEHIB employees are not subject to the reporting obligations in CPA article 171(2). However, the agencies' regulations provide for a disclosure obligation mediated by a central committee at each agency. At the on-site visit there was some uncertainty regarding the exact course of action which will be taken by MEHIB and Eximbank employees upon discovering that an insured party, a borrower or an exporter may be involved in foreign bribery. The Hungarian authorities subsequently clarified that both agencies have a central committee to which suspicions are referred by employees and which decides whether to forward the information to the law enforcement authorities. The procedure for approving credit or insurance is temporarily stopped during the review by the committee. The authorities also clarified the agencies' practice with regard to what constitutes sufficient evidence of bribery to refuse the initial provision of support for a given transaction.<sup>26</sup> Although there is no official definition of "sufficient evidence", new internal procedures provide that the sufficient evidence standard is always met if criminal proceedings have been commenced against the person participating in the transaction. Generally, it was emphasized that both agencies follow essentially the same rules and procedures with regard to combating bribery.

### *Commentary*

*The lead examiners take note of the amendments of regulations to improve awareness of foreign bribery in the procedures for providing export credit support to companies exporting abroad and to improve reporting practices. The lead examiners recommend that the Working Group follow up with regard to the practical application of these new rules by officials in the Hungarian export credit agencies.*

#### *d) Reporting by private individuals and businesses*

49. Hungarian law expressly provides that private enterprises and individuals may report criminal offences to law enforcement authorities. [See art. 171 (1) CPA.] The Hungarian authorities believe that there have been prosecutions and convictions for domestic bribery based on spontaneous reports, but note that they cannot provide statistics on the number of reports or the persons who have reported on bribery because data about the source of reports is not collected. The Hungarian authorities have indicated that collecting generic statistical information about the type of originator of reports would involve risks relating to the protection of private personal data, and would accordingly require legislative authorisation. Hungary also did not provide information on whether the law enforcement authorities have received any reports of alleged foreign bribery (from any source). No investigations have been opened. Generally, the lead examiners had the impression that private enterprises and individuals in Hungary play a small role in this respect and they consider that the absence of reports by private individuals and enterprises is partly due to a lack of information explaining the legislation on foreign bribery, as described above.

50. Another reason for the lack of reporting in Hungary may be inadequate protection for whistleblowers against reprisals by their employers. In general, the lead examiners found that panellists appeared to have given relatively little consideration to the concrete difficulties and fears of reprisals faced by an employee who is considering whether to report about suspicious activities. Trade union representatives explained at the on-site visit that although awareness of corruption in general is high, employees rarely report concrete cases to the law enforcement authorities. The government has not enacted any specific law or policy regarding whistleblower protection for employees in Hungary; only the provisions of the domestic labour law apply.<sup>27</sup> The only provision dealing with whistleblower protection is

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<sup>26</sup> See Action Statement, § 4.

<sup>27</sup> A law enforcement representative explained that special protection could be given to witnesses at the investigation stage, depending of the gravity of the case. For example, investigative authorities can

article 257 CC, which establishes the offence of taking detrimental action against a person who has made an “*announcement of public concern*”. However, although domestic bribery is likely to be included as an area of “*public concern*”, coverage of foreign bribery is much less certain. Article 257 is set out in the end of the chapter regarding domestic corruption in the Criminal Code; as discussed below, the Hungarian authorities generally consider that such provisions apply only to the domestic offence.<sup>28</sup>

51. Collective agreements and corporate codes also appear to provide little if any real protection. Among the enterprises represented at the on-site visit, only one stated that its code of conduct contained rules prohibiting detrimental action against employees who report suspicions of criminal offences such as bribery.

52. In addition, as in many other countries, in certain circumstances the reporting of allegations of bribery can give rise to liability or legal proceedings for defamation. Panellists expressed differing views regarding concerns about defamation proceedings. One panellist noted that a member of a Parliamentary Committee investigating a high-profile oil smuggling case was “*convicted*” for defamation; given that defamation involves only civil liability in Hungary, this likely referred to a finding of civil liability.<sup>29</sup> On a related question, journalists were not concerned about the risk of defamation proceedings; one journalist indicated that she was unaware of any convictions of journalists for defamation. Indeed, some commentators have noted that journalists’ ability to publish unsubstantiated allegations of corruption is a problem. The Hungarian authorities contend that an examination of the effect of defamation laws in practice on the reporting of bribery is outside the scope of a Phase 2 examination. They further note that liability for defamation in Hungary is only civil and that it requires intentional acts, such as reporting in bad faith. The lead examiners consider that the effect of defamation laws and suits on bona fide reporting about bribery cases legitimately forms part of the Phase 2 review.

### ***Commentary***

***The lead examiners encourage the Hungarian authorities to consider measures to facilitate the reporting of foreign bribery by employees. In this regard, the examiners encourage the Hungarian authorities to consider extending the coverage of article 257 CC, which establishes the offence of taking detrimental action against a person who has made an announcement of “public concern”, to include detrimental action taken against persons who report in good faith suspicions of foreign bribery. The lead examiners also recommend that Hungary re-examine whether existing labour law provisions sufficiently protect people in the private sector who report foreign bribery cases from retaliatory action.***

### ***e) Reporting by auditors***

53. The rules governing the reporting of suspicions of bribery by auditors did not appear to be clear to all of the accounting and audit professionals with whom the examiners met during the on-site visit. For example, a representative of the Chamber of Auditors referred to a general obligation of secrecy with three exceptions: disclosure obligations relating to money laundering, quality assurance procedures and ethics

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maintain secrecy over the identity of some individuals who report. For further development on the issue of witness protection, see the section below on Investigative techniques, §§ 90-92.

<sup>28</sup> Even if it were to apply to retaliation against persons who report foreign bribery, which appears unlikely, the practical use of this provision is may be limited because the Responses indicate that there have been no proceedings under article 257 for decades. (See Supp. Responses at 6.) Nonetheless, the Hungarian authorities consider that the existence of a penal sanction has a dissuasive effect.

<sup>29</sup> This Committee was set up to carry out an independent investigation into oil smuggling in which some high-ranking officials were supposedly linked.

proceedings. The Hungarian authorities indicated that Hungarian law with regard to auditor reporting obligations is consistent with ISA 240. Although it contemplates reporting obligations under national law, ISA 240 does not itself require any reporting by auditors to regulatory and enforcement authorities unless national law so provides.<sup>30</sup>

54. One provision that is relevant in certain limited circumstances is article 44 of the Act of Business Associations. It provides that where an auditor “*ascertains or otherwise learns that a considerable decrease in assets of the business association is probable, or perceives any other issue which entails the liability of the executive officers or the supervisory board members*” as set forth in that Act, he shall request the business association’s supreme body be convened. If the “*supreme body is not convened or ... fails to take the decision required by legal regulations, the auditor shall inform the court of registration exercising legal supervision*”. The Court of Registration can impose financial penalties or, in “*serious*” cases, require the winding up of the company; however, it is not clear if the Court can transfer cases to the law enforcement authorities or if its proceedings are public.

55. Article 44 raises a number of concerns. First, its scope is both narrow and unclear. It applies only to a considerable decrease in assets of the company or to issues involving “*the liability of executive officers or supervisory board members*”; on its face, it does not require any reporting of illegal acts not involving the liability of officers or directors, such as bribery by ordinary employees. It is also arguably focused only on harm to shareholders and not on more general wrongdoing by the corporation with regard to third parties.

56. The Hungarian authorities contend that the limitation of article 44 to cases involving liability of senior executives and board members is not a problem because such persons are liable to ensure that the operations of the company are in accordance with the law. Thus, any misdeed by an employee could entail the liability of senior executives and would consequently trigger the disclosure obligations of article 44. Thus, the Hungarian authorities consider that “*the auditor convenes the supreme body (or informs the Court of Registration) not only in the case where the executive officers or supervisory board members themselves do not follow the regulations, but when the employees of the company do not follow the regulations and the executive officers or the supervisory board members do not take the necessary steps to avoid it. This rule covers every type of irregularities, [including] bribery.*” The problem with this interpretation is that liability for senior managers for bribery by employees requires a finding that “*the act could have been prevented had he properly fulfilled his control or supervisory authorities.*” [See art. 258/B(3),(4) CC.] There is thus no automatic liability. The lead examiners are concerned about a rule which requires an auditor to in effect make a determination of liability of the senior executives and board members – their failure to fulfil supervisory obligations in order to prevent the underlying infraction – as a condition to disclosure of bribery by ordinary agents and employees. The lead examiners consider that the Hungarian authorities should amend the law to require internal and possible external disclosure by auditors of suspicions of all illegal acts of foreign bribery by agents or employees of the company. In addition, the authorities should ensure that the disclosure obligation applies to all audited entities, not just to those subject to the Act on Business Associations.

57. Moreover, awareness of the possible use of article 44 in this context appears limited at best. As noted above, a representative of the Chamber of Auditors did not refer to it in enumerating the exceptions to the auditor’s duty of confidentiality. No case law or other interpretation of article 44 has been provided. There are no statistics about referrals to the Court of registration by auditors.

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<sup>30</sup> See ISA 240 – The Auditor’s Responsibility to Consider Fraud and Error in an Audit of Financial Statements § 68 (stating that an auditor’s professional duty of confidentiality “*ordinarily precludes reporting fraud and error to a party outside the client entity*”, but that the duty may be overridden by national law).

58. Finally, as set forth below in the section on the liability of legal persons, §§ 144-160, the examiners consider that the law on liability of legal persons should be amended to eliminate the requirement of prior punishment of a physical person as a condition to liability of the legal person for foreign bribery. (See also Phase 1bis report at 20.) In this context, the limitation of the disclosure obligation in article 44 of the Act on Business Associations to cases involving liability of physical persons should also be re-examined. The lead examiners consider that if auditors discover facts that suggest liability of the company for foreign bribery, he or she should be required to report it to the supreme body and, in the face of inaction, to appropriate outside authorities.

### *Commentary*

*The examiners recommend that the rules regarding reporting of suspicions of foreign bribery by auditors should be improved and better publicized. Reportable suspicions should include any good faith suspicions of bribery by agents or employees of the audited entity, regardless of the potential personal liability of officers and directors. Moreover, these rules should require auditors to report suspicions of bribery to management and, as appropriate, to corporate monitoring bodies. In addition, Hungary should consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent authorities. The lead examiners also recommend that the Hungarian authorities re-examine the reporting obligations of auditors in conjunction with the recommended changes to the rules on the criminal liability of legal persons (discussed below) and in particular the recommended elimination of the requirement of the prior punishment of a physical person.*

#### *f) Reporting in the context of preventing money laundering.*

59. Act XV of 2003 (the “AML Law”) concerns the prevention of money laundering and reporting of suspicious transactions. The AML Law applies broadly both to the financial sector and to a large number of professions outside the financial sector, including lawyers and auditors, in accordance with FATF Recommendations and the relevant EU directives. [See AML Law art. 1(1).] Hungary’s FIU is Pénzmosás elleni Osztály, which is the Anti Money Laundering Unit at the Hungarian National Police Headquarters (AML Unit). In April 2000, Hungary established a new single supervisory agency, the Hungarian Financial Supervisory Authority (HFSA), which is tasked, *inter alia*, with supervising banking and credit institutions, insurance companies and other financial and investment institutions, including active AML supervision. [See AML Law art. 2(2)(a).]<sup>31</sup>

60. The AML Law requires entities subject to AML reporting requirements – known as service providers -- to develop internal rules to fulfil their obligations under the law; it also requires that the supervisory body approve the rules. Supervisory bodies must also make available guidelines and model rules. [See AML Law arts. 11(3)-(5), 15(3).] The Ministry of Finance, in cooperation with the AML Unit, is required to publish guidelines necessary for elaboration of internal rules for service providers who are not subject to state or professional supervision. (Id. art. 12.) The AML Unit is also required to verify that such service providers possess rules and their operation, and can carry out on-site inspections to this end. (Id. art. 13.) During the on-site visit, the AML Unit indicated that it had received 22 000 sets of internal rules, so many that it was not yet able to determine if all required parties had in fact submitted them. Violations of the obligation to develop internal rules are sanctioned by fines of HUF 10 000 to 100 000

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<sup>31</sup> Other supervisory bodies with AML responsibilities include the Hungarian Chamber of Auditors (auditors), the Hungarian Bar Association (attorneys), the Hungarian Chamber of Notaries (notaries) and the Hungarian Gaming Board (casinos). [See AML Law art. 2(2) – (5).]

(EUR 41 to 408 and USD 55 to 545) (unless other provisions provide for more severe penalties).<sup>32</sup> (See id. art. 13.)

61. Hungary has greatly improved the resources available to prevent money laundering in recent years. During the on-site visit, an AML Unit representative indicated that its staff had grown from eight people three or four years ago to 43 at present, including 20 police officers. In addition, computer facilities have been modernised and new internal regulations have minimised the administrative burden. The Unit has also benefited from a considerable number of training opportunities, including from foreign experts. (See Supp. Responses part VII.)

62. Although Hungary has substantially improved its AML regime, the lead examiners noted significant problems with the AML reporting process in practice, including both an excessive number of inappropriate suspicious transaction reports (STRs) and poor results in generating criminal investigations from STRs.<sup>33</sup> A 2002 Council of Europe report refers to a risk of over-reporting by banks stemming from the current level of liability on employees or a poor understanding of the role of a compliance officer. (As described below in § 177, the negligent failure to report a suspicious transaction is punishable by up to two years imprisonment.) The examiners consider that the problems are principally due to (1) the lack of a common understanding about the interpretation of guidance on the identification of suspicious transactions supplied in model rules issued by the Hungarian supervisory authorities between, on the one hand, the supervisory authorities and the AML Unit, and, on the other hand, financial institutions; (2) the lack of guidance from financial institutions to their employees; and (3) at least until recently, insufficient resources at the AML Unit to deal with reports. Recent events appear to have exacerbated the problem. Both AML Unit and business representatives indicated during the on-site visit that a proceeding last year against bank employees for non-reporting had prompted reporting by many institutions of all transactions over USD 10 000 or 15 000. The quality of reports is frequently poor and they omit any information about why the transaction is suspicious. One financial institution representative noted that he expects the number of STRs will increase further because electronic screening of transactions has now been made mandatory.

63. Subsequent to the on-site visit, the Hungarian authorities indicated that "*there is no limit above which bank employees have to or tend to make such reports.*" Rather, they make reports when the transaction appears suspicious in all the circumstances. The examiners recognise that the legal rules on reporting are framed in those terms, but, based on the views expressed during the on-site visit, they consider that there is a discrepancy between those rules and actual practice.

64. As noted above, there is a serious disparity between the very high number of STRs and the low number of criminal investigations. The relevant statistics show that only 14 criminal investigations have been generated by over 26 000 STRs in the past three years. The Responses state that the AML Unit makes an inquiry into each STR within 30-60 days, and that when it finds information suggesting that a crime has been committed, it launches a criminal investigation or notifies the relevant investigative authority. During the on-site visit, the AML Unit indicated that it had not been able to effectively conduct an inquiry in many cases due to a lack of resources and the number of STRs. AML Unit representatives indicated that they write letters asking for more information in some cases, but that they terminate inquiries if they do not receive any further information; in such cases, they make a decision about the referral of the matter for

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<sup>32</sup> Currency exchange rates are as of 20 December 2004.

<sup>33</sup> See Responses § 11.3 & Supp. Responses VII (5655 STRs and 5 investigations in 2002; 12 364 and 4 in 2003; 8759 and 5 in 2004 so far). A 2002 COE report indicated that the number of STRs had grown substantially since their 1999 report, but that few criminal investigations resulted. See Second Round Evaluation Report on Hungary, European Committee on Crime Problems, Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV) (approved 13 December 2002).

criminal investigation based on the existing record. The AML Unit representatives indicated that in practice, they rely only on the voluntary provision of additional information by service providers.

65. Subsequent to the on-site visit, the Hungarian authorities provided a number of clarifications on these issues. They indicated that the AML Unit had conducted an initial inquiry with regard to all of the 12 364 STRs received in 2003 and to most of the 14 120 STRs from 2004. In some cases, the initial inquiry was still ongoing. The authorities recognised that "*[i]t is a fact that the number of STRs requires – if the resources of the Unit are left unchanged – an outstanding effort from the Unit in order to be able to investigate all STRS so that they meet the quality requirements.*"

66. In response to the difficulties with the number of STRs and their poor quality, the AML Unit met with financial institutions in August 2004 to attempt to develop better criteria for the existence of suspicions. In addition, the HFSA published a recommendation in 2004 that thoroughly describes the criteria for suspicious transactions and how to report them.<sup>34</sup> The Recommendation (¶ 2.2.1.) indicates that all available information should be included in the STR. It also mandates annual training of employees. In particular, the police and relevant supervisory bodies should meet regularly with financial institutions and other service providers to provide regular guidance and feedback with regard to STRs in order to improve their quality.

67. In this regard, the examiners note that representatives of financial institutions complained during the on-site visit that they do not receive any feedback from the police with regard to their AML reports and underlined that this lack of feedback hinders their efforts to improve their reporting practices. Subsequent to the on-site visit, the Hungarian authorities have strongly contested this view and have provided further information about feedback. They have indicated that (1) the AML Unit gave feedback to all the persons submitting reports in all cases until June 2004; and (2) since June 2004, in accordance with the HFSA recommendation, the Unit has been providing feedback (guidelines) on a regular basis rather than in each individual case, unless the report concerns a sum higher than 50 million HUF (EUR 200 000 and USD 272 626). The aim of the guidelines is to suggest changes in the practice, as well as to recall to new tendencies in money-laundering. They also indicate that the AML Unit also held seminars in many banks and other financial institutions. For the future, the Unit is planning to replace the seminars with annual conferences for the now larger circle of firms subject to the obligation to report. Nonetheless, given the existing difficulties, the lead examiners consider that a sustained approach is necessary in this area.

68. The Responses state that the AML Unit works in close cooperation with the Anti-Corruption Unit at police headquarters and would transfer any information on bribery to that unit. (See Supp. Responses ¶ VII.) This response raises concerns about awareness of the applicable rules on competence to investigate foreign bribery. As described further below, the Prosecutor's Office has the exclusive competence to investigate (as well as prosecute) foreign bribery cases.

69. Article 303/B CC provides that intentional failure to fulfil reporting obligations in the AML Act is a crime punishable with imprisonment of up to three years; a negligent failure is punishable by imprisonment up to two years. There has been one conviction for a failure to report under article 303B. Generally, investigations with regard to potential reporting violations entail on-site visits. More generally, supervisory authorities and the AML Unit can also carry out on-site inspections to monitor compliance with AML requirements.

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<sup>34</sup> See Recommendation by the President of the Hungarian Financial Supervisory Authority No. 1/2004 on the Prevention and Impeding of Terrorism and Money Laundering.

## *Commentary*

*The lead examiners take note of the numerous recent improvements in the AML regime in Hungary including the substantial increases in resources and changes to applicable law. However, the examiners are concerned about practical difficulties in the implementation of the STR system and especially the pronounced disparity between the low number of criminal investigations and the high number of STRs. The lead examiners recommend in this regard that the Hungarian authorities take appropriate steps to improve the flow of information and feedback between the relevant actors in the AML system, including financial institutions and other service providers subject to AML legislation, the police, supervisory bodies such as the HFSA, and prosecutors. While noting the recent increases in resources, the lead examiners also consider that Hungary should monitor the available resources on an on-going basis to ensure that they are sufficient to allow (1) the AML Unit to carry out its functions effectively, including in particular its initial inquiries arising out of STRs and its provision of operational feedback to service providers; and (2) the HFSA to continue to provide appropriate guidance to service providers.*

## **B. INVESTIGATION, PROSECUTION AND SANCTIONS**

### **1. Institutional framework**

#### **a) Public Prosecutors' Office**

70. In Hungary, prosecutions are conducted by the Public Prosecutors' Office (PPO). Act V of 1972 on the Public Prosecution Office of the Republic of Hungary and Act LXXX of 1994 on the Status of Public Prosecutors are the directing statutes for the organisation of the PPO. The PPO is divided into four hierarchical levels: local, county (19 counties, as well as the Budapest Metropolitan PPO), regional appellate prosecution offices, and the Prosecutor General's Office.

71. As guaranteed by Chapter XI of the Hungarian Constitution, the PPO is independent of both the Judiciary and the Government, including the Ministry of Justice. The administration of all PPOs is the responsibility of the Prosecutor General of Hungary and his Office.<sup>35</sup> The Prosecutor General is elected by Parliament on the proposal of the President of the Republic for six years.<sup>36</sup> He can not receive instructions on specific cases from anyone and is only answerable to Parliament, to whom he submits general reports annually. All public prosecutors are appointed by the Prosecutor General. Top level and high level prosecutors (such as the Chief public prosecutors at county level) are appointed for an indefinite time, but "their appointment may be withdrawn at any time without giving reasons";<sup>37</sup> the Hungarian authorities explained that, where the appointment is withdrawn, prosecutors are reassigned but remain prosecutors. Less senior public prosecutors may also be dismissed by the Prosecutor General but for a limited number of reasons, including staff cuts or structural reorganisation.<sup>38</sup>

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<sup>35</sup> Article 53(3) of the Hungarian Constitution.

<sup>36</sup> Article 52 *ibid.*

<sup>37</sup> Article 22 of Act LXXX of 1994 on the Status of Public Prosecutors.

<sup>38</sup> Article 28 *ibid.*

72. One particularity of the Hungarian system is that public prosecutors can have the competency to investigate as well as prosecute cases. To this end, a special “*county prosecutorial investigation office*” exists within each county-level prosecution office. For some offences, these offices have exclusive competence to investigate.

73. Certain domestic bribery offences by or against certain high ranking domestic public officials, as well as the foreign bribery offence are among the list of offences under article 29 of the CPA for which the PPO has exclusive investigative competence.<sup>39</sup> Thus, for any foreign bribery offence, the police are under an obligation to immediately refer such cases to the PPO for investigation. However, during the on-site visit, it was unclear whether all the relevant law enforcement authorities were fully aware of these rules governing competence and requiring transfer of cases involving foreign bribery offences (see section (c) below on coordination between law enforcement authorities).

74. Further rules define investigative and prosecutorial competence over foreign bribery offences within the PPO, although such rules appear somewhat complex. Directive 6/2001 created on 1 June 2001 the Central Investigation Office of the Public Prosecution Service (CIOPPS), operating at county level (it is placed within the Budapest Metropolitan PPO) but with national competence, in order to more effectively prosecute and investigate organised crime and corruption. The powers of CIOPPS were extended in July 2003 by Directive 11/2003 which gave it competence for investigation and prosecution of all cases referred to CIOPPS by the Prosecutor General.

75. Article 49(2) of Directive 11 of 2003 from the Prosecutor General defines the specific criminal acts falling within the exclusive jurisdiction of CIOPPS,<sup>40</sup> which include offences committed by high-ranking public officials as well as certain offences against public officials. While bribery of domestic public officials (article 253 CC) is specifically mentioned,<sup>41</sup> bribery of foreign public officials (article 258B CC) is not. According to representatives of CIOPPS, this is the result of an oversight, and they consider it logical that the foreign bribery offence also falls within their exclusive competence.

76. Cases concerning offences not cited in article 49(2) of the Directive may also be transferred to CIOPPS by decision of the Prosecutor General, the Deputy Prosecutor General for Criminal Matters or the Head of the General Investigations Supervision Department of the Prosecutor General’s Office.<sup>42</sup> To ensure that the Prosecutor General’s Office is in a position to refer cases to relevant specialised offices such as CIOPPS, public prosecutors are under instruction to report serious crimes to the Prosecutor General, as provided in Circular 2 of 2002. However, the Circular provides only a general obligation to report cases concerning “*a criminal offence with significant local or national importance due to, for instance, its subject or people concerned*”,<sup>43</sup> and specific reporting obligations as regards cases by and against certain high-ranking public officials, money laundering offences, and offences related to the “*real estate mafia*”.<sup>44</sup> There is no specific reporting obligation as concerns cases concerning a foreign bribery offence. Nonetheless, public prosecutors interviewed at the on-site visit believed that all public prosecutors would be aware that the foreign bribery offence constituted a serious crime, and would thus report it. Concern remains, however, that, in the absence of clear indications that foreign bribery constitutes “*a*

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<sup>39</sup> Article 29(g) of the Criminal Procedure Act.

<sup>40</sup> The Directive does not specifically mention CIOPPS. It addresses the competence of “*the appointed organisational unit*”.

<sup>41</sup> Article 49(e) of Directive 11/2003.

<sup>42</sup> Article 49(g) *ibid*.

<sup>43</sup> Article 1 of Circular 2/2002.

<sup>44</sup> Article 2, *ibid*.



*criminal offence with significant local or national importance*”, foreign bribery offences may not be duly reported by all public prosecutors to CIOPPS, notably in smaller provincial jurisdictions where public prosecutors may need to be made aware of the significance of the foreign bribery offence and the subsequent duty to report it.

77. As of October 2004, CIOPPS included a staff of 15 public prosecutors, two auditing experts and one technical assistant. Although regular training is available to CIOPPS personnel, no specific training on the foreign bribery offence has been provided to date. Representatives of CIOPPS indicated that they handle an average of 400 to 450 cases each year, with only a quarter being investigated and less than 100 going to trial. They further indicated that, due to a heavy workload, CIOPPS public prosecutors in charge of investigating and prosecuting a serious crime are often unable to appear before the courts themselves. Thus, at the trial stage, representation of CIOPPS will often be taken over by a prosecutorial unit at county level, set up specifically for the purpose of ensuring PPO representation at the trial stage. This strain on resources, while regrettable in itself, may further pose problems when complex cases involving a foreign bribery offence arise. In such situations, the new prosecutors in charge of arguing the case at trial would have to use a disproportionate amount of time in order to make themselves acquainted with the complex facts of the case, while the valuable knowledge acquired by those CIOPPS prosecutors conducting the investigation and prosecution prior to trial will be lost at the critical trial stage.

#### ***Commentary***

***The lead examiners recommend that Hungary clarify the competence of CIOPPS regarding foreign bribery cases, and take effective measures to ensure that CIOPPS promptly receives relevant information concerning such cases, notably by ensuring that the police and prosecutorial authorities are aware that they should refer foreign bribery cases to CIOPPS.***

***They further recommend that the Hungarian authorities ensure that the necessary resources are made available, in particular at CIOPPS, for the effective investigation and prosecution of the foreign bribery offence, and consider enabling the same prosecutor to follow a case throughout the entire investigation and prosecution, including at the trial stage.***

#### ***b) Police bodies***

78. Given the exclusive competence of the PPO in investigating as well as prosecuting the foreign bribery offence, the role of the Hungarian Police in this respect is consequently very limited. Nonetheless, the PPO may rely on the Police where they require additional support, and are authorised to request from the Special Service for National Security (SNSS, see also below) the use of special investigative techniques.

79. The main body in charge of criminal investigations in Hungary is the Police, which operate under the responsibility of the Hungarian Ministry of the Interior. The Hungarian Police counts approximately 40 000 police officers, and is divided into regional and municipal units.

80. On 1 March 2002, a specific Anti-Corruption Unit (ACU) has been created at the National Police Headquarters. The current legal basis for the functions and competences of the ACU is found in Decree 15/1994 of the Minister of Interior, as amended by Decree 26/2002 and Decree 38/2004 of the Minister of Interior. The Hungarian authorities have indicated that the ACU has exclusive competence within the Police for dealing with corruption issues. This exclusive competence is however limited to corruption offences not included under article 29 of the Act on Criminal Proceedings (CPA), for example those concerning bribery of lower ranking Hungarian officials. ACU representatives interviewed at the on-site visit indicated that, according to the procedure in place, other police units and institutions have a duty to

notify the ACU of any suspicion of bribery; the ACU is then responsible for launching the criminal procedure where it is competent, or referring it to the PPO if the offence falls under article 29 of the CPA.

81. At the time of its creation in 2002, ACU had a staff of eight persons. Its resources have however been increased since: at the time of the on-site visit in October 2004, ACU counted 18 police officers and two controllers. While some police officers have financial training, this is not generally the case. Representatives of ACU indicated that in-house training was provided to its staff on a regular basis, but that none had been focused on the foreign bribery offence. While the ACU will not itself be investigating the foreign bribery offence, it may nonetheless be appropriate for police officers working in this unit to be aware of the foreign bribery offence in order to be able to identify and detect it, before forwarding it to CIOPPS.

82. The Special Service for National Security (SSNS) is a civil national security service in charge of providing assistance to law enforcement agencies authorised by law to order special investigative means and methods. The SSNS was created by Act XXV of 1995 as a central body responsible for providing investigative techniques that involve intrusion into private life and require an external (by judges or the Minister of Justice) or internal (by the head of unit of the tasking organisation) authorisation. The SSNS has no authority to conduct investigations on its own initiative, but only acts at the request of the tasking organisations such as the Police (41 per cent of demands) or the PPO. (For further discussion on the use of special investigative techniques, see section 2(a) below.)

#### *Commentary*

*The lead examiners recommend that Hungary provide adequate training to police officers, notably those working for the Anti-Corruption Unit (ACU) at the National Police Headquarters, on the foreign bribery offence, in order to ensure that, where foreign bribery cases come to light, ACU has the expertise to recognise them as such and report them in timely manner to the prosecuting authorities.*

#### *c) Coordination between law enforcement authorities*

83. One element that raised the concern of the examining team during the on-site visit was the lack of clarity concerning competence of the different law enforcement bodies for investigating a foreign bribery case.

84. ACU representatives as well as certain representatives of the PPO interviewed at the on-site visit appeared to be under the impression that the competence of the Police versus that of the PPO would be determined based on the position of the persons involved; in foreign bribery cases more specifically, there was uncertainty as to whether the position of the active briber or that of the public official would be taken into account. ACU representatives seemed to believe that they would be competent to investigate foreign bribery offences, provided that no high ranking officials were involved.

85. According to CIOPPS, on the other hand, the Police would generally not be involved in the investigation of foreign bribery cases, except in situations where urgent measures may be required before referral of the case to the PPO, or if instructed to act by the PPO itself. CIOPPS representatives indicated that, where they require police assistance, prosecutors are free to rely on any police force. They further stated that, in foreign bribery cases, they would probably rely on the ACU. However, no case has arisen to date to test this hypothesis.

86. The erroneous impression that the police may be competent to investigate certain bribery cases based on the position of the briber or public official involved stems from articles 29(a) to 29(g) of the CPA, which provides for the exclusive competence of the PPO in conducting investigations for offences

committed by or against certain high ranking public officials. This confusion in interpretation could be usefully clarified with better awareness raising on the new article 29(g) introduced by Act I of 2002 in the CPA and which provides for the clear competence of the PPO for offences under Title VIII of Chapter XV of the Criminal Code, including the foreign bribery offence.<sup>45</sup> Following the on-site visit, the Hungarian authorities explained that this confusion also arose from an error in Schedule 2 of Decree 15/1994 of the Minister of Interior; this Schedule has since been corrected.

### *Commentary*

***The lead examiners are concerned about the lack of awareness regarding the clear allocation of authority to the PPO for foreign bribery investigations. They welcome the change brought to Schedule 2 of the Minister of Interior Decree to clarify this, and urge the Hungarian authorities to take all necessary measures to publicise the mechanisms for competence and coordination among the Police and prosecuting authorities without delay.***

### **d) Tribunals**

87. The Hungarian judicial system is composed of four court levels: 111 local courts, 20 county courts, regional courts of appeal and a Supreme Court. The regional courts of appeal were set up in July 2003 to reduce the workload both of the county courts and the Supreme Court. Before the reform, appeals from local courts were heard by county courts, and appeals from county courts decisions were heard by the Supreme Court. The former system was not appropriate to deal with the increasingly complex and numerous cases arising. Under the current system, cases whose adjudication is particularly difficult either because of the facts or laws involved are commenced in county courts; appeals in these cases are heard by the new regional courts of appeal. Local courts continue to decide simpler cases, and appeals in those cases continue to go to the county courts. Extraordinary requests for legal remedies, i.e., procedures other than appeals, are dealt with by the regional courts of appeal or by the Supreme Court. The Supreme Court also assists in ensuring the uniform application of the law through the so-called legal uniformity procedure. Three regional courts of appeal started work in July 2003 in Budapest, Pécs and Szeged, and two further regional courts in Debrecen and Győr will start work in January 2005. The overall situation as regards the length of judicial proceedings has improved, and the backlog of cases has been reduced.<sup>46</sup>

88. Act of Parliament of 8 July 1997 created a National Judicial Council (NJC) which took over the Ministry of Justice's responsibilities for the administration of the courts. Although the Ministry retains certain policy-setting powers such as the right to propose new legislation to regulate the court system, management of the courts is under the sole responsibility of the NJC. The NJC is a body elected by the judges in the county courts and is responsible for, *inter alia*, nominating judges, determining promotions, drafting the courts' budget proposal, initiating legislative proposals related to the work of the courts, as well as regulating and supervising court operations. The powers of the NJC also include the provision of training to judges. Representatives of the NJC present at the on-site visit indicated that, training on specific offences (including the foreign bribery offence) has never been provided, although projects are under way in this respect. Thus, to date, specialisation of judges is not formalised but is carried out according to

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<sup>45</sup> Article 258/B on the foreign bribery offence is the first article in Title VIII of Chapter XV on Crimes against the Propriety of International Affairs, in the Criminal Code.

<sup>46</sup> According to the European Commission's "Comprehensive monitoring report on Hungary's preparations for membership" at p.14, 86 per cent of all proceedings at first instance are now terminated in less than one year (1997: 83.7 per cent). The number of cases lasting longer than a year has been reduced to 36 000. In 2002, a record number of 1 166 000 cases – 6 per cent more than in 2001 – was terminated. 60 per cent of the 13 500 pending procedures at the Supreme Court are to be transferred to the new Regional Courts of Appeal. The backlog of court cases was reduced to 168 309 in 2002 (3.7 per cent less than in 2001).

competencies available in the courts, and any “*specialisation*” of judges is by reason of personal training or experience, rather than training organised by the NJC. Given the increasing complexity of financial and economic crime, judges interviewed at the on-site visit felt it would be desirable to put in place appropriate training programmes for judges at county and appeal court levels.

### *Commentary*

***Given the increasing complexity of economic and financial crime, the lead examiners encourage the Hungarian authorities to include appropriate materials on the foreign bribery offences in the training provided to judges.***

## **2. Investigation**

### **a) Investigative techniques**

89. In the Hungarian system, investigative techniques are divided in two main groups: those involving intrusion into private life (interception and recording of telecommunications, infiltration, etc.) which require external authorisation, and less intrusive methods (physical surveillance in public areas, data collection, etc.) which only require the internal authorisation of a supervisor.

90. Under article 201 of the CPA, covert data gathering techniques may be used when the offence is punishable with at least five years of imprisonment,<sup>47</sup> or is related to trans-boundary crime.<sup>48</sup> Investigations into foreign bribery offences may therefore rely on covert investigative techniques in such cases, provided authorisation is granted. The SSNS (see above) is the competent body for providing covert intelligence gathering means. For foreign bribery cases, prosecutors will need to seek prior authorisation from a judge by presenting a motivated request.<sup>49</sup> All prosecutors interviewed at the on-site visit indicated that such requests are almost always granted. Where there is a situation of urgency, prosecutors may go directly to the SSNS to request that covert data gathering begin, and must then obtain authorisation from a judge within the next 72 hours. All participants specified that, in practice, judges’ authorisations are usually granted even more quickly, well within the 72 hour limit. The SSNS uses its own resources for granting technical assistance where authorisation by a judge has been provided; thus, there is no impact on the available resources at the PPO. Representatives of the SSNS indicated that, in the past year, use of these techniques has dramatically increased (31 per cent between 2002 and 2003).

91. Witness protection mechanisms are available under Chapter VII, Title III (article 95 to 98/A) of the CPA. Different levels of protection exist, from confidential treatment of the witness’s personal data, to witness protection programmes including change of identity. There is no limitation on the list of offences which may justify witness protection. Such protection may be requested by the witnesses (or lawyers acting on their behalf) or ordered *ex officio*.<sup>50</sup> To obtain special witness protection, including confidentiality of identity, article 97 of the CPA requires the following: (i) the witness’s testimony must relate to substantial circumstances in a serious case; (ii) the expected evidence must be irreplaceable; (iii) the identity of the witness and the intention to hear his/her testimony must not be known to the defence; and (iv) the disclosure of the witness’s identity would seriously jeopardise his/her life, physical integrity or personal freedom (or that of his/her relatives).

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<sup>47</sup> Article 201(a).

<sup>48</sup> Article 201(b).

<sup>49</sup> Article 203 of the CPA.

<sup>50</sup> Article 96 *ibid*.

**b) Judicial cooperation**

*(i) Mutual legal assistance*

92. Rules governing mutual legal assistance (MLA) are set forth in Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters (the “ILA Law”). The Hungarian authorities have indicated generally that other than new provisions with regard to seizure and confiscation, it remains substantially unchanged from 2000. MLA available under the ILA Law includes extradition (discussed below), surrender or acceptance of criminal proceedings, surrender or acceptance of sentences of imprisonment or enforcement of such measures, and procedural assistance. The ILA Law applies “*unless otherwise stipulated by an international treaty*”. Hungary has ratified the relevant European treaties on MLA and has also concluded MLA treaties with a number of countries including Australia, Canada and the U.S.A.

93. Hungary has taken action to resolve an issue raised in Phase 1 with regard to whether bank secrecy could interfere with MLA. (See Phase 1 Report § 9.3.) Since Phase 1, article 51 of Act CXII of 1996 on Credit Institutions and Financial Enterprises (CIFE) has been amended to add a provision (art. 51(7)) to explicitly lift bank secrecy obligations in the context of MLA requests made pursuant to an international agreement and that contain a signed confidentiality clause.<sup>51</sup> Article 51(7) lifts bank secrecy; but it does not require the production of bank information.<sup>52</sup> At the time of the on-site visit, the agency requesting the bank information pursuant to an MLA request was required to notify the affected customer regarding its receipt of information. [See CIFE art. 53(2).] After the on-site visit, Article 53(1) of CIFE was amended, effective 1 January 2005, to eliminate the requirement of notification.

94. In Phase 1, Hungary indicated that it could not provide MLA to Parties requesting assistance in relation to non-criminal proceedings against legal persons. During the on-site visit, the Hungarian authorities confirmed that this limitation continues to exist. Hungary has enacted measures pursuant to the 2000 EU Convention which, once they enter into force, would require it to provide MLA to other EU Convention parties with regard to certain requests of this type.<sup>53</sup> However, the EU Convention has not yet entered into force and the Hungarian provisions will only enter into force upon the entry into force of that Convention.<sup>54</sup> Thus, MLA in this context is still not available to any Parties to the OECD Convention that have adopted regimes of administrative or civil liability for legal persons that engage in bribery.

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<sup>51</sup> See CIFE art. 51(7) (bank secrecy obligation does not apply where Hungarian law enforcement agency makes written request in order to fulfil written foreign MLA request made pursuant to international agreement and containing signed confidentiality clause); see also art. 51(3) (lifting bank secrecy for requests by tax authorities pursuant to similar foreign MLA request).

<sup>52</sup> In contrast, Arts. 52 and 53(1) CIFE require that financial institutions immediately release bank account data, without informing the relevant customer, upon the written application of investigating authorities, if it is alleged that the account is associated with certain crimes. But Article 52 defines the relevant crimes as the trade of narcotics, terrorism, illegal arms trading, money laundering or organised crime; foreign bribery is not included in the list. During the on-site visit, MLA specialists explained that in any event article 52 does not apply to MLA-generated requests because they are now covered by article 51(7). They also stated that despite its general language referring to written requests by “*investigating authorities, the national security service and the prosecution*”, article 52 applies only to the investigative phase and not during the judicial phase. In this regard, they explained that the reference to prosecutors requesting information is needed because prosecutors are entitled to investigate at an early stage of the case.

<sup>53</sup> Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (not yet entered into force).

<sup>54</sup> The EU Convention will come into force after eight states who were EU members in 2000 have completed the necessary procedures for its adoption. See

95. Article 5(1)(a) of the ILA Law imposes a dual criminality requirement. In Phase 1, Hungary explained that where the offence is within the scope of the Convention, dual criminality should exist if the requesting Party has fulfilled its obligation under the Convention in establishing the offence. During the on-site visit, MLA specialists indicated that the offence is not required to be identical or have the same name in both countries, but that it must be substantially the same.

96. The MLA process is administered by two central authorities. For requests that arise during the investigative stage (prior to the indictment), the Public Prosecutor's Office (PPO) is competent; for requests that arise after the indictment, the Ministry of Justice (MOJ) is competent. According to the Hungarian authorities, most requests (over 90 per cent) are sent and received by the PPO.

97. Two departments at the PPO have nationwide competence to deal with MLA requests: the Department of Supervision of Investigations, which deals generally with MLA requests; and the Most Serious Crimes Department, established in July 2003, which deals with the MLA aspects of such crimes. A PPO representative indicated that all letters rogatory received by the PPO are dealt with using the same procedures and on an urgent basis. There are no time limits for responding to MLA requests in the Criminal Procedure Act. However, prosecutors have the power to fix time limits for the agents charged with carrying out the necessary measures. In addition, "*enhanced supervision*" applies to such action; at the on-site visit, this was described as involving review of the entire file at least once or twice. The PPO representative stated during the on-site visit that requests are generally dealt with quickly. Similarly, she indicated that the available human resources were sufficient; the general MLA department has six prosecutors plus the head of the division. In addition, the Most Serious Crimes department is staffed by prosecutors specialised in economic crime and terrorism cases and they are able to handle MLA requests as well. The Public Prosecutors' Office statistical information does not identify foreign bribery cases among MLA cases, but they are certain that none exist. See Responses § 13.1.

98. In approximately 5-10 per cent of cases, and in particular when the foreign authority requests assistance from a Hungarian court, the request is forwarded to the relevant court or courts by the MOJ. The MOJ representatives indicated that the MOJ has no supervisory function in this regard and basically serves as a post office. The response is left to the relevant court. The MOJ transmitted approximately 950 incoming MLA requests in 2004 (and approximately 450 Hungarian requests to foreign countries) and has 3-4 staff for this purpose. A MOJ representative estimated that requests labelled as urgent would generally be satisfied by the relevant court within a month, but this estimate was based only on the general perceptions of MOJ staff; the MOJ does not maintain statistics about the length of time required to respond to requests. Because neither the MOJ nor any other agency tracks treatment of MLA requests by the courts, it is difficult to evaluate Hungary's performance in this area.

99. In addition, Act LIV of 2002 on International Cooperation of Law Enforcement Agencies (the "Law Enforcement Cooperation Act") provides for cooperation between Hungarian and foreign law enforcement agencies. It established an International Law Enforcement Cooperation Centre (NEBEK) to coordinate the receipt of and response to foreign requests for assistance. NEBEK can provide MLA assistance more quickly than through traditional channels, notably by facilitating direct police to police or prosecutor to prosecutor contacts.<sup>55</sup> However, the relationship between the ILA Law on the one hand, and NEBEK and the Law Enforcement Cooperation Act on the other hand, is not clear.

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[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000Y1229\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000Y1229(02)&model=guichett).

<sup>55</sup> Other assistance available under the law includes the direct exchange of information, controlled delivery, establishment of joint criminal intelligence groups, covert investigations, cross-border surveillance, hot-track pursuit and other matters.

100. With regard to seizure and confiscation, the MOJ indicated that one case involving a request from Germany had been resolved and confiscation granted. NEBEK has participated in obtaining the freezing of accounts within one or two days. However, there are no statistics breaking down MLA requests by type of request.

101. Hungary has also recently joined Eurojust and sent a national member from the Prosecutor's Office. Hungary has received about 5-6 incoming requests from Eurojust since May 2004. According to the Hungarian authorities, none of these requests relates to corruption.

### *Commentary*

*The lead examiners welcome the amendment of CIFE to exclude bank secrecy as a ground to refuse MLA requests. The lead examiners recommend that Hungary consider taking appropriate measures to make MLA available to all Parties to the OECD Convention in cases involving administrative or civil proceedings against legal persons for foreign bribery. In addition, Hungary should ensure that sufficient resources are available to effectively carry out its MLA obligations and monitor its performance of those obligations; for example, the examiners are concerned that insufficient resources are available at the MOJ to allow for any review of the progress of MLA requests or maintenance of statistics.*

#### (ii) *Extradition*

102. The ILA Law provides for extradition in the absence of a treaty or pursuant to a treaty.<sup>56</sup> Extradition is available for foreign bribery cases: Article 11(2) of the ILA Law provides that extradition is “permitted for the purposes of conducting criminal proceedings, if the act on the grounds of which extradition is requested is punishable under the laws of both Hungary and the requesting state by imprisonment of at least 1 year”. No requests for extradition have been made or received by the Hungarian authorities relating to foreign bribery. (See Responses § 14.) Hungary indicates that the condition of dual criminality should be satisfied if the offence is within the scope of the Convention, and the requesting Party has fulfilled its obligation under the Convention in establishing the offence. (See Phase 1 Report.) Hungary has also recently adopted legislation to govern surrender proceedings based on the European arrest warrant. [See Act CXXX of 2003 on the Co-operation with the Member States of the European Union in Criminal Matters (the “EU Cooperation Act”) (adopting the European arrest warrant).]

103. Article 10(3) of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. Where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities. Generally, Hungary does not extradite its citizens. Article 13(1) of the ILA Law only permits the extradition of Hungarian citizens that are citizens and permanent residents of another State.<sup>57</sup> The Hungarian authorities explained in Phase 1 that because extradition is generally not available for Hungarian citizens, all cases involving Hungarian citizens, including cases based on acts committed by Hungarian citizens abroad, would be prosecuted in Hungary based on nationality jurisdiction. During the on-site visit, prosecutors indicated that such prosecutions have been commenced in only a few cases, including one manslaughter case in which sanctions were imposed.

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<sup>56</sup> See ILA Law § 3 (providing that ILA Law shall be applied “*unless otherwise stipulated by an international treaty*”); id. §§ 11-35 (providing for extradition from and to Hungary).

<sup>57</sup> Article 13(2) allows the “*re-extradition*” of Hungarian citizens to a foreign state where they were extradited to Hungary from that state under the condition that they would be re-extradited to that state following completion of criminal proceedings or a sentence in Hungary.

104. Prosecutors also indicated that new rules now apply to Hungarian nationals who are subject to the European arrest warrant. Upon receipt of a European arrest warrant for purposes of prosecution, Hungarian officials will now generally arrest and surrender Hungarian nationals resident in Hungary for foreign prosecution, but surrender for prosecution may be conditioned on agreement to allow the accused to choose to serve any sentence or detention order in Hungary. [See EU Cooperation Act. § 5(2).]

### *Commentary*

*The lead examiners recommend that the Working Group follow up with regard to actions taken when Hungary refuses to extradite based on the Hungarian nationality of the person whose extradition is requested.*

## **3. Prosecution**

### *a) Principles of prosecution*

#### *(i) Mandatory prosecution*

105. Once the investigation is completed, the prosecutor may perform further investigations, suspend or terminate the investigation, or file an indictment.<sup>58</sup> In Hungary, criminal procedure is based on the principle of legality, which implies that an indictment shall be filed in every case, except where the alleged facts do not constitute a criminal offence, where the suspect can not be identified and no result may be expected from the continuation of the procedure, or where grounds exist for the preclusion or termination of punishability.<sup>59</sup>

106. Although no foreign bribery cases have been detected to date, representatives of the PPO assured that such cases would be taken very seriously and that all necessary measures would be taken to enable the filing of an indictment. In support of this, the Hungarian authorities relied on statistical information<sup>60</sup> on recent practice concerning domestic bribery involving official persons indicates that these offences are being prosecuted in Hungary. Close to 800 bribery related offences become known annually,<sup>61</sup> and virtually all offences related to bribery of domestic official persons are investigated.<sup>62</sup> Between 80 and 90 per cent of investigations lead to an indictment, and 10 to 20 per cent result in a conclusion of the investigation without the filing of an indictment. It should be noted that these statistics cover cases of both active and passive domestic bribery.

107. However, the lead examiners consider that such statistics on domestic corruption are not necessarily indicative of similar determination to prosecute foreign bribery cases, given that the interest and policy objectives differ widely between domestic and foreign bribery. Clear attribution of competence to a specific body, as well as ensuring adequate training and resources for the detection and prosecution of foreign bribery offences would provide clearer indication that the prosecution of foreign bribery cases is a priority.

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<sup>58</sup> Article 216(1) of the CPA.

<sup>59</sup> Article 6 *ibid.*

<sup>60</sup> Information provided by ERÜBS, the Unified Statistical Database of the Police and Prosecutors' Service, for the years 1995 to 2003.

<sup>61</sup> ERÜBS statistics indicate that 651 bribery related offences became known in 2000, 836 in 2001, 793 in 2002, and 782 in 2003.

<sup>62</sup> Less than 1 per cent of reported offences were subject to refusal of investigation between 1995 and 2003.



### Instructions from superiors in the hierarchy

108. Given the PPO's hierarchical organisation (see point B.1.(a) above), prosecutors can be instructed within the hierarchy and are obliged to follow instructions from superiors and the Prosecutor General.<sup>63</sup> Such instructions must be in conformity with the law, and may include instructions to open and/or terminate a case. At the request of prosecutors, instructions can be put in writing.<sup>64</sup> It was unclear to the examining team whether these instructions would appear in the case file: discussions at the on-site visit appeared to indicate they would not, but, after the on-site visit, the Hungarian authorities indicated that such instructions would always be available in the case file. Legal texts in support of this were not provided to the examining team. Prosecutors may ask to be dismissed from a case where they feel that the instructions are incompatible with the law or their legal conscience; in such situations, the case is entrusted to another prosecutor or the superior prosecutor may take over.<sup>65</sup> The lead examiners are concerned that if instructions are not made available in the case file, this would potentially allow senior prosecutors wide discretion to issue instructions, without meaningful review or transparency. The Hungarian authorities specified that Directive 11/2003 prescribes that detailed reasons for the filing of a case must always be indicated in the file by the prosecutor.

109. Naturally, prosecutors are bound by the Constitution and other legal rules, both in their work and in their behaviour, and including when issuing instructions.<sup>66</sup> The CPA, including grounds for closing an investigation, must always be observed. To further guarantee their independence, the Constitution prohibits public prosecutors from joining a political party or engaging in political activities.<sup>67</sup> Nonetheless, the European Union Accession Report on Hungary points out concerns raised by Parliamentarians regarding alleged lack of action in investigating corruption cases.<sup>68</sup> A judge interviewed at the on-site visit further considered that where senior prosecutors, who may have had links with political parties prior to their nomination within the PPO, are responsible for decisions relating to prosecutions, they might be susceptible to influence in issuing instructions. In this respect, the lead examiners stress the importance of clarifying that considerations prohibited under Article 5 of the Convention (i.e. national economic interest, relations with foreign States, or the identity of the natural or legal person) should not be taken into account when investigating or prosecuting a foreign bribery case.

### Review of decisions to close investigations

110. Under Hungarian law, there is no judicial review per se against a decision to close a case and not proceed with an indictment. However, limited legal remedies are available to “*anyone affected by the dispositions in the decision of the prosecutor or the investigating authority*”, within eight days of communication of the decision.<sup>69</sup> Such an objection can be sustained by the prosecutor or investigating authority within three days, but, if this is not the case, the objection is transmitted (i) to the prosecutor if the decision to close was taken by an investigative authority; or (ii) to a superior prosecutor if the decision was taken by a prosecutor. Given that the investigating authority in foreign bribery cases is the PPO,

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<sup>63</sup> Article 43(1) of Act LXXX of 1994.

<sup>64</sup> Article 43(2) *ibid.*

<sup>65</sup> Article 43(5) *ibid.*

<sup>66</sup> Article 22(1) of Act V of 1972 on the Prosecution Service of the Republic of Hungary.

<sup>67</sup> Article 53(2) of the Constitution of the Republic of Hungary.

<sup>68</sup> “Comprehensive monitoring report on Hungary’s preparations for membership” at p.13, European Commission, November 2003;  
[http://europa.eu.int/comm/enlargement/report\\_2003/pdf/cmr\\_hu\\_final.pdf](http://europa.eu.int/comm/enlargement/report_2003/pdf/cmr_hu_final.pdf).

<sup>69</sup> Article 195 of the CPA.

objections to prosecutorial decisions to close a case will always go to the superior prosecutor. Beyond this level of internal review, there are no further legal remedies.<sup>70</sup> An additional provision in the CPA states that “*anyone being affected by the measure or omitted measure of the prosecutor or the investigating authority may make an objection thereto*”.<sup>71</sup> In this case, the objection is not transmitted to a higher authority, and the only possibility is for the prosecutor or investigating authority to sustain the objection.

111. During the on-site visit, discussions with representatives of the PPO focused on the different definitions contained in articles 195 (“*anyone affected by the dispositions*”) and 196 (“*anyone affected by the measure or omitted measure*”). Prosecutors appeared unclear as to the scope of article 195: for certain prosecutors, possibilities to appeal under article 195 would be open to anyone “*concerned*” by the decision, while others considered that only persons specifically “*mentioned*” in the decision could appeal it. One prosecutor indicated that he felt a narrow interpretation should be given to article 195, in order to allow only persons to whom the decision was addressed to object, while other people concerned by the decision could only object as provided under article 196. As regards the possibility for competing companies having suffered from the corrupt behaviour of less scrupulous competitors to file an objection, prosecutors felt that this may be possible under article 195 only if the company was the one to have filed the complaint; objections by this company under article 196 as a person “*concerned*” by the decision would probably not be accepted. Given that the situation has not arisen to date, this interpretation is subject to confirmation by future practice. The Hungarian authorities indicated, after the on-site visit, that an amendment procedure has been initiated with the objective of clarifying the scope of articles 195 and 196 of the CPA.

112. The lead examiners remain concerned that this limited possibility to challenge decisions to not prosecute may be insufficient. If a superior prosecutor has instructed the public prosecutor in charge of the investigation and prosecution to close a case, it is unlikely that he/she will sustain objections raised under article 195 and that the case will be reopened.

113. The Hungarian CPA further provides, under articles 53 and 199(2), for the possibility of instituting supplementary private action, whereby the “*victim*” may bring charges as a “*substitute private accuser*”. This possibility is available if the complaint was rejected or the investigation terminated because the action did not constitute a criminal offence or based on grounds for preclusion of punishability,<sup>72</sup> or if the prosecutor filed formal charges only in respect of part of the accusation or dropped the charges.<sup>73</sup> Such supplementary private action is governed by criminal law procedure. The Hungarian authorities indicated they had no knowledge of such civil action having taken place, to date, in bribery cases, since the PPO is not likely to dismiss such cases.

114. However, the provisions on substitute private action may not be applicable in practice in foreign bribery cases. The victim is defined as “*the party whose right or lawful interest has been violated or jeopardised by the criminal offence*”.<sup>74</sup> According to the Hungarian authorities, victims would include natural as well as legal persons, but no cases of actions by legal persons have been cited. In this respect, public prosecutors present at the on-site visit were doubtful however as to whether a competitor could represent a sufficiently direct interest to act as a victim, even where he/she filed the original complaint. Furthermore, questions remain regarding the capacity of all state or state-owned companies to institute a

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<sup>70</sup> Article 195(5) *ibid.*

<sup>71</sup> Article 196 *ibid.*

<sup>72</sup> Article 199(2) *ibid.* Article 199(3) further states that the victim may not act as substitute private prosecutor “*if punishability is precluded because the offender is a child or mentally disabled, or upon the death of the offender.*”

<sup>73</sup> Article 53(1)(b) and (c) *ibid.*

<sup>74</sup> Article 51(1) *ibid.*

supplementary private action. A recent Supreme Court Uniformity Decision of September 2004<sup>75</sup> has opened the door to possibilities of supplementary private action by such persons. The Supreme Court indicated that “for criminal offences in which the State suffered material damage, a substitute private prosecution may take place in all cases where the conditions set out by article 53(1) of the Act on Criminal Proceedings are fulfilled.” To date, this possibility is however only open to a limited number of State bodies, namely “a State company or other economic organisation of the State or any other budgetary institution.” Foreign States, however, are not specifically included in the Supreme Court’s Decision. Thus a foreign State whose public official received a bribe from a Hungarian national may not be able to institute a supplementary private action.

### *Commentary*

***The lead examiners stress the importance of ensuring that the investigation and prosecution of foreign bribery cases are not influenced by considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved. They recommend that Hungary ensure that such considerations shall not be taken into account in foreign bribery cases.***

***Furthermore, in order to increase transparency, the lead examiners recommend that the Hungarian authorities take measures to require inclusion of instructions by senior prosecutors in the case file, and review possibilities for challenging decisions to close investigations, notably through private prosecutions by competitors.***

### (ii) *Statute of limitations*

#### General statute of limitations

115. Under article 33(1)(b), of the Hungarian Criminal Code, the statute of limitations for an offence that is not punishable by life imprisonment is the period equal to the maximum sentence applicable to the offence, but may not be less than three years. Since the increase of imprisonment penalties, by Act CXXI of 2001, the statute of limitations for the foreign bribery offence has been increased to five years in cases falling under article 258/B(2)<sup>76</sup>, but continues to be three years for a violation of article 258/B(1)<sup>77</sup>. All acts of criminal proceedings by law enforcement authorities, including MLA requests, interrupt the statute, with the period of time of prescription restarting on the day of the interruption.<sup>78</sup> Where the competent authority refuses to lift immunity, the statute of limitations is suspended for the duration of the immunity, except where the criminal case is prosecuted under supplementary private action (where the victim brings charges as substitute private accuser).<sup>79</sup> The statute of limitations, as in most criminal law systems, begins to run on the day on which the facts constituting the crime were realised.<sup>80</sup>

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<sup>75</sup> Supreme Court of the Hungarian Republic, Legal Uniformity Decision N°3/2004 [Criminal Matters] of 13 September 2004.

<sup>76</sup> The giving or promise of a favour so that the foreign official person violates his official duty, exceeds his competence or otherwise abuses his official position.

<sup>77</sup> The giving or promise of an undue favour to a foreign official person, in connection with his/her functions.

<sup>78</sup> Article 35(1) CC.

<sup>79</sup> Article 35(3) *ibid.*

<sup>80</sup> Article 34 CC.

116. As expressed by the Working Group in the Phase 1 and Phase 1bis examinations, concerns remain with regard to the three year statute of limitations applicable for offences under article 258/B(1), which may be too short given the particular complexity surrounding foreign bribery cases. Indeed, and as underlined by several law enforcement and civil society representatives at the on-site visit, corruption is very difficult to uncover. Reliance on intermediaries, secret commissions, false invoices, and, more generally, complex corporate mechanisms may render difficult the detection of the foreign bribery offence. Furthermore, as pointed out by prosecutors, corrupt practices are often detected when investigations are conducted in respect of other offences. Thus, it is likely that the three year statute will have run out by the time the foreign bribery offence is uncovered, thus rendering impossible the prosecution of the criminal act.

#### Limitation on the investigation period

117. Since the entry into force of the new CPA in July 2003, the period for investigations is limited to two years maximum from the date of the first questioning of the suspect.<sup>81</sup> The initial period set out by article 176(1) for investigation is two months, which may be extended up to one year by the country prosecutor general where the investigation is conducted by the police, and by the head of the prosecutor's office where investigation is conducted by the PPO. As provided under article 176(2), this period may be further extended by the Prosecutor General, but the extension may not be longer than two years following the first questioning of the suspect. Defence lawyers and judges interviewed at the on-site visit considered this period to be largely sufficient for carrying out necessary investigative measures in most cases, and stressed that people should not be kept under investigation for an indefinite period.

118. Although the lead examiners recognise these concerns, they consider that the two year limitation period does not provide a balance with the interest of ensuring the effective investigation of complex cases dealing with corruption of foreign officials. Collecting intelligence from abroad is notoriously time-consuming, and the case in Hungary may often depend on the investigation abroad. Translations of articles of the CPA provided after the on-site visit clarified that the investigation will be suspended, *inter alia*, where the suspect is absconding or abroad,<sup>82</sup> where the identity of the offender can not be established during the investigation,<sup>83</sup> or where action of the foreign authority in response to a request for legal aid is required.<sup>84</sup> This suspension pending responses to MLA or extradition requests is however limited to one year: article 188(3) provides the prosecutor with the discretion to set a maximum one year deadline if the investigation is suspended pending the return of a person abroad, or action of the foreign authority. Given that requests for mutual legal assistance or extradition often take longer than one year to process, concerns remain regarding the adequacy of a two year limitation period on investigation in serious cases involving bribery of foreign public officials.

#### *Commentary*

***The lead examiners consider that, given the growing complexity of the corporate mechanisms in place to pay and dissimulate bribe payments, the three year statute of limitations for a foreign bribery offence under article 258/B(1) (giving or promising an undue favour to a foreign official person in connection with his/her functions) does not allow for an adequate period of time for prosecution. They therefore recommend that Hungary consider increasing***

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<sup>81</sup> Article 176 of the CPA, introduced by Act I of 2002.

<sup>82</sup> Article 188(1)(a) *ibid.*

<sup>83</sup> Article 188(1)(c) *ibid.*

<sup>84</sup> Article 188(1)(e) *ibid.*

*its statute of limitations applicable to the offence under article 258/B(1) to five years, in line with the period for the foreign bribery offence under article 258/B(2).*

*Given the recent entry into force of the limitation period imposed for the conclusion of investigations, the lead examiners recommend that Hungary consider allowing for longer suspensions of this limitation period in foreign bribery cases, notably where information is required from abroad. They further recommend that the Working Group follow-up the practice in this respect to assess whether the limitation period on investigations provides for adequate time for investigation of foreign bribery offences under articles 258/B(1) and 258/B(2) CC.*

(iii) *Grounds for precluding or terminating proceedings*

#### Statutory immunity from prosecution

119. The Hungarian legal system sets out a temporary immunity from prosecution (i.e. for the duration of one's mandate) to a large group of public officials. Immunity is guaranteed under the Constitution to the President of the Republic<sup>85</sup> and to Members of Parliament (MPs).<sup>86</sup> Article 551(1) of the CPA further provides that “*no criminal procedure may be instituted*” against, *inter alia*, MPs, judges of the Constitutional Court, certain Ombudsmen, as well as the Chairman and Deputy Chairman of the State Audit Office (SAO). For these categories, the immunity applies to acts performed in the course as well as outside the performance of their duties. In addition, under article 551(2), professional judges, public prosecutors and lay assessors benefit from similar immunities but only “*on account of criminal offences committed by them in their official capacities*”. The lead examiners consider that this system of immunities could hinder effective investigation and prosecution of the foreign bribery offence in certain cases, for instance where MPs or other immune officials are allegedly involved with Hungarian companies engaged in bribery of foreign public officials.

120. Only the Prosecutor General may initiate the procedure for the lifting of immunities of persons covered by article 551(1) and (2), by submitting a request for suspension of immunity to the body or person authorised to suspend the immunity.<sup>87</sup> Such bodies and persons are designated in the specific legal acts concerning the different categories of persons enjoying immunity, which also contain additional rules on the modalities for lifting the immunity. The relevant authority is Parliament for lifting immunities of the President of the Republic (impeachment procedure), MPs, Chair and Deputy Chair of the SAO. For members and judges of the Constitutional Court, the Constitutional Court is responsible for deciding on suspension of immunity. For other judges, the decision is taken by the President of the Republic, on recommendation from the National Judicial Council. The Prosecutor General decides on the lifting of immunity for prosecutors.

121. Pursuant to article 552(2) of the CPA, the statute of limitations is suspended during the period of the immunity in cases where the authority competent to waive immunity refuses to lift it. The same article states that “*unless otherwise provided for in other legislation, the abandonment of the procedure for such reason may not be an impediment to the criminal procedure to be resumed after the personal immunity has come to an end*” (see also section (ii) above on the statute of limitations).

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<sup>85</sup> Article 31/A(1) of the Constitution of the Republic of Hungary.

<sup>86</sup> Article 20(3) *ibid*.

<sup>87</sup> Article 552(1) of the CPA.

122. In addition to immunity from criminal prosecution, the persons covered by article 551(1) and (2) of the CPA and whose immunity has not been lifted may not be interrogated as suspects, and no coercive measures may be taken against them, except where they have been caught in the process of committing the offence.<sup>88</sup> This extension to immunity from certain investigative measures may constitute an obstacle to effectively investigating other natural and legal persons involved in the same bribery transactions or in related offences, for whom the statute of limitations continues to run.

123. Several representatives of civil society as well as judges expressed the view that the categories of officials benefiting from immunities are fairly wide and, according to an NGO report, only two MPs were subject to criminal investigation by 2002.<sup>89</sup> However, civil society representatives present at the on-site visit acknowledged that prosecutions against MPs were becoming increasingly common. With specific regard to domestic corruption cases, although one representative of the opposition party recounted a case in which the immunity of an MP had been lifted, the judicial authorities interviewed at the on-site visit were more dubious in this respect, and recalled several cases in which the immunities of MPs of the governing party were not lifted. A November 2003 European Commission Report also indicated that “*in several cases of suspected corruption, the lifting of immunity requested by the CIOPPS has been refused*”.<sup>90</sup> Representatives of the Ministry of Justice indicated that in practice the immunity would be lifted in bribery cases. In this respect, after the on-site visit the Ministry provided data from 2002 indicating that for this term of Parliament, ten requests for the lifting of immunity of MPs were granted and only two refused, neither of which was related to corruption. Furthermore, the Parliament’s Committee for Immunities issued a general guidance concerning corruption cases on 16 June 2004 stating that “*the uninterrupted practice of the Parliament in corruption cases, according to which the immunity of MPs has always been lifted, regardless of the political interest at stake, is endorsed by the Committee and will be followed in the future.*”

#### Article 255A of the Criminal Code

124. Article 255A CC exonerates a perpetrator of domestic bribery who (1) confesses the act to the authorities first hand, (2) surrenders the obtained unlawful financial advantage, and (3) reveals the circumstances of the criminal act. Article 255A applies only to a defined list of domestic offences and not to foreign bribery offences. Given that no foreign bribery offence has been prosecuted to date, further monitoring by the Working Group is necessary to ascertain whether cases of foreign bribery are not prosecuted due to the presence of the factors in article 255A, and to consider the extent to which such factors might be considered mitigating circumstances in sentencing.

#### *Commentary*

***The lead examiners are concerned that such a broad range of public officials enjoy immunity from prosecution, as well as immunity from certain investigative measures, in Hungary. The lead examiners recommend that the Hungarian authorities consider, within the constitutional principles of the State, measures that may be taken in order to ensure that immunity does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences and that it is consistent with Article 5 of the Convention. The lead examiners further recommend that the Hungarian authorities issue guidelines stressing that all necessary***

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<sup>88</sup> Article 551(3) *ibid.*

<sup>89</sup> Corruption and Anti-corruption Policy in Hungary, Open Society Institute, 2002, Monitoring Anti-corruption policies in the EU candidate countries.

<sup>90</sup> “Comprehensive monitoring report on Hungary’s preparations for membership” at p.16, European Commission, November 2003.

*measures should be taken to lift such immunities in the context of foreign bribery investigations and prosecutions.*

*The lead examiners also recommend that the Working Group follow up with regard to the potential effect of the factors identified in article 255A CC relating to cooperating defendants on the investigation, prosecution and sentencing in foreign bribery cases.*

**b) The foreign bribery offence**

*(i) Overview*

125. Domestic bribery offences are set forth in Title VII of the Criminal Code, entitled Crimes against the Integrity of Public Life, which contains articles 250-258A. Foreign bribery offences are set forth in Title VIII, entitled Crimes against the Integrity of International Public Life, which contains articles 258B-258F. Title VIII includes offences for both passive (art. 258D) and active bribery of foreign officials (art. 258B), as well as bribery of employees or members of a “*foreign economic organisation*” (art. 258C) and trafficking in influence in international relations (art. 258E). Article 258B defines two different active offences for bribery of foreign officials. Paragraph (2) applies to bribery of a foreign official so that he/she will violate his/her official duties, exceed his/her competence or otherwise abuse his/her official position. Paragraph (1) applies a lesser sanction to bribing a foreign official “*in connection with his functions*”.

*(ii) Elements of the Offence*

The Undue Advantage and the Nature of the Expected Action or Inaction by the Foreign Public Official

126. As noted in the Phase 1bis Report, Act CXXI of 2001 amended the Criminal Code by adding the adjective “*undue*” to describe the advantage offered to a foreign public official. [(See art. 258B CC (applying to person who gives or promises an “*undue favour*”).] The Hungarian authorities indicated that the change would make it possible to distinguish between criminal and lawful behaviour. At the on-site visit the Hungarian authorities explained that “*undue favour*” refers to both material and personal advantages regardless of actual value, and that it covers both direct and indirect benefits to the official.

127. The essential element when deciding whether or not an advantage is “*undue*” is its nature or value. The Hungarian authorities indicated that the local custom would not be taken into account when deciding whether an advantage is “*undue*”. The examples of “*undue favour*” provided during the on-site visit varied from giving credit or credit facilities to offering the possibility of earning money (e.g. offering a second job) or paying for school for a relative. The Hungarian authorities also indicated that a bribe paid to a public official by the best qualified bidder who is then awarded the tender would constitute an undue favour. However, no case law has been provided to illustrate these interpretations.

128. During the on-site visit, a representative of the law enforcement authorities stated that it is often very difficult to decide whether an advantage is “*undue*”. He considered that this was the case especially where the *quid pro quo* (i.e. what the public official is expected to provide in return for the “*undue favour*”) is not obvious or apparent. A similar issue arose in a recent domestic matter referred to by, among others, several civil society representatives at the on site visit. This case involved a bidding procedure in which there was allegedly preferential treatment of local wine producers with political connections. According to many participants at the on-site visit, charges have not been laid because of the difficulty in establishing the illegality of the *quid pro quo* obtained by the bidders. Panellists appeared to consider that a contract would need to be expected or obtained from the public official in order to constitute the offence. Subsequent to the on-site visit, the Hungarian authorities indicated that these views were the personal opinions of the panellists and that this element does not constitute any problem for the police, prosecutors or judges. However, the examiners note that, as stated above, a law enforcement official had encountered

difficulties with this element of the offence. Moreover, the Hungarian authorities have not explained why no charges have been laid in the case involving wine producers. As stated above, the examiners consider that, for instance, an explanatory brochure with concrete examples of the application of the foreign bribery and related legislation could greatly assist in improving the understanding of the offence and related offences.

129. In this regard, the lead examiners note that, as stated in the Phase 1bis Report, article 258B(1) was amended so that it no longer requires proof that the bribe was intended to influence the functioning of an official “*to the detriment of the public interest*”. Instead, the offence now only requires proof that the bribe was given or promised “*in connection with the functioning of a foreign official person*”. This new language, which arguably eliminates the need for an explicit quid pro quo for the particular payment, should help to overcome the difficulties expressed in the previous paragraph. The lead examiners consider that this change should also be better publicised by the Hungarian authorities.

### Foreign Public Official

130. At the time of Hungary Phase 1bis examination a “*foreign official*” was defined in article 137(3) CC as “*a person vested with legislative, judicial or public administration duties in accordance with the laws of a foreign State*”. The Working Group found that the reference to the laws of a foreign State in this definition was not in compliance with the Convention and recommended that the Hungarian authorities review the definition.

131. Article 137(3)(a) was amended in 2003 and the new language took effect in March 2004. The amendment eliminates the reference to the laws of a foreign State. Pursuant to the new definition, a foreign official is, *inter alia*, “*a person vested with legislative, judicial, public administration or law enforcement duties in a foreign State (...)*”.<sup>91</sup> The Hungarian authorities indicate that persons vested with law enforcement duties are the members of the authorities responsible for investigating and prosecuting criminal offences. The lead examiners consider that this change satisfactorily resolves the concerns about references to foreign law.

132. The definition of foreign public official in Article 1(4)(a) of the Convention includes both an “*office*”-based component and a “*function*”-based component. The definition of a “*foreign official person*” in article 137(3) CC, as applied to persons working for foreign states, is based on duties, i.e., a functional criteria: as noted, it applies to persons “*vested with legislative, judicial, public administration or law enforcement duties in a foreign State (...)*”. The definition does not include a list of offices. As noted in the Phase 1bis report, the Hungarian authorities have explained that they consider that the concept of “*office*” is covered by that of “*duties*” since logically persons holding a public office have the right (possibility) to perform public duties. (See Phase 1bis Report §1.3.)<sup>92</sup> During the on-site visit, a representative of Ministry of Justice stated that the new definition would cover all persons performing public duties at all levels and subdivisions of government, from the national to the local level, as well as persons performing tasks delegated by a foreign country in connection with public procurement. The Hungarian authorities have also indicated that the definition also covers officials performing administrative or public duties in a state-owned or state-controlled enterprise or organisation. No case law has been provided on these points, some

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<sup>91</sup> This part of the definition applies to officials of foreign states; other parts apply to officials of international organisations and courts.

<sup>92</sup> Representatives of the Ministry of Justice and judges also indicated that in applying the domestic definition of “*official person*”, the main element when deciding whether or not a person has the quality of “*official*” is the performance of a public duty regardless of the public or private nature of the institution or the body he/she works for. However, the domestic definition differs from the foreign definition and includes a list of offices as well as a functional criteria.



of these issues arise out of recent changes to the definition of foreign public official and no case law is available.

133. According to the Commentary relating to the domestic bribery offence, a person who is commissioned by a state administrative organ to perform certain duties is apparently a public official only if he/she is under a contract of employment.<sup>93</sup> Thus, the definition of a public official arguably depends on the legal arrangement under which an individual is remunerated for his/her services, rather than the nature of his/her functions. The examiners are concerned that the application of this rule to foreign bribery cases would not be in compliance with the Convention. The Hungarian authorities consider that this interpretation reflects only the opinion of the author and that it is not the official position of the drafters of the law or the Parliament. However, the Explanatory Memorandum does not address this point.

134. The lead examiners also have possible concerns about the application of Hungarian law to bribes to individuals who work for foreign companies and in particular foreign state-owned companies and, as such, carry out public functions. Under the Convention, such individuals are foreign public officials. The concerns arise from the relationship between articles 258B and 258C CC. As noted above, articles 258B(1) and (2) apply to bribery of foreign official persons whereas article 258C criminalises active bribery of an employee or member of a “*foreign economic organisation*”. A foreign economic organisation refers to companies and other legal persons “*entitled to perform economic activities*”; it includes state-owned or controlled companies.<sup>94</sup> Accordingly, both articles 258B and 258C arguably apply to bribes paid to a member or employee of a foreign state-owned or state-controlled company who is carrying out public duties.

135. The difficulty arises because article 258B applies broadly and covers bribes paid so that an official will “*violate his official duty, exceed his competence or otherwise abuse his official position*” as well as bribes paid “*in connection with a foreign official’s functions*”. In contrast, article 258C applies only where the briber seeks to have the employee or member of the foreign economic organisation “*violate his duty*”. The provisions are thus inconsistent with regard to, for example, bribes paid to influence the person’s exercise of his/her discretion.

136. During the on-site visit, a representative of the Ministry of Justice explained that, depending on the situation and the circumstances of the case, both of these provisions could be applicable. He further indicated, however, that in the case where the bribed person is an employee of a foreign economic organisation but he/she is also performing public duties, article 258B is the only applicable provision. Hence, the main element when deciding which provision of the Criminal Code applies is whether or not the member or employee of the foreign economic organisation was performing a public function or duty.

137. Some passages in the Commentary are of concern to the examiners in this regard. In discussing article 254, a provision somewhat similar to article 258C that is applicable to bribery of employees and members of domestic economic organisations, the Commentary states that article 254 punishes only bribery aimed at obtaining actions in breach of a duty. It is “*therefore not a sufficient condition that giving or promising an advantage is otherwise in connection with the actions of an employee or member of a state organ etc.*” The Hungarian authorities consider that these interpretations reflect only the opinion of the

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<sup>93</sup> See Commentary on article 250, point 2 (in article discussing notion of public official, stating that “[t]hose who accept an advantage of pecuniary nature in connection with controlling activities performed on commission by a state administrative organ, but without having a contract of employment therewith, do not commit bribery.”).

<sup>94</sup> The Criminal Code defines a “*foreign economic organisation*” as an “*organisation functioning as a legal person according to its personal law, which is entitled to perform economic activities in its prevailing organisational form*”. (See art. 258F(2) CC).

author and that it is not the official position of the drafters of the law or the Parliament. The Explanatory Memorandum does not address this point.

138. During the discussion of the report in the plenary meeting of the Working Group, a question was raised about whether foreign military officials would constitute foreign officials under Hungarian law. The lead examiners consider that the broad language of the Hungarian law referring to persons serving in , inter alia, "administrative bodies", is similar to the broad language of the Convention in this respect and that military officials would accordingly constitute foreign public officials under Hungarian law. They draw attention in this respect to the broad scope of the reference to administrative officials in the Convention. Nonetheless, they consider that this issue should be followed up by the Working Group in light of actual practice.

### Bribery through Intermediaries

139. Unlike Article 1 of the Convention, article 258B does not expressly cover bribery through an intermediary. The Hungarian authorities consider that the phrase “*gives or offers undue favour to the foreign public official or with regard to the latter to a third person*” covers both cases involving intermediaries and cases involving third party beneficiaries. (See Phase 1 Report §§ 1.5, 1.7.) On the former point, the Hungarian authorities have described a Supreme Court domestic bribery case finding an individual liable for bribery where he paid money to an intermediary so that the latter would obtain a drivers licence for the briber using his connections and influence.<sup>95</sup> The intermediary was found liable for trafficking in influence. While it is not clear that actual benefits passed through to the official, this case supports the Hungarian authorities' interpretation of the law regarding coverage of intermediaries. The Hungarian authorities have confirmed that the domestic and foreign bribery offences have identical language in this respect.

### *Commentary*

*The lead examiners welcome the amendment of article 258B CC to eliminate the reference to foreign law in the definition of foreign official. They encourage the Hungarian authorities to make clear in relevant explanatory materials that the concept of persons “vested with legislative, judicial, public administration or law enforcement duties” in article 258B also applies to cover all foreign officials who hold public offices. The lead examiners also consider that the Hungarian authorities should better publicise and explain the amendment of article 258B(1) to require only proof that the bribe was given or promised “in connection with the functioning of a foreign official person”.*

*The lead examiners recommend that the Hungarian authorities consider clarifying the application of the definition of foreign official to persons commissioned by state administrative organs. They also consider that further clarification may be necessary with regard to the relationship between articles 258B and 258C of the Criminal Code and the application of the law to bribery of employees or members of foreign-state owned companies who are carrying out public functions.*

*The lead examiners accordingly recommend the Hungarian authorities take appropriate measures to disseminate information and issue guidelines about the interpretation of the new rules in these respects. In light of the absence of case law, the Lead Examiners also recommend that the Working Group follow up on the application of the foreign bribery*

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<sup>95</sup> Supreme Court (Legf. Bír. Bfv. IV. 1544/1997; published under No. BH1998.320).

*provisions as case law develops, including with regard to the definition of foreign public official and the question of bribery through intermediaries.*

(iii) *Defences*

Duress

140. The Hungarian authorities indicate that under the Hungarian criminal law “*duress*” could be a defence or a mitigating factor in sentencing applicable in a foreign bribery case. They further explain that, pursuant to article 26 CC, “*duress*” also includes extortion. The Hungarian authorities asserted however at the on-site visit that it would be difficult to establish this defence in a foreign bribery case. The main reason for this is the nature and the extent of this defence. It is only applicable when the offender proves that the offence was committed under a direct threat of physical or psychological damage to him/herself or his/her relatives. In the view of the prosecution authorities, duress does not cover psychological coercion like, for instance, the interposing of obstacles or delays in the normal performance of activities. They further asserted that duress does not cover the situations where the public official made clear that he/she will not carry out his/her official duties without the bribe. However, no specific case law or guidelines was provided to support this statement.

*Commentary*

*In light of the absence of cases supporting the position of the Hungarian authorities that the defence of duress is limited to threats of physical or psychological damage, the lead examiners recommend monitoring this issue to confirm the scope of the defence as applied in practice to foreign bribery cases.*

c) *Liability of legal persons*

141. On 1 May 2004, Act CIV on Measures Applicable to Legal Persons under Criminal Law (“Act CIV of 2001”) entered into force. Although the Act recently entered into force, it was adopted in 2001 and was accordingly addressed in the Phase 1bis report. (See Phase 1bis Report at 4-8, 20.) The Working Group recommended that certain issues be re-examined in the Phase 2 review including the requirement of a conviction of a natural person and the requirement that the perpetration of the bribery must have aimed at or resulted in the legal entity gaining financial advantage.

142. Act CIV of 2001 has not yet been applied and there is thus no Commentary on applicable case law. The Explanatory Memorandum was mentioned several times during the on-site visit. The Hungarian authorities have not supplied the lead examiners with a translation of the Explanatory Memorandum for Act CIV of 2001. Accordingly, the lead examiners base the following observations on the text of the law and the explanations given by the participants at on-the site-visit.

(i) *The requirement of a conviction of a natural person for bribery*

143. Article 2 of Act CIV of 2001 specifies the individuals whose actions can trigger the liability of the legal person. Article 3(1) then provides that measures can be taken against a legal entity “*if the court has imposed punishment on the person committing the criminal act defined in Article 2 ...*” Thus, unless one of the specified natural persons is identified, convicted and sentenced, no sanction can be applied against the legal person. The only exception is where “*the perpetrator is not punishable due to his mental illness or death.*” [See art. 3(2).] The Hungarian authorities reiterated the need for the conviction and sentencing of a natural person both in the Responses and at the on-site visit. They explained during the on-site visit that liability of legal persons is considered to be complementary because “*the emphasis (of the regime) is on finding the natural persons who are responsible for the crime*”.

144. As a procedural matter, the identification of a natural person responsible for the offence of foreign bribery from being committed is a necessary step in order to initiate proceedings against a legal person. Panellists indicated that criminal proceedings may be commenced against a legal entity provided that an investigation or prosecution against a natural person acting in the interest of this entity has been already initiated.

145. The lead examiners believe that a regime for the liability of legal persons for foreign bribery that requires the prior conviction and sentencing of the natural person who perpetrated the offence does not meet the standard under article 2 of the Convention. A system of liability of legal persons that requires the identification and conviction of the natural person involved in the offence fails to address increasingly complex corporate structures, which are often characterised by decentralised decision-making. In addition, a number of defences could potentially exclude the liability of a natural person in cases of corruption. (See Phase 1bis report at 7-8.)

146. The Hungarian authorities consider that the Convention leaves space for national authorities to decide whether to implement it by prescribing criminal sanctions or administrative sanctions against legal persons. The lead examiners agree with this interpretation, but they consider that once a country decides upon one of the two methods, it is required to achieve effective, proportionate and dissuasive sanctions of legal persons. They consider that the requirement of the punishment of a physical person currently prevents Hungary from achieving that standard under Act CIV of 2001. Moreover, in the absence of a conviction of a physical person, there are no administrative sanctions applicable to legal persons who commit bribery. The applicable administrative sanctions for bribery, such as exclusion from public procurement, require a conviction of the company (and thus punishment of a physical person). See below the section on Other Sanctions, §§ 201-208.

### ***Commentary***

***The lead examiners recommend that the Hungarian authorities amend the law to eliminate the requirement of a conviction of a natural person as a prerequisite to the liability of a legal person.***

(ii) *The requirement of an intended or actual financial advantage for the legal person*

147. Article 2 of Act CIV makes an intended or actual financial advantage for the legal entity an essential element for the liability of legal persons. Article 2 provides that legal persons can be liable for intentional offences in the Criminal Code if, *inter alia*, “*the perpetration of such an act was aimed at or has resulted in the legal entity gaining financial advantage ...*” Financial advantage is defined in Section 1(1)(2) of the CIV Act as “*any object, right of pecuniary value, claim or preference irrespective of whether they have been registered pursuant to the Act on Accounting, as well as cases where the legal entity is exempt from expenditure according to an obligation arising from a rule of law or contract or according to the rules of reasonable business management.*”

148. These provisions raise two principal concerns for the lead examiners. First, article 2 requires that the bribe have been aimed at producing, or have actually produced, a financial gain for the legal person. This leads to the concern that, where the financial gain went to an affiliate, the offence might not be considered to have been committed. At the on-site visit, a representative of the Ministry of Justice confirmed that if the bribe is not aimed at, or does not produce, a gain for the legal person but is instead aimed at or produces a gain for an affiliate (e.g. a parent company or foreign subsidiary), the sanctions cannot be applied to the legal person itself. In contrast, a representative of the judicial authorities at the on-site visit indicated that judges might be willing to sanction a company even though the “*financial advantage*” from the foreign bribery offence went to its affiliate although the basis of this approach was

not specified. The examiners note that this requirement could be particularly difficult to establish when an enterprise has recourse to complex corporate structures when performing its economic activities abroad.

149. Second, the examiners are also concerned about the necessity to demonstrate an actual or intended financial advantage, i.e. a profit. This condition may not be satisfied in cases where the *quid pro quo* is not provided by the foreign public official or a financial gain (profit) is not shown in the books. In some cases, companies could bribe in order to obtain a loss-making contract, such as where they are seeking to enter a major new market. In cases where the *quid pro quo* is received, but the prosecutor is unable to demonstrate that a profit was obtained, an offence might not be considered to have been committed. Proof of the existence of a profit also creates substantial evidentiary burdens for the prosecution and could involve complicated analysis of accounting and other documents.

### *Commentary*

***The lead examiners are concerned by the provisions in Act CIV requiring that the briber have aimed at giving or have actually given a financial advantage to the legal entity. The requirement that the benefit must be directed at the specific legal entity subject to prosecution creates a substantial loophole that companies can seek to exploit by directing payments or contracts to affiliates or, potentially, to other third party beneficiaries. The examiners recommend that the Hungarian authorities amend the law to eliminate this requirement. In addition, the examiners are concerned about potential difficulties arising from the necessity to prove an intended or actual financial advantage or profit. In some circumstances, such as cases involving complicated accounting or a loss-making contract, this requirement could constitute a serious obstacle for the prosecution. The examiners recommend that the Hungarian authorities eliminate this requirement in foreign bribery cases.***

(iii) *The additional conditions for the liability of the legal person*

150. As noted, article 2 defines the specific persons whose acts can give rise to the liability of the legal person. It also defines the conditions under which bribery by such persons can give rise to the liability of the legal person. The specific persons and additional conditions for liability are defined as follows: (i) the bribery is committed by one of the members or officers [of the legal entity] entitled to manage or represent it, or a supervisory board member and/or their representatives acting within the legal scope of activity of the legal person [article 2 (1)a)]; (ii) the bribery is committed by one of the members of the legal entity or an employee acting within the legal scope of activity of the legal person provided the bribery could have been prevented by the chief executive fulfilling his supervisory or control obligations [article 2 (1)b)]; and (iii) the bribery is committed by a third party individual, provided that the legal entity's member or officer entitled to manage or represent it had knowledge of the facts [article 2(2)]. Generally panellists recognised that a number of the definitions in article of the persons would need interpretation in practice. In the view of a representative of the Ministry of Justice, the Act on Business Associations should give sufficient guidance in this respect with regard to the specified persons.

151. The additional requirements for liability of the legal person will also need to be interpreted and applied by the courts. For example, article 2(1)(a) and (b) both require that the bribery have been committed by the relevant person “*within the legal entity's scope of activity*”. The Hungarian authorities have indicated that a criterion is necessary to link the offence to the legal person in order to satisfy constitutional requirements. The examiners accept this point, but are concerned about the possibility of narrow interpretation of the scope of activity criterion particularly as applies to criminal activity and suggest follow up with regard to the application of this criterion in practice.

152. Similarly, as a representative of the judiciary pointed out, it will be necessary to clarify the exact meaning of concepts like a failure to “*supervis[e]*” by a “*chief executive*”.<sup>96</sup> The law does not provide any guidance in this respect. The Phase 1bis report indicated that a variety of officers or board members could be a chief executive. (See Phase 1bis report at 7.) Nor have the Hungarian authorities provided the lead examiners with any materials explaining the necessary degree of supervision to avoid liability for bribery. Depending on the interpretation given to these and other terms, the scope of liability may be significantly restricted.

153. The Hungarian authorities consider that the key concepts in the law are explained to an adequate degree in the Explanatory Memorandum, but in the absence of an opportunity to review a translation of the relevant passages or other information, the lead examiners cannot meaningfully evaluate that assertion.

### *Commentary*

*The lead examiners recommend that the Hungarian authorities develop and publicise circulars, brochures or other explanatory materials relating to the application of key terms in Act CIV of 2001 to the foreign bribery offence, including for instance their application to particular factual hypotheses. The lead examiners also encourage the Hungarian authorities to (1) define more clearly than by the reference to a "chief executive" the class of persons whose failure to supervise can trigger the liability of the legal person; and (2) consider establishing minimum standards with regard to appropriate supervision by such persons in order to avoid liability. More generally, given the recent entry into force of the law, the absence of case law and the inability to review the Explanatory Memorandum concerning the new law, the lead examiners recommend that the Working Group follow up with regard to the application and interpretation of the new law.*

(iv) *Legal persons subject to criminal liability*

154. Article 1 of Act CIV defines the legal persons subject to the Act as follows:

any organisation or organisational units thereof vested with rights of individual representation, which the governing rules of law recognise as legal entities, as well as organisations that can be subject to conditions of civil law in their own right and possess assets distinct from that of their members, including companies active prior to registration pursuant to the Act on Economic Associations.

155. The Hungarian authorities have clarified that Article 1 of Act CIV of 2001 establishes two independent criteria for legal persons: (1) those entities which governing rules of law recognise as legal entities; and (2) organisations that can be subject to conditions of civil law in their own right and possess assets distinct from their members. Accordingly, even if the governing law does not provide that an entity is a legal entity, it may be a legal person within the meaning of article 1.

156. During the on-site visit, it was not entirely clear whether some state-owned or state-controlled companies may be excluded from the application of the new regime for criminal liability of legal persons, although some panellists indicated that public enterprises would also be covered by the new legislation.<sup>97</sup>

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<sup>96</sup> The Hungarian authorities also suggested that “*in a very serious circumstance*” the offence could be considered to be committed in a group or in criminal conspiracy. The basis for this liability and the criteria for defining such “*very serious circumstances*” are unclear.

<sup>97</sup> The following are expressly excluded from the scope of the Act CIV, and are therefore not subject to criminal liability: “*the State of Hungary, foreign States, the institutions listed in the Constitution of the*

Subsequent to the on-site visit, the Hungarian authorities clarified that state-owned and state-controlled enterprises function in accordance with the Civil Code or the Act on Economic Associations. According to the Hungarian authorities, these laws always clearly indicate that these entities are legal persons, and, as such, they constitute legal persons under Act CIV of 2001.

157. At the on site visit the Hungarian authorities reiterated their position during the Phase 1 bis review that *de jure* legal persons and *de facto* legal persons are covered by article 1 of Act CIV. In addition, in their view, because Act CIV does not distinguish Hungarian legal persons from foreign legal persons, foreign legal persons are subject to criminal liability.

**d) Related offences**

*(i) Accounting and auditing: Standards and offences*

158. The Accounting Law C of 2000 (the “Accounting Law”) took effect on 1 January 2001 and has been framed generally to bring Hungarian financial reporting practices in line with International Accounting Standards (IAS) and the EU fourth and seventh directives. The Accounting Law applies to all economic entities (except for private entrepreneurs, civil law associations, building groups, and the Hungarian commercial representation offices of foreign-registered companies). Additional accounting and financial reporting obligations for financial institutions, insurance companies and other specific entities are set forth in other legislation. Until recently, the Ministry of Finance set Hungarian Accounting Standards (HAS) which were incorporated into the Accounting Law. The Hungarian Accounting Standards Board (HASB) was recently established to take over the responsibility for setting HAS from the Ministry of Finance.

159. The Accounting Law establishes the applicable bookkeeping principles. Article 15(2) sets forth a principle of completeness and requires that an economic entity shall enter in its books, *inter alia*, “all the economic events” which affect assets, liabilities and profits in the subject year. Article 15 also includes provisions setting forth the principles of a “true and fair view”, consistency and clarity, among others. Under article 15(3) of the Accounting Law items entered in the books and contained in the annual accounts shall be such that they can be found and proved in reality, and can also be verified by outside parties. During the on-site visit, accounting professionals indicated that they understood article 15 to prohibit off-the-books accounts. Under article 165(1)-(2) of the Accounting Law all economic transactions and events which change the inventories or composition of assets, or the liabilities thereof shall be documented (recorded). The data of all documents reflecting the process of economic transactions (events) shall be entered in the bookkeeping records.

160. In addition, article 160 of the Accounting Law, which governs the standard chart of accounts, provides for a “Article 0” of the Accounts which contains the records of accounts for items which do not affect the balance sheet profit or loss figure for the year in question and for items such as contingent liabilities. Article 90(4)(a) of the Accounting Law provides that the notes on the accounts shall include an itemized account of contingent liabilities and commitments under off-balance sheet items. They shall be further detailed and broken down by transaction type (according to the subject matter of the transaction)

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*Republic of Hungary, the Office of the National Assembly, the Office of the President of the Republic, [...] and any bodies which are, according to the law, responsible for tasks of governance, public administration and local government administration, and international organisations established under international agreements.” [See Article 1 (2) of Act CIV.]*

161. All companies must file their financial statements and, if applicable, their auditor's report with the Court of Registration and the Company Information Office of the Ministry of Justice. Financial statements must be prepared in accordance with HAS, which as noted are detailed and generally reflect the requirements of the relevant EU directives and IFRS.<sup>98</sup> Insofar as they are parent companies, economic entities must produce consolidated financial statements.<sup>99</sup> Financial statements are readily available and can be downloaded from the website operated by the Office.<sup>100</sup>

162. No cases have been reported of sanctions being applied to accounting offences related to foreign bribery. (See Responses § 12.1.) The Hungarian authorities have also not identified any accounting cases relating to the domestic bribery offence. During the on-site visit, awareness of the possible use of accounting infractions related to bribery appeared to be limited. Although there are generally over 700 domestic bribery cases each year, mostly for petty bribery offences, there appears to be little or no focus on the accounting aspects of these infractions. No examples or statistics of accounting offences relating to domestic bribery have been provided. The examiners are concerned by the lack of enforcement of the accounting offences in this regard.

163. In addition, the translations of the penal provisions applicable to accounting offences contain some ambiguities. The translation of article 289 CC in the Responses (§ 12.3) refers to a person who "*obstructs the transparency or inspection of his financial situation*". It is not clear if this is a substantive change from the situation in 2000.<sup>101</sup> In addition, it appears that both a three-year and a two year maximum term of imprisonment apply where a person "*obstructs the transparency or inspection of his financial situation*". [See art. 289(1) and art. 289(3)(b).] These provisions need to be clarified. For private entrepreneurs, violations of "*record keeping and documentation obligation[s] prescribed by law*" are sanctioned. The Hungarian authorities have not identified the nature or source of these obligations for private entrepreneurs.<sup>102</sup> Fines or community service work may be imposed instead of imprisonment.

164. Under the Accounting Law, an external independent audit is required for a broad range of undertakings: those whose annual net sales exceed HUF 50 million (EUR 200 000 and USD 272 626). Audits must be conducted in accordance with the National Standards on Auditing. These are based on International Standards on Auditing (ISA) and have been applicable since 1 January 2001. Some international bodies have recommended an easing of audit requirements for small and medium sized

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<sup>98</sup> The Ministry of Finance expects that HASB will work to achieve full convergence of HAS with International Financial Reporting standards (IFRS) within six to eight years.

<sup>99</sup> Report on the Observance of Standards and Codes, Hungary: Accounting and Auditing (20 June 2004) (World Bank) ("ROSC") § 6.

<sup>100</sup> ROSC § 12.

<sup>101</sup> As described in the Phase 1 report, Article 289 CC subjects a person to a maximum term of imprisonment of 2 years for violating the rules in the Act on Accounting on reporting, bookkeeping, certificates or other obligations where he/she makes "*impossible or difficult*" the "*survey or inspection of his/her property situation*". The commentary on the Criminal Code clarified that the offence was completed where the perpetrator makes it impossible to overview all or part of his/her property. The condition was not satisfied where the acts of the perpetrator cause temporary difficulties, or unnecessary work, etc. For example, a crime would be committed where a person does not provide exact data and information regarding his/her financial situation, hides the relevant documents and invoices and thereby causes significant difficulties for the authorities to complete their overview.

<sup>102</sup> If the tax authorities establish that the published annual accounts or abridged annual accounts do not comply with the provisions of the Accounting Law, then a default penalty may be imposed on the undertaking in question according to the Act on the Rules of Taxation. The Hungarian authorities have not provided information about the application of this provision in practice.



enterprises and micro-enterprises in particular because the information currently required may be excessive for the needs of outside investors.<sup>103</sup> In this regard, the lead examiners consider that the Hungarian authorities, in adopting any such changes, should pay due attention to the importance of accounting and auditing in the fight against bribery.

165. Auditors must be members of the Hungarian Chamber of Auditors. To qualify as an auditor, an individual must have three years of experience and have passed qualifying examinations. The Chamber of Auditors recently instituted quality control systems and commenced quality control inspections of its members in 2003. The Chamber requires auditors to obtain 24 hours per year of continuing professional education. This training includes topics relating to fraud and money laundering, but not specifically to bribery. The Chamber has a Code of Ethics, but it simply prohibits unethical behaviour generally and does not specifically address bribery.

166. Auditor independence is addressed by articles 29-30 of the Act on Auditors and articles 43-44 of the Act on Business Associations. (See Responses § 16.) During the on-site visit, audit specialists indicated that further developments with regard to auditor independence, with regard to issues such as audit committees, the provision of non-audit services and audit partner or audit firm rotation, were awaiting the EU's 8th Directive on Company Law.<sup>104</sup> At present, audit partner rotation is required for financial institutions, but not for other companies. Hungarian rules on the dismissal and resignation of statutory auditors have been criticized because a statutory auditor may resign or be dismissed to avoid an audit opinion qualification.<sup>105</sup> The Hungarian authorities acknowledge the absence of any regulation in this area, but indicate that the auditing contract may limit the possibility of dismissal. The lead examiners, however, are concerned that in circumstances of this nature the contracting parties may have little interest in enforcing their rights to performance of the auditing contract; moreover, even if there were a contract dispute between the auditor and the company, it may not give rise to any publicity.

167. A recent World Bank report notes that a breach of duty by an auditor is not subject as such to criminal liability in Hungary although auditors may be liable for various criminal offences if they abuse their position (e.g., contributing to fraud by directors or assisting directors in tampering with the accounts). (See ROSC § 19.) Thus, while the Criminal Code does not contain separate regulations on the breach of duty by an auditor, the general rules of the Code apply to auditors. Auditors have unlimited liability under civil law, but there has been only one significant action against an auditor or audit firm. It is still pending. Auditors may also be reported to the Chamber of Auditor's ethics committee for violations of their obligations as auditors, breaches of ethical regulations, negligence and professional deficiencies. (See Act on Auditors arts. 59-63.) During the on-site visit, representatives of the Chamber of Auditors noted that proceedings against auditors are suspended pending related criminal proceedings.

### **Commentary**

***The lead examiners recognise the important efforts by the Hungarian authorities, and accounting and auditing professionals, to establish rigorous accounting and auditing standards and to adhere generally to the relevant international standards relating to accounting and auditing. The examiners also take note of the mandatory training requirements for auditors in Hungary and encourage the Hungarian authorities to take***

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<sup>103</sup> See ROSC § 43.

<sup>104</sup> The proposed 8th Directive addresses, *inter alia*, numerous issues relating to statutory audits including public oversight, external quality assurance, auditor independence, codes of ethics, auditing standards, disciplinary sanctions and the appointment and dismissal of statutory auditors.

<sup>105</sup> See ROSC §§ 11, 46.

*measures to ensure that accounting and auditing issues related to bribery are regularly examined in that context. The examiners recommend follow up by the Working Group with regard to the application in practice of article 8.1 of the Convention.*

*In addition, the examiners are concerned by the weak enforcement of accounting and auditing obligations in the area of bribery and the limited number of enforcement actions. Particularly in light of the numerous cases of domestic bribery each year, the Hungarian authorities and professional bodies should enforce accounting and auditing offences more effectively and develop relevant case law and standards. The examiners also recommend follow up with regard to the application in practice of article 8.2 of the Convention with regard to the applicable sanctions.*

(ii) *Denial of tax deductibility for bribes and enforcement*

#### Tax deductibility of bribes

168. Since the Phase 1bis review, Hungary has modified its tax legislation to expressly deny the tax deductibility of bribes paid to foreign public officials<sup>106</sup>. Both the Corporate Tax Law and the Personal Income Tax law now stipulate that such payments “*shall not qualify as costs or expenses [...] the expenditures incurred in connection or associated in any way or form with the felony offences, by definition of the Criminal Code, of bribery, profiteering with influence, bribery in international relations and profiteering with influence in international relations*”.

169. The Tax Administration officials interviewed at the on-site visit indicated that a previous conviction for a (foreign bribery) offence is very likely to be required to deny deduction of a claimed expenditure at the time the deduction is first claimed. There are no instructions or guidelines on the new legislation explaining the particular circumstances under which such a deduction can be refused<sup>107</sup>. Regarding payments to foreign unspecified recipients in particular (or in cases where the recipient seems to be fictitious), the Hungarian authorities indicated that there are no specific provisions denying their deductibility.

170. In addition, in light of discussions at the on-site visit, the lead examiners are concerned that Hungarian tax inspectors may not pay sufficient attention to some categories of allowable expenses, such as those related to significant consultancy fees, political party contributions etc., under which it might be possible to disguise a bribe payment. A representative of the Tax Administration indicated, however, that in case of dubious expenditures, the inspectors would normally review the payment and, if there are any discrepancies, refuse to deduct the claim for an expense.

171. As far as activities to promote the new legislation on tax treatment of bribes are concerned, representatives of the Tax Administration indicated that until now, specific training has not been provided and practical guidelines have not been issued. Moreover, the Tax Administration representatives at the on-site visit were not aware of the OECD Bribery Awareness Handbook for Tax Examiners.

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<sup>106</sup> See article 8, Schedule n°3, part A of the Corporate Tax Law.

<sup>107</sup> There have been in the past a number of critics on the proper functioning of the tax administration officials in Hungary. This problem seems to be eradicated at present but may still need monitoring, especially in the context of the implementation of the recently modified tax legislation.

### *Commentary*

*The lead examiners recommend that Hungary take all necessary measures to ensure that no conviction for foreign bribery is required to deny the deductibility of the suspected bribe, and review the operation of the time limit for reopening a tax case. In addition, they recommend that Hungary provide guidance and training to the Tax Administration officials on the application of the new rules prohibiting tax deductibility, including the detection of bribe payments disguised as legitimate allowable expenses. The lead examiners encourage Hungary to make the OECD Bribery Awareness Handbook for Tax Examiners available to officials of the Tax Administration responsible for enforcement.*

### Limitation periods for enforcement

172. As mentioned above, the Hungarian Tax Administration believes that a previous conviction is currently required in order to deny the deductibility of a bribe at the time the deduction is first claimed. In this context, the lead examiners considered the adequacy of the time limit for reopening a tax file in order to reassess a previously accepted deduction. Pursuant to the tax regulations, the time limit for retroactively disallowing the deductibility of an expense is five years. (See Rules of Taxation art. 164.) Considering that the statute of limitations for the foreign bribery offences in article 258/B(2) is five years (and only three years for the offence under article 258/B(1)), the lead examiners are concerned that there would not be sufficient time to obtain a conviction of foreign bribery and meet the limitations period under the tax law for retroactively denying the deductibility of the bribe expense.

173. The representatives of the Tax Administration at the on-site visit indicated that it would be possible to reopen a closed tax case when a new important circumstance has been revealed or discovered by the tax authorities. However, this provision would be applicable only within the general five-year time limit set forth in the tax regulation provisions. The time limit can be suspended during criminal prosecutions or court proceedings under certain conditions. Article 164 of the Rules of Taxation provides that "[i]n connection with any act of tax or social security fraud (article 310 Criminal Code) or fraud (article 318 Criminal Code) that involves taxes, social security contributions or budgetary subsidies is suspected, the term of limitation for the right for tax assessment shall prevail for as long as the term of limitation for the crime itself remains in effect". This provision allows for an extension of time to take into account the requirement for a conviction before definitely executing/or closing a tax case related to these types of fraud. However, such an extension of the time limit for taxation purposes would only be applicable to cases related to the listed criminal offences (tax or social security fraud and fraud that involves taxes, social security contributions or budgetary subsidies, as defined by relevant articles of the Criminal Code). While the examiners recognise that most cases of deductions of bribes will likely involve tax fraud and thus should qualify for the extension in article 164, in the absence of clarification about the exact scope and operation of the exception, they continue to have concerns about the applicable time limits.

### *Commentary*

*The lead examiners are concerned that the time limit for reopening a tax case may be too short for the effective implementation of the 1996 Recommendation, especially taking into account the complexity of foreign bribery investigations and prosecutions and the frequent need to obtain MLA. They recommend that the Hungarian authorities review its operation in this regard.*

(iii) *The offence of money laundering and its enforcement*

174. Hungary has substantially improved its anti-money laundering regime in recent years.<sup>108</sup> Articles 303 and 303/A CC sanction the offences of intentional and negligent money laundering respectively. Hungary has adopted the “*all crimes*” approach to predicate offences and thus includes bribery as a predicate offence. Article 303(1) punishes intentional money laundering by imprisonment of up to five years. Higher penalties (2-8 years) apply if money laundering involves a pattern of criminal profiteering, or is committed by officers of financial or similar institutions, attorneys or public officials. One branch of Article 303(1) applies to the use of criminal proceeds in business activities. The second branch applies to performance of a financial or bank transaction in connection with the proceeds of crime “*in order to conceal its true origin*”. The examiners are concerned about the application of the requirement of an intent to conceal in certain cases, such as where a financial institution knowingly transfers proceeds from crime from one account to another for an independent business purpose. The Hungarian authorities have not supplied information or case law about the meaning of this requirement. Negligent money laundering is generally punishable under Article 303/A by imprisonment up to two years, community work or a fine; in more serious cases, prison terms up to three years can be imposed.<sup>109</sup>

175. Articles 303 and 303/A do not expressly provide that the predicate offence can be committed anywhere in the world. During the on-site visit, an AML Unit representative indicated that she believed the offence would apply to bribery committed abroad, as indicated by the Hungarian authorities in Phase 1. However, there have been no such cases so far.

176. Article 303(4) provides immunity from punishment for a person who “*voluntarily reports to the authorities or initiates such a report shall not be punished for money laundering, provided that the act has not yet been revealed or it has been revealed only partially.*” While this provision may help to encourage reporting of offences, it appears to establish a somewhat mechanical test for the availability of complete immunity from prosecution, regardless of the actions of the informant, based merely on the provision of a “*report*” and without any requirements for on-going cooperation. The reference to immunity for reports of “*partially*” revealed money laundering is also unclear, but the Hungarian authorities indicate that they understand that the money laundering must have been previously undetected. No case law interpreting this provision or any statistics regarding its use have been provided. As noted above at § 126, a similar defence applies to domestic bribery (but not to foreign bribery) under article 255A CC. Its application to offences related to foreign bribery raises concerns for the lead examiners similar to those discussed above. In addition, in the bribery context, the defence requires that the perpetrator surrender the unlawful advantage whereas no such requirement exists in the money laundering context.

177. There have been no convictions for money laundering under arts. 303 or 303A, but there were nine investigations underway at the time of on-site visit. Although Hungary’s Financial Intelligence Unit (FIU) is part of the police department, criminal investigations under art. 303 and 303A are undertaken by the prosecutor’s department, not the police. Feedback about investigations appeared to be a problem because of poor inter-departmental communication. In particular, police officials, including officials in the

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<sup>108</sup> Hungary was identified as a Non-Cooperative Country or Territory (NCCT) by the Financial Action Task Force (FATF) in 2001, but was removed from the NCCT list in June 2002 after substantial improvements were achieved. See FATF, Non-Cooperative Countries and Territories, [www1.oecd.org/fatf/NCCT\\_en.htm](http://www1.oecd.org/fatf/NCCT_en.htm). Deficiencies requiring and receiving remedial action included the existence of anonymous passbooks and the lack of information about beneficial ownership.

<sup>109</sup> As discussed above in the section on reporting in the context of preventing money laundering, at § 70, the Criminal Code also contains offences relating to the failure to report suspicious transactions, and one conviction has occurred under these provisions.

FIU, indicated that they receive little if any feedback from the prosecutor's office about the outcome of a case once it is taken over by the prosecutors. Only the prosecutors' office maintains statistics.

178. Under the AML Law, financial institutions – and not the AML Unit – are required to suspend suspicious transactions. [See AML Law art. 9(1).] The financial institution must immediately inform the AML Unit and it can proceed with the transaction unless the AML Unit acts within 24 hours; accordingly, the client will generally be unaware of the suspension.

#### *Commentary*

*The lead examiners consider that, where appropriate, information about the results of prosecutorial activity should be made more available to other relevant actors including the police and financial institutions. As in other areas, efforts should be made to improve cooperation and communication between CIOPPS and the police units and other agencies involved in the fight against money laundering, and CIOPPS' exclusive competence over foreign bribery should be better publicized.*

#### *e) Jurisdiction*

179. Article 3(1) of the Hungarian Criminal Code establishes jurisdiction of Hungarian courts over all crimes committed in Hungary, including the offence of bribing a foreign public official. It does not expressly state that jurisdiction is established if an offence is committed in whole or in part in Hungary. In the Phase 1, the Hungarian authorities stated that according to the commentaries to the Criminal Code, an offence is committed in Hungary if any element of the crime is committed in Hungary or the result of the crime is realised in Hungary. This interpretation was confirmed by prosecutors interviewed at the on-site visit, but no case law was provided in support of this affirmation.

180. Article 3(1) CC also establishes jurisdiction over acts committed by Hungarian citizens abroad that are crimes under Hungarian law, without requirement of a dual criminality. A number of questions remain untested to date concerning application of this principle where legal persons are concerned, notably regarding the prosecution of bribery offences committed by a foreign subsidiary where the Hungarian legal person incited and/or authorised the bribe.

181. Furthermore, under article 4(1) CC, Hungary has jurisdiction over crimes committed by non-Hungarian citizens abroad either where dual criminality exists,<sup>110</sup> where it is prescribed by an international treaty,<sup>111</sup> or for specific categories of crimes.<sup>112</sup> Prosecutors indicated that the OECD Convention would be considered an international treaty in this respect and non Hungarian citizens involved in a foreign bribery offence could be prosecuted in this respect. However, Article 4 of the Convention does not prescribe universal jurisdiction for the foreign bribery offence, so may not constitute a legal basis in this regard.

182. Thus, from a legal point of view, some jurisdiction principles in Hungary go beyond the requirements in Article 4 of the OECD Convention, which only addresses jurisdiction based on territoriality and the nationality of the offender. However, given the current strain on resources in the PPO and courts, the prosecution of non-Hungarian nationals paying bribes abroad may not be a priority. Of greater concern is the potential impact of this problem on the prosecution of Hungarian legal persons.

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<sup>110</sup> Article 4(1)(a) CC.

<sup>111</sup> Article 4(1)(c) *ibid.*

<sup>112</sup> These include crimes against humanity as well as certain criminal acts against the Hungarian State, but would not cover the foreign bribery offence.

Because of the necessity of a conviction of a natural person in order to convict a legal person under Hungarian law (see above the section on Liability of Legal Persons §§ 146-149), if the Hungarian authorities do not prosecute a non-Hungarian employee of a Hungarian company who pays a bribe abroad, they will not be able to obtain a conviction of the Hungarian legal person. This could be an impediment to the application of the foreign bribery offence to Hungarian legal persons who use non-citizens to bribe abroad on their behalf.

#### *Commentary*

*The lead examiners note the broad jurisdiction established in Hungarian law over bribery of foreign public officials. However, given the absence of case law, notably as regards legal persons, and offences committed in whole or in part abroad, the lead examiners recommend that this issue be further monitored by the Working Group.*

#### **4. Sanctioning the foreign bribery offence**

##### **a) Criminal sanctions**

##### *(i) Natural persons*

183. Under the Hungarian Criminal Code, the domestic and foreign bribery offences for active bribery employ identical language and carry sanctions of a maximum of 3 years imprisonment for giving or promising a favour to an official in connection with his duties<sup>113</sup>; and 1 to 5 years imprisonment for giving or promising a favour to induce the official to violate his/her duty, exceed his/her competence or otherwise abuse his/her official position.<sup>114</sup>

184. Pursuant to the Criminal Code, a fine between HUF 3 000 (EUR 12.23 and USD 16.37) and HUF 10 800 000 (EUR 44 036 and USD 58 931) may be imposed where the court considers imprisonment to be too severe a penalty for the offence in question. Additionally, a fine between HUF 10 000 (EUR 40.77 and USD 54.55) and HUF 10 000 000 (EUR 40 774 and USD 54 566) may be imposed on a person who has been sentenced to imprisonment of a definite term if he/she committed the crime for profit-making or the imposition of a fine would more effectively deter him/her from committing a new crime. A fine cannot be imposed as a supplementary punishment where property has been confiscated.

185. There are no provisions for the imposition of additional administrative or civil sanctions for natural persons, such as exclusions from public funding or procurement, although such sanctions are available for legal persons (see below). However companies may be dissolved and the persons behind them may set up a new legal person with similar criminal activities. Thus, it may be necessary to sanction the individuals behind the companies and their role in the foreign bribery offence, in order to ensure that the relevant natural persons, as well as the legal persons, can be excluded from a certain activity.

186. Under article 83 CC, the sentence must be proportionate to the seriousness of the offence, the danger that the offender represents to society, the degree of culpability of the offender, as well as other aggravating and mitigating circumstances. Aggravating circumstances would include the repetitious nature of the offence, and duress (if not accepted as a ground for precluding punishability, see section B.3.(b)(iii) above on defences) may be a mitigating factor. The Supreme Court has issued guidelines in this respect, although these were not made available to the examining team.

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<sup>113.</sup> Article 258/B(1) CC.

<sup>114.</sup> Article 258/B(2) *ibid.*

187. No foreign bribery cases have been handled by the Hungarian courts to date. As regards domestic bribery,<sup>115</sup> 450 offenders were sanctioned in 2003. One hundred and fifty-eight fines were pronounced and 262 imprisonment sanctions were imposed, of which nearly 80 per cent were suspended.<sup>116</sup> No indication was given regarding the amount of the fines or the years of imprisonment.

(ii) *Legal persons*

188. Article 3 of the Act CIV of 2001 on measures applicable to legal persons provides for the following measures: winding up the legal entity, limitation of the activity of the legal entity, and imposition of a fine. Measures to limit the activity and impose a fine may be ordered independently or jointly, but winding up the legal entity may not be combined with other sanctions. Fines can be of a maximum of three times the financial advantage gained or intended to be gained, and at least HUF 500 000 (EUR 2 038 and USD 2 727).<sup>117</sup>

189. Sentences may also include limitations on the activity of the company. This may concern, *inter alia*, participation in public procurement, entering into concession contracts, or receiving funding from central or local government, as well as other activities prohibited by the courts (see also below section (c) on other sanctions). To date, however, there is no commercial register recording information about convictions of companies. Thus, it is unclear how the Hungarian authorities will ensure in practice that such interdictive sanctions are carried out.

190. Furthermore, if the sentence for a legal entity includes limitations on its activities, once the judgement has become final, any public procurement and concession contracts that it has been awarded may be rescinded, and it may be required to reimburse any public funds already received in connection with the offence.<sup>118</sup> Winding up of the company may be ordered if serious circumstances exist, such as when the entity was established to cover up a criminal offence or if its actual activity served the purpose of covering up a criminal offence. Exceptions exist if the legal entity is considered to be acting in the public interest, is of strategic importance to the national economy or carries out national defence related tasks.

191. Given the very recent entry into force on 1 May 2004 of Act CIV of 2001 introducing the criminal liability of legal persons, practical experience is not yet available. However, the requirement of the prior conviction of a natural person in order to sanction the legal person may also preclude the application of effective, proportionate and dissuasive sanctions to legal persons, as required under Article 3 of the Convention.

**b) Confiscation**

(i) *Confiscation of assets*

192. Act CXXI of 2001 has abolished the possibility of parallel application of the confiscation measures (see point (ii) below) and confiscation of assets, giving priority to confiscation of assets.<sup>119</sup> The Hungarian authorities explained in Phase Ibis that the main measure applicable in foreign bribery cases would be the confiscation of assets, since a bribe and its proceeds would not constitute an endangerment to

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<sup>115</sup> For offences under articles 250 to 255 CC.

<sup>116</sup> Source: ERÜBS (Unified Statistical Database of the Police and the Prosecutors' Service)

<sup>117</sup> Article 6 of Act CIV of 2001.

<sup>118</sup> Article 5 of Act CIV of 2001.

<sup>119</sup> Article 77(6) *ibid*.

public safety, but rather a financial gain or advantage. (For additional background on the distinction between the confiscation of assets and confiscation, see Phase 1bis report, section B.3.2.)

193. Criminal provisions in article 77/B(1) CC relating to the confiscation of assets prescribe the mandatory confiscation of assets: (a) resulting from a criminal offence obtained in the course of or in connection with the perpetration of a criminal act; (b) obtained in connection with crimes committed in affiliation with organised crime; (c) replacing those mentioned above; (d) supplied or intended to be used to finance the means for the commission of a crime. “Assets” are defined in article 77/C(4) as covering any profits, intangible assets, claims of monetary value and any financial gain or advantage.

194. The provisions under article 77/B are applicable to both natural and legal persons,<sup>120</sup> and including to successors of the natural or legal person.<sup>121</sup> There is no possibility for the judge to omit application of these provisions, even where the assets are not owned by the offender, unless these assets were obtained in good faith for consideration (as opposed to articles 77 and 77/A on confiscation which do not allow for confiscation of the object not owned by the offender). It is unclear whether article 77/C(1)(d) would allow for confiscation of the instrument of the crime (or its financial equivalent if the instrument itself is no longer available).

195. Although Hungary indicated in its Responses to the Phase 2 questionnaire that it could be reasonably presumed that these confiscation measures had been applied in many cases, no statistical information was provided to the examining team on the number and amount of confiscation of assets measures pronounced. As regards the notion of proceeds of crime, no case law was provided concerning the interpretation of the notion given by the courts in practice.

(ii) *Confiscation*

196. The criminal provisions relating to confiscation<sup>122</sup> require the mandatory confiscation of an object where (a) it was either used or intended to be used as an instrument for the commission of a criminal act; (b) its the possession constitutes an endangerment to public safety or is illegal; (c) it was created by way of a criminal act (proceeds); (d) it is the object for which the criminal act was committed (object of the criminal act). However, when confiscation may constitute a disproportionate punishment in relation to the seriousness of the offence, it may be omitted (article 77/A).

197. No statistical information was provided to the examining team on the number of confiscation measures imposed by courts, notably for bribery and related offences.

*Commentary*

***Given that no foreign bribery case has yet been brought before the Hungarian courts, the lead examiners recommend that the level of sanctions and the use of confiscation and confiscation of assets measures in cases of bribery of foreign public officials be further monitored by the Working Group in order to determine whether the sanctions handed down are sufficiently effective, proportionate and dissuasive for natural persons. As regards legal persons, the lead examiners consider that the requirement of a conviction of a natural person as a prerequisite to the liability of a legal person will prevent the application of effective, proportionate and dissuasive sanctions to legal persons.***

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<sup>120</sup> Article 77/B(2) *ibid.*

<sup>121</sup> Article 77/B(3) *ibid.*

<sup>122</sup> Article 77(1) CC.



*The lead examiners further encourage the Hungarian authorities to consider introducing additional civil or administrative sanctions for natural persons convicted of foreign bribery, as is the case for legal persons, notably to ensure that individuals responsible for a company's criminal activities cannot benefit from public funding or participate in public tenders.*

*Further, for the purpose of making a complete assessment of Hungary's implementation of Article 3 of the Convention, the lead examiners recommend that the Hungarian authorities compile statistical information on the sanctions imposed for violations of the foreign bribery offences for natural and legal persons, including administrative sanctions, confiscation and the confiscation of assets.*

c) *Other sanctions*

198. Article 3(4) of the Convention requires parties to “*consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official*”. Paragraph 24 of the Commentary indicates that “*among the civil or administrative sanctions, other than non-criminal fines, which might be imposed ...for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement ...*”. The sanctions that can be imposed by courts are addressed above; this article examines the approach taken by the relevant administrative agencies.

(i) *Public procurement*

199. Public procurement as a share of GDP is now very high by international standards in Hungary.<sup>123</sup> As noted above, articles 5(2)(b) and 5(3) of Act CIV of 2001 provide that the court, in sentencing a legal person found guilty of a crime, may limit the ability of the entity to participate in public procurement procedures and rescind existing public procurement contracts. As noted above, these provisions have not yet been applied. During the on-site visit, public procurement representatives complained that as a general matter they have no link with the courts and that they do not receive information from the courts. There is no commercial register to record information about convictions concerning companies.

200. In addition to the provisions of Act CIV of 2001, a new Public Procurement Law entered into force in May 2004. The Law automatically excludes companies convicted of “*an offence concerning their business activities or professional conduct*” by a final judgement. [See Public Procurement Law art. 60(1)(c).] The exclusion lasts until “*the time limit for the detriments regarding criminal records lapses*”. The Hungarian authorities have not clarified the meaning of this latter phrase. In addition, the Public Procurement Law notes that limitations imposed under Act CIV of 2001 will be applied in the context of public procurement. The relationship between the automatic exclusion under the new Public Procurement Law and the limitation under Act CIV of 2001, which requires a court order, is not clear.<sup>124</sup>

201. During the on-site visit, a representative of the Council for Public Procurement indicated that foreign bribery would constitute an offence concerning a company's business activities and would accordingly attract the automatic exclusion. A representative indicated that companies are required to submit a notarised declaration as part of the tender process in which they declare that they do not have any convictions identified in art. 60 of the Law. (See art. 63.) The Public Procurement Act also provides for

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<sup>123</sup> Hungary was an early starter on establishing a system for increasing the efficiency of public procurement, especially on making sure that competitive bidding took place, but Hungary has not yet succeeded in raising the share of procurement advertised in the market above the average for EU countries. See OECD 2004 at 137.

<sup>124</sup> See above the section on criminal sanctions for legal persons, §§ 191-194.

civil legal remedy actions by competitors or certain officials before an arbitration committee. The Arbitration Committee can impose sanctions for violations of the Act, including placing the bidder on a blacklist, nullifying decisions by contracting authorities or imposing fines of up to HUF 1 Million (EUR 4 077 and USD 5 455). Article 334(3) provides that where the arbitration committee detects suspicious activity relating to a possible crime, it shall report it to the competent authorities.

### *Commentary*

***The lead examiners take note of the extensive new provisions on public procurement. They invite the Hungarian authorities to take measures to improve the effectiveness of sanctions on companies convicted of bribery, such as by creating an appropriate register recording such convictions. They also invite the authorities to clarify the relationship between the sanctions relating to public procurement in Act CIV of 2001 and in the new Public Procurement Law.***

#### (ii) *Privatisation*

202. Hungary has carried out an extensive privatisation program and in many areas privatisation is completed or nearly so. (See OECD 2004 at 122.) However, the state still has substantial interests in a significant number of companies and the privatisation program has picked up again after a slowdown in 2002. The state-owned Privatisation and Holding Corporation (APV), which had stakes in 167 businesses in December 2002, has seen its portfolio reduced to 157 in December 2003. Also, the classification of some units as “*strategic*” and not for sale has been dramatically reduced, from 93 companies to 23 in 2003. (See OECD 2004 at 122.)

203. APV representatives indicated during the on-site visit that they were unaware of any provision in the regulations governing tenders that would mandate any particular consequences for bribery convictions, such as exclusion from bidding. They suggested that the committee responsible for deciding on the winning tender in a particular case could take such information into account. However, they recognised that they were unaware of any mechanism that would necessarily inform the agency about foreign bribery convictions of bidders for privatisation contracts.<sup>125</sup>

204. As noted, article 5 of Act CIV of 2001 specifically allows the court to impose an exclusion from public procurement for a company convicted of foreign bribery. No similar specific provision exists for privatisation procedures. Article 5(2)(f), however, does give the court the power to impose limitations on a convicted company’s ability to pursue “*any other activities which have been prohibited by the court*”. The examiners encourage the Hungarian authorities to make clear that such sanctions can include exclusion from privatisation procedures in appropriate cases.

### *Commentary*

***The lead examiners recommend that the Hungarian authorities consider appropriate measures to exclude companies and individuals with involvement in foreign bribery from the ability to participate in privatisations. In addition, the mechanisms for informing the authorities responsible for privatisations about criminal convictions and proceedings relating to foreign bribery should be improved.***

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<sup>125</sup> APV employees are not civil servants and are accordingly not subject to the reporting obligation in article 171 CPA.

(iii) *Export Credit Assistance*

205. Both MEHIB and Eximbank indicated during the on-site visit that a final Hungarian court judgement is required to terminate existing insurance or credits. Sanctions include terminating the contract and reclaiming any indemnity or amounts paid. Current MEHIB and Eximbank regulations only permit sanctions to be applicable to the transaction which is the subject of the application. There is no possibility of wider sanctions.<sup>126</sup>

*Commentary*

*The lead examiners recommend that the Working Group follow up with regard to the treatment by export credit agencies of companies and persons suspected of, or convicted of, foreign bribery.*

**C. RECOMMENDATIONS**

206. Based on its findings regarding Hungary's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to Hungary under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

**Part I. Recommendations**

***Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials***

207. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Hungary:

- a) take further action to raise the level of awareness of the foreign bribery offence and the need for its enforcement among those agencies that work with Hungarian companies active in foreign markets, including trade promotion agencies and officials [Revised Recommendation, Paragraph I];
- b) ensure that, in light of the transfer of anti-corruption responsibilities from the Prime Minister's Office Secretariat Responsible for Public Assets to the Ministry of Justice in December 2004, the Ministry of Justice has appropriate resources to carry out its new role. [Revised Recommendation, Paragraph I];
- c) put in place practical training for those actively involved in enforcement of the foreign bribery offence, including in particular for the Central Investigation Office of the Public Prosecution Service (CIOPPS) and the Anti-Corruption Unit (ACU) at the National Police Headquarters [Revised Recommendation, Paragraph I];
- d) ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved shall not be taken into account in the investigation or prosecution of foreign bribery cases [Convention, Article 5];

<sup>126</sup>

At the earlier stage of the initial decision to grant support, both agencies have indicated that, where there is sufficient evidence of bribery, they will withhold support for the transaction in question. See above the section on Prevention and reporting in the context of export credit aid, §§ 48-49.

- e) take appropriate action to improve awareness among companies and others of the foreign bribery law and of the intention to enforce it [Revised Recommendation, Paragraph I];
- f) take measures to raise awareness of the foreign bribery offence among the accounting, auditing and legal professions, and to ensure that accounting and auditing issues related to bribery are regularly examined in the context of the mandatory training requirements for auditors. [Revised Recommendation, Paragraph I].

208. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Hungary:

- a) consider expanding the scope of article 255B CC, which sanctions the failure to report domestic bribery by public officials, to provide sanctions for the non-reporting of foreign bribery offences [Revised Recommendation, Paragraph I];
- b) provide guidance and training to tax officials on the application of the new rules prohibiting tax deductibility, including the detection of bribe payments disguised as legitimate allowable expenses [Revised Recommendation, Paragraph 1];
- c) take appropriate measures to require auditors by law to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities [Revised Recommendation, Paragraph V.B];
- d) consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retaliatory action [Revised Recommendation, Paragraph 1];
- e) take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system [Revised Recommendation, Paragraph 1].

***Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences***

209. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Hungary:

- a) clarify the competence of CIOPPS regarding foreign bribery cases, and take effective measures to ensure that CIOPPS promptly receives relevant information concerning such cases, notably by ensuring that the police and prosecutorial authorities are aware that they should refer foreign bribery cases to CIOPPS [Convention, Article 5; Revised Recommendation, Paragraph 1];
- b) ensure that the necessary resources are made available, in particular at CIOPPS, for the effective investigation and prosecution of the foreign bribery offence, and consider enabling the same prosecutor to follow a case throughout the entire investigation and prosecution, including at the trial stage [Convention, Article 5; Revised Recommendation, Paragraph 1];
- c) consider taking appropriate measures to make MLA available to all Parties to the Convention in cases involving administrative or civil proceedings against legal persons for foreign bribery

and ensure that sufficient resources are available to effectively carry out MLA obligations [Convention Article 9(1); Revised Recommendation, Paragraph VII(iii)];

- d) in order to increase transparency, include instructions by senior prosecutors in the case file, and review possibilities for challenging decisions to close investigations, notably through private prosecutions by competitors [Convention, Article 5; Revised Recommendation Paragraph 1];
- e) extend the statute of limitations applicable to the offence under article 258/B(1) CC to an appropriate time so as to ensure the effective prosecution of the offence, in line with the period for the offence under article 258/B(2), and allow for sufficiently long investigation periods [Convention, Article 6; Revised Recommendation Paragraph 1];
- f) consider, within the constitutional principles of the State, measures that may be taken in order to ensure that immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases [Convention, Article 5; Revised Recommendation Paragraph 1].

210. With respect to the criminal liability of legal persons for foreign bribery, the Working Group recommends that Hungary:

- a) amend the law on the criminal liability of legal persons to eliminate, insofar as they apply to foreign bribery cases, (1) the requirement that a natural person be convicted and punished as a prerequisite to the liability of a legal person; (2) the requirement that the bribe must have aimed at or resulted in the legal entity gaining "*financial*" advantage or profit; and (3) the requirement that the bribe must have aimed at giving or have actually given such an advantage to the specific legal entity subject to prosecution. [Convention, Articles 2 and 3];
- b) consider (1) defining more clearly and more broadly than by the reference to a "*chief executive*" the class of persons whose failure to supervise can trigger the liability of the legal person; and (2) establishing minimum standards with regard to appropriate supervision by such persons in order to avoid liability [Convention, Articles 2 and 3].

211. With respect to related tax and accounting/auditing offences, the Working Group recommends that Hungary:

- a) take appropriate measures to enforce accounting and auditing offences more effectively, particularly in connection with bribery cases [Convention, Article 8];
- b) take all necessary measures to ensure that no conviction for foreign bribery is required to deny the deductibility of the suspected bribe, and review the operation of the time limit for reopening a tax case [Revised Recommendation Paragraph IV].

212. With respect to sanctions, the Working Group recommends that Hungary:

- a) consider introducing additional civil or administrative sanctions for natural persons convicted of foreign bribery, analogous to those applicable to legal persons, and compile relevant statistical information [Convention, Article 3; Revised Recommendation, Paragraph 1];
- b) consider taking measures to improve the effectiveness of sanctions on companies convicted of bribery [Convention Article 3(1), (4)].

## **Part II. Follow-up by the Working Group**

213. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

- a) in light of the recent entry into force of the law on the liability of legal persons, the absence of case law and the inability to review the Explanatory Memorandum concerning the new law, the application and interpretation of the law as it applies to foreign bribery [Convention, Articles 2, 3];
- b) the application of the foreign bribery provisions as case law develops, including with regard to the definition of foreign public official and the question of bribery through intermediaries [Convention, Article 1];
- c) whether the defence of duress is limited to threats of physical or psychological damage [Convention, Article 1];
- d) jurisdiction over cases of bribery of foreign public officials, notably as regards legal persons and offences committed in whole or in part abroad [Convention, Article 4];
- e) actions taken when Hungary refuses to extradite based on the Hungarian nationality of the person whose extradition is requested [Convention, Article 10(3)];
- f) the application of sanctions by the courts and the use of confiscation and confiscation of assets measures in cases of bribery of foreign public officials, to ensure they are effective, proportionate and dissuasive [Convention, Article 3].

**ANNEX 1**  
**List of Acronyms**

<b>ACU</b>	Anti-Corruption Unit (ACU) at the National Police Headquarters
<b>Act CIV</b>	Act CIV of 2001 on Measures Applicable to Legal Persons under Criminal Law
<b>AML Law</b>	Anti-Money Laundering Law
<b>AML Unit</b>	Anti-Money Laundering Unit at the national Police headquarters
<b>APV</b>	Privatisation and Holding Corporation
<b>CC</b>	Criminal Code
<b>CIFE</b>	Act CXII of 1996 on Credit Institutions and Financial Enterprises
<b>CIOPPS</b>	Central Investigation Office of the Public Prosecution Service
<b>CPA</b>	Act on Criminal Proceedings
<b>ERÜBS</b>	Unified Statistical Database of the Police and Prosecutors' Service
<b>Eximbank</b>	Hungarian Export-Import Bank
<b>FDI</b>	Foreign direct investment
<b>FIU</b>	Financial intelligence unit
<b>HAS</b>	Hungarian Accounting Standards
<b>HASB</b>	Hungarian Accounting Standards Board
<b>HFSA</b>	Hungarian Financial Supervisory Authority
<b>HITDA</b>	Hungarian Investment and Trade Development Agency
<b>IAS</b>	International Accounting Standards
<b>IFRS</b>	International Financial Reporting Standards
<b>ILA Law</b>	Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters
<b>ISA</b>	International Standards on Auditing
<b>MEHIB</b>	Hungarian Export Credit Ltd.
<b>MLA</b>	Mutual legal assistance
<b>MOJ</b>	Ministry of Justice
<b>NEBEK</b>	International Law Enforcement Cooperation Centre
<b>NJC</b>	National Judicial Council
<b>ODA</b>	Official development assistance
<b>PPO</b>	Public Prosecutors' Office
<b>Responses</b>	Responses of Hungary to the general Phase 2 questionnaire
<b>SAO</b>	State Audit Office
<b>SSNS</b>	Special Service for National Security
<b>STR</b>	Suspicious transaction reports.
<b>Supp. Responses</b>	Responses by Hungary to the questions in the supplemental Phase 2 questionnaire
<b>UNDP</b>	United Nations Development Programme

**ANNEX 2**  
**Excerpts from Relevant Legislation**

*Criminal Code*

**Interpretative Provisions**

**Article 137** For the purposes of this Act

[...]

3. “foreign public official” shall mean

*a)* a person serving in the legislature, law enforcement, administrative body or criminal prosecution body of a foreign state,

*b)* a person serving in an international organization created under international convention, whose activities form part of the organization’s activities,

*c)* a person elected to serve in the general assembly or body of an international organization created under international convention,

*d)* a member of an international court that is vested with jurisdiction over the territory or the citizens of the Republic of Hungary, and any person serving in such international court, whose activities form part of the court’s activities,

[...]

17. “economic organization” means the economic organizations listed under Paragraph c) of Article 685 of Act IV of 1959 on the Civil Code, as well as organizations which, according to the Civil Code, are subject to the provisions on economic organizations concerning the civil law relations of such organizations in connection with their economic activities.

**Title VIII - Crimes against the Propriety of International Affairs**

**Bribery in International Relations**

**Article 258/B** (1) Any person who gives or promises unlawful advantage to a public official of another country, or to a third person on account of such public official, in connection with his actions in an official capacity is guilty of a misdemeanour punishable by imprisonment not to exceed three years.

(2) The person committing bribery shall be punished by imprisonment between one to five years, if he gives or promises the unlawful advantage to a foreign public official to induce him to breach his official duty, exceed his competence or otherwise abuse his official position.

(3) The director of a business association, or a member or employee with authority to exercise control or supervision shall be punished according to Subarticle (1), if the member or employee of the business association commits the criminal act defined in Subarticles (1) and (2) for the benefit of the business association, and the criminal act could have been prevented had he properly fulfilled his control or supervisory obligations.

(4) The director of a business association, or a member or employee with authority to exercise control or supervision shall be punished for misdemeanour by imprisonment not to exceed two years, work in community service or a fine, if the criminal act defined in Subarticle (3) is committed involuntarily.

**Article 258/C** (1) Any person who gives or promises unlawful advantage to an employee or member of a foreign business association, or to another person on account of such employee or member, to induce him to breach his duties is guilty of a misdemeanour punishable by imprisonment not to exceed two years.

(2) The punishment shall be imprisonment not exceeding three years if the unlawful advantage is given or promised to an employee or member who is authorized to act in the name and on behalf of a foreign business association.



**Article 258/D** (1) Any foreign public official who requests an unlawful advantage in connection with his actions in an official capacity, or accepts such advantage or a promise thereof, or agrees with the party requesting or accepting the advantage, is guilty of a felony and shall be punished by imprisonment between one to five years.

(2) The perpetrator shall be punished by imprisonment between two to eight years, if he breaches his official duty in exchange for unlawful advantage, exceeds his competence or otherwise abuses his official position, or if he commits the act in criminal conspiracy or in a pattern of criminal profiteering.

### **Profiteering with Influence in International Relations**

**Article 258/E** Any person who - purporting to influence a foreign public official - requests or accepts an unlawful advantage for himself or on behalf of another person is guilty of a felony punishable by imprisonment not to exceed five years.

### **Interpretative Provisions**

**Article 258/F** For the purposes of this Title

- 1.
2. foreign economic organization shall mean organizations functioning as an artificial person according to its personal law, which is entitled to perform economic activities in its prevailing organizational form.

### **Infringement of Accounting Regulations**

**Article 289** (1) The person who

- a) infringes annual reporting, bookkeeping and auditing obligation,
- b) the documentation system

prescribed in the Accounting Act or in the legal regulations adopted under its authorization, and thereby obstructs the transparency or inspection of his financial situation is guilty of a misdemeanour punishable by imprisonment not to exceed two years, work in community service or a fine.

(2) Any private entrepreneur who violates his record keeping and documentation obligation prescribed by law, and thereby obstructs the transparency or inspection of his financial situation shall be punished according to Subarticle (1).

(3) The punishment shall be imprisonment not exceeding three years if the act defined in Subarticle (1)

- a) results in an error corrupting the true and fair view in relation to the given financial year and distorts the amount of profit, equity capital or the balance sheet total, or
- b) obstructs the transparency or inspection of financial situation in the given year.

(4) The punishment for felony shall be imprisonment not to exceed three years in the case of Subarticle (1) or five years in the case of Subarticle (3) if committed in a financial institution, insurance institution or investment firm.

## **Money Laundering**

### **Non-performance of Reporting Obligation in Connection with Money Laundering**

**Article 303/B** (1) Any person who fails to comply with the reporting obligation by the Act on the Prevention and Combating of Money Laundering is guilty of felony punishable by imprisonment not to exceed three years.

(2) Any person who negligently fails to comply with the reporting obligation referred to in Subarticle (1) is guilty of misdemeanour punishable by imprisonment not to exceed two years, work in community service or a fine.

### ***Act XIX of 1998 on Criminal Proceedings***

#### **Denunciation of a criminal offence**

**Article 171** (1) Anyone may lodge a claim for investigation concerning a criminal offence. It is compulsory to lodge the claim for investigation, if failure to do so constitutes a criminal offence.

(2) Members of the authority and official persons, further, if prescribed by a separate legal provision, public bodies shall be obliged to lodge a claim for investigation – also identifying the offender, if his person is known – concerning a criminal offence coming to their cognisance within their scope of competence. The means of evidence shall be attached to the claim for investigation, or, if this is not practicable, their safekeeping shall be arranged for.

### ***Act CIV of 2001 on Measures Applicable to Legal Persons under Criminal Law***

#### **Interpretative Provisions**

**Article 1** (1) For the purposes of this Act

1. Legal persons shall be understood as any organization or organizational units thereof vested with rights of individual representation, which the governing rules of law recognize as legal persons, as well as organizations that can be subject to conditions of civil law in their own right and possess assets distinct from that of their members, including companies active prior to registration pursuant to the Act on Economic Associations,

[...]

#### **Conditions for Applying the Measures**

**Article 2** (1) The measures defined in the present act are applicable to legal persons in the event of committing any intentional criminal offence defined in Act IV of 1978 on the Criminal Code (CC) if the perpetration of such an act was aimed at or has resulted in the legal entity gaining financial advantage, and the criminal offence was committed by

a) the legal person's member or officer entitled to manage or represent it, its supervisory board member and/or their representatives, within the legal entity's scope of activity,

b) its member or employee within the legal entity's scope of activity, and it could have been prevented by the chief executive by fulfilling his supervisory or control obligations.

(2) Other than the cases defined in paragraph (1) the measures defined in this act shall be applicable even if committing the criminal offence resulted in the legal entity gaining financial advantage, and the legal entity's member or officer entitled to manage or represent it, had a knowledge on the commission of the criminal offence.

## Measures to be taken against Legal Persons

**Article 3** (1) If the court has imposed punishment on the person committing the criminal offence defined in Article 2, it may take the following measures against the legal entity:

- a) winding up the legal entity,
- b) limiting the activity of the legal entity,
- c) imposing a fine.

(2) The measures defined in paragraph (1) can be taken even if the criminal offence has caused the legal entity to gain financial advantage, but the perpetrator is not punishable due to his mental illness or death.

[...]

### *Act XCII of 2003 on Rules of Taxation*

**Article 53** (1) All tax-related facts, data, circumstances, resolutions, certificates and other documents shall be deemed confidential information.

(2) Employees and former employees of the tax authority, experts involved in any auditing or other procedures, and all other persons who, in their official capacity, gain knowledge of any confidential tax information or other secrets in the course of the disclosure, registration and processing of data, auditing, tax assessment, withholding taxes and tax advances, tax collection, judicial execution and use of such data for statistical purposes shall handle such as strictly confidential. The tax authority shall be subject to confidentiality in respect of all of the documents, data, facts and circumstances obtained in the course of its official proceedings.

(3) The person described in Subsection (2) shall be considered to have violated the obligation of confidentiality if such person conveys any confidential tax information or any other secret obtained during a taxation or court proceeding to an unauthorized party or if such person uses or publishes such information without substantial reason.

**Article 54** (1) The use of confidential tax information shall be justified if it is

a) used for a tax audit, the control of budgetary subsidies, the information of the agencies described in Subsections (2) and (3) or the initiation and execution of tax administration proceedings,  
b) prescribed or permitted by law,  
c) used with the consent of the party concerned,  
d) reveals information concerning the name, corporate name, commercial domicile, branch office or tax number of a taxpayer engaged in business operations to another taxpayer for reasons of lawfully fulfilling his tax liabilities or to a state agency or public corporation for performing their respective duties, as is necessary.

[...]

(5) Upon request, the tax authorities shall disclose confidential tax information

a) to the court;  
b) upon a request approved by the district attorney, to the investigating authority if such information is necessary in the interest of instituting or conducting criminal proceedings;  
c) upon a request made upon the prior consent of the director of the national security agency, to the national security services acting within its jurisdiction prescribed by law;  
d) to the State Audit Office and to the Government Control Office if the information is necessary for its investigation;  
e) to the Minister of Finance if the information is necessary for taxation and the monitoring and control of taxation;  
f) to the director of the agency overseeing the budgetary chapter if the information is necessary for internal control under the State Budget Act.

(6) Upon receiving a request marked "urgent action" from an investigating authority (even if the request lacks the public prosecutor's approval stipulated in specific other legislation), the tax authority must provide the investigating authority with those data in its possession classified as tax secrets that are in connection with the case.

**Article 164** (1) The right of tax assessment shall lapse five years after the last day of the calendar year in which the taxes should have been declared or reported, or paid in the absence of a tax return or declaration. Unless otherwise provided for by law, the right of claiming budgetary subsidy shall lapse five years after the last day of the calendar year of commencement of eligibility. The term of limitation shall be extended by six months if, at the time the tax return is filed late or the budgetary subsidies are claimed, there are fewer than six months left until the right to file taxes or the right to claim budgetary subsidies lapses. In connection with any act of tax and social security fraud (Article 310 of the Criminal Code) and fraud (Article 318 of the Criminal Code) that involves taxes, social security contributions or budgetary subsidies, the term of limitation for the right for tax assessment shall prevail for as long as the term of limitation for the crime itself remains in effect.

**ANNEX 3**  
**List of Participants in the On-Site Visit**

**MINISTRIES AND STATE ORGANS**

Prime Minister's Office - Secretariat Responsible for Public Assets  
Ministry of Economy - Investment Department  
Ministry of Finance  
Ministry of Justice  
Ministry of Home Affairs/ Interior  
Ministry of Public Administration - Body of Inspectors and Controllers of Public Administration  
The Hungarian Ombudsman  
State Audit Office  
Council for Public Procurement  
Hungarian Export-Import Bank (Eximbank)  
Hungarian Export Credit Ltd.(MEHIB)  
Corvinus International Investment Ltd. (related to MEHIB organization)  
Investment and Trade Development Agency

**LAW ENFORCEMENT AND JUDICIAL AUTHORITIES**

Public Prosecutor's Office (International department)  
Anti-Corruption Unit at the National Police Headquarters  
Coordination Office for Fighting Organised crime  
Financial Services Agency  
Special Service for National Security (SSNS)  
Customs Authorities  
Anti-Money Laundering Unit at Hungarian National Police Headquarters (FIU)  
CIOPPS  
National Council of Judiciary  
Budapest High Court of Appeal

**ACCOUNTING BODIES**

Chamber of Hungarian Auditors  
ISACA Hungary Chapter  
Ernst & Young

**CIVIL SOCIETY**

Transparency International Hungary  
Foundation of Market Economy  
National Institute of Criminology (OKRI)  
Beszelo magazine  
Open Society Institute  
Liga Trade Unions  
National Coalition of the Hungarian Trade Unions  
Professors

## **PRIVATE SECTOR**

Hungarian Chamber of Commerce  
Confederation of Hungarian Employers Organizations for International Cooperation  
National Coalition of Employers  
Danubius (hotels)  
Trigranit Development Corporation (construction)  
OTP (bank)