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PROBLEMATIC ISSUES OF HUNGARIAN CRIMINAL LAW RELATED TO THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN COMMUNITIES

Introduction

The modernisation of criminal law in Hungary is a necessity. It is already a commonplace that the introduction of the market economy does not only have advantages, but it also generates specific economic crimes.

The Hungarian State tries to respond to these new challenges by introducing new criminal provisions and by reforming the administration of justice in general. The most important example that can be mentioned is that since 1990 the Hungarian Criminal Code (Act IV of 1978) has been amended thirty six times! These modifications concern more than five hundred text places. According to some legal scholars, this flux of modifications has already a dimension that constitutes a risk to the principle of legal certainty. That is one of the reasons why the Hungarian government is currently rather in favour of creating a new Criminal Code containing all the amendments necessary for the harmonisation with the acquis communautaire and required by the relevant international instruments ratified by Hungary.

It is obvious that in the Member States of the European Union complete national sovereignty in the field of criminal law does not exist any more. It is even more striking in respect of candidate countries, since most of the instruments of the acquis in the domain of organised crime, fraud and corruption have been drawn up under Title VI of the TEU, not to mention the conventions set up by the Council of Europe or the OECD considered to be part of the *acquis communautaire*. Although these documents are not legally binding with regard to Member States, they form part of the *acquis communautaire* that - according to the famous Copenhagen criteria - must be incorporated by the candidate countries into their national legislation in its integrity by the time of accession.

On the other hand, it is perfectly understandable that the European Union requires from the candidate countries the setting up of an effective system for the protection of the financial interests of the Communities in order to fight against irregularities committed with regard to the immense sums provided to these countries in the framework of the pre-accession strategy (see the PHARE, ISPA and SAPARD programmes integrated to the framework of the Accession Partnerships). The question remains, however, why to introduce more stringent rules in the applicant countries than in the actual Member States of the Union receiving much more considerable subventions from the different Community Funds? The most significant example in this respect is the criminal liability of economic organisations and the liability of heads of businesses in respect of which the Member States are still divided. The introduction of these concepts to the Hungarian system of criminal law is currently subject to a heated debate.

In respect of the protection of the financial interests of the EC, the following specific questions of criminal law must be mentioned:

1. Definition of subvention fraud

The present definition of fraud does not fulfil every criteria of protecting neither the state's nor the European Communities' financial interests. It is based on the classical elements of the criminal fraud. One must point it out that in this respect the fight against illegal obtaining of subventions is not efficient. The requirements of the accession of Hungary to the EU demand the creation of new criminal law rules in this field.

Currently, Section 288 of the Criminal Code contains the provisions on the acquisition of unlawful economic advantage: "The person who - in the interest of the acquisition of an economic advantage - deceives the organ or person entitled to decision, and acquires thereby for himself or somebody else unlawfully the economic advantage provided by the state, shall be punishable with imprisonment of up to five years." According to the draft amendments currently under discussion in the Ministry of Justice, this definition is going to be amended in order to achieve compatibility with the definition of fraud given by Article 1 par. 1 (a) of the PIF Convention.

2. Money laundering

The offence of money laundering was introduced to the Hungarian Criminal Code in 1994[1] in the framework of an important amendment containing several new economic offences taking also into account the Recommendations of the Council of Europe in this field. Since 1994, the definition of the offence has been amended three times and a new proposal is currently under discussion in the Ministry of Justice and in the Ministry of Interior.

According to the present version of Section 303 a person who conceals pecuniary assets gained in connection with a criminal act committed by someone else that is punishable by imprisonment pursuant to the Criminal Code, by concealing or dissimulating their origin or true nature, supplying false data concerning their origin or true nature to the authorities, who obtains, uses or utilises the pecuniary assets for himself or for a third party, hides, handles, sells them or performs any financial or banking operation with the pecuniary assets or with their countervalue, or acquires other pecuniary assets for the countervalue thereof, if he knew the origin of the pecuniary assets at the time of perpetration, shall be punishable with imprisonment of up to five years. Until now there has been only five money laundering cases tried by the criminal courts and only one final decision has been passed. The judgement was not guilty.

Hungary ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime on 2 March 2000.

3. Corruption - bribery

The Hungarian Criminal Code regulates several different forms of bribery: active and passive bribery of national officials, active and passive economic bribery and different types of bribery in international relations.

Hungary ratified the OECD Convention on combating bribery of foreign public officials in international business transactions on 17 December 1997 and the Criminal Law Convention on Corruption of the Council of Europe on 22 November 2000.

Concurrently with the ratification of the OECD Convention, Hungary amended its Penal Code by Act LXXXVIII of 1998, and a new Title VIII on Crimes Against the Propriety of International Affairs was inserted to Chapter XV containing provisions on the purity of state administration, administration of justice and public life. Sections 258/B - 258/D of this regulates the criminal act of bribery in international relations. Without going into details we wish to emphasise that the already existing factual elements of bribery have been adapted in the regulation, this corresponds to the requirements of the convention. Moreover, it goes beyond those requirements, since it renders passive bribery punishable by law, as well (Section 258/D). However, as it was stated by the Octopus II Country Report on Hungary (20 December 2000), the lack of obligatory financial investigations of offences related to corruption, often prevents the conviction of suspects.

4. Criminal liability of economic organisations

Criminal liability of legal persons does not exist in Hungary, but there are legislative plans on the introduction of this concept to the Hungarian criminal law system. Currently there is a big debate on this issue. It is more or less accepted that a certain form of liability for criminal activities within the economic entity should be created, but its method is still not clear.

The main obstacle of the criminal liability of legal entities is the classical doctrinal system of criminal law, which is based on the constitutional principle of culpabiliy of natural persons. The second counter-argument is that the international conventions - except for the Criminal Law Convention of the Council of Europe on Corruption - do not demand the creation of criminal liability.

It seems to be unacceptable for the majority of legal scholars and practitioners in Hungary to break the principle of culpability by creating an exception. According to the current legislative proposals of the Ministry of Justice in this field, a separate Act will be drawn up, on the basis of which several measures of legality (winding-up order, suspension of operation, exclusion from certain

1 See: Act IX of 1994 on the amendment of the Criminal Code - entered into force on the 15th May 1994.
At the same time a separate Act and a Government Decree were promulgated containing detailed rules on the obligation of reporting suspicious transactions: Act XXIV of 1994 on the Prevention and Impeding of Money Laundering and Government Decree No. 74/1994 (V.10.) on the Execution of Act XXIV of 1994 on the Prevention and Impeding of Money Laundering.

legal advantages, disqualification from the practice of commercial activities, fine and placing under professional supervision) could be applied against an economic organisation. A lot of criminal law specialists are in favour of administrative liability which can be tried together with the criminal liability of natural persons accused with economic crime by criminal courts in an adhesive process.

5. Criminal liability of heads of businesses

The introduction of provisions regarding the criminal liability of heads of businesses for acts committed by subordinate persons raises constitutional problems in Hungary. Although the Constitution does not contain expressly the principle of culpability, the Constitutional Court implicitly recognised it as a constitutional principle by referring to the principle of presumption of innocence [2].

According to the National program for the adoption of the *acquis*, the introduction of criminal liability of legal entities and the criminal liability for the executives of business companies is planned for the second half of 2001 [3].

6. Financial control of subventions

The internal and external auditing of subventions belongs to the Kormányzati Ellen_rzési Hivatal (Governmental Auditing Office) which is subordinated to the Hungarian Government. The Office contracted with the DG XX to control the proper use of EU subventions (PHARE, ISPA, SAPARD). The construction of an organisational structure and the information network of a subvention-auditing unit with functional independence is the task of the near future.

Conclusions

By mentioning the examples of harmonisation above, we tried to highlight that the Hungarian government is fully aware of the country's obligations as to the acceptance of the *acquis communautaire*. In our opinion, however, it is important to strike a delicate balance between, on the one hand, the fulfilment of the criteria of accession and, on the other hand, the introduction of new provisions to the Criminal Code necessary for the effective fight against fraud and other related offences but without ruining the traditional basic concepts of Hungarian criminal law. One should not forget that in this respect a wide consensus is necessary from the part of law enforcement agencies, prosecutors, and judges: the ones who ultimately apply these provisions, which requires a long and thorough debate.

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2 See Decisions 11/1992 and 63/1997 of the Constitutional Court of the Republic of Hungary.

3 *National Program for the Adoption of the acquis - Hungary, Revised version 2000*, June 2000, Volume II, p. 266. (See on the homepage of the Hungarian Ministry of Foreign Affairs: **www.mfa.gov.hu**)

TOPICAL TASKS IN COMBATING CORRUPTION IN THE CZECH REPUBLIC

Although corruption is a universal problem it is especially widespread in all post-communist countries undergoing dramatic transitions.

The term "corruption" is not explicitly included in the Czech Penal Code. The expression "bribery" ("podplacení") is applied. Bribery means *any misconduct when the public official misuses his position by providing someone with authorised or unauthorised services or when the official obtains an advantage for himself/herself or for another person*. This leads to the acquisition of benefits that are not otherwise obtainable through procedures in the legal framework.

The main fields of corruption includes influencing the authorities:

- with the aim of obtaining state orders,
- within criminal proceedings,
- for obtaining an advantage when a public competition is announced,
- in their decision making procedures regarding compensations of restitution claims, obtaining loans, postponing instalment and others.

In 1998, the police Service for Combating Corruption and Serious Economic Criminality investigated 21 serious criminal offences in connection with the above mentioned fields. Most cases were prosecuted under provision 158 of the Czech Penal Code – "Misuse of Official Power". There were another 250 cases investigated by the Criminal Police, in which this provision was applied (e.g. in the cases of corruption of officers from traffic inspectorates /car theft/ or customs/financial and tax fraud/).

	Number of investigated cases	Number of solved and prosecuted cases
1993	18	1
1994	27	3
1995	37	13
1996	39	11
1997	40	19
1998	41	30
1999 (first half)	78	58

The investigation of "corruption cases" is generally very complicated and law enforcement authorities face the lack of evidence in many cases. It shows the following table with the numbers of investigated and prosecuted serious corruption cases that were investigated by the Service for Combating Corruption and Serious Economic Criminality in 1993 – first half of 1999.

The cases of corruption in 1998 and 1999 were investigated on the basis of the provision 158 (Misuse of Official Power), the provision 160 (Accepting bribes), the provision 161 (Offering bribes), the provision 162 (Indirect Bribery) and the provision 255 (Breach of duty in the Management of the Other People's Property).

The investigation of corruption activities is sometimes influenced by different evaluation of authorities involved in criminal proceedings – investigators, public prosecutors and judges.

Considering all these problems connected with the investigations of corruption activities, the Ministry of Interior in co-operation with experts of other ministries drafted the Governmental programme for the effective combating of corruption. The Czech Government approved this programme at its session on the 17th February 1999.

The Government Programme for Combating Corruption is accompanied by the Report on Corruption in the Czech Republic. It briefly describes some findings on corruption in the Czech Republic, some foreign experience gained in combating corruption and the legislation in force in the Czech Republic that is applicable in combating corruption proposed in the Programme. This Programme collected facts concerning corruption not only from public authorities, but also from non-governmental organisations. Further on it considered also recommendations by the United Nations, Council of Europe, European Union and OECD. In the framework of this program the government laid down legislative plan for adoption of the necessary acts. It also expressed its intention to elaborate and make public an annual report concerning the state of corruption in our country – from the viewpoint of both the public authorities and of the civil associations involved (e.g. Transparency International). In co-operation with the above-mentioned bodies a manual on corruption will be prepared for the public. The elaboration of the programme was an imple-

mentation of the duties accepted by the Czech Republic in the Pre-Accession Agreement on Combating Organised Crime, under which the signatories are obliged to develop their own (national) programme for combating corruption.

Concerning international legal instruments in the field of corruption the Czech Republic implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 27 December 1997, Paris by accepting appropriate legislative measures.

The Czech penal legislation relating to corruption was amended in the summer of 1999 in line with the above-mentioned OECD Convention. The Czech Penal Code recognises three types of bribery:

- passive bribery or receiving bribes,
- active bribery or offering bribes,
- and indirect bribery or receiving bribes in order to influence public officials.

All these above-mentioned types of corruption are considered as serious crimes if they are committed in connection with a *public official*. This amendment in new provision 162 a) subprovision 2 of the Czech Penal Code brought a new definition of public official for corruption offences only. Regarding corruption the definition of a public official was extended ???

- to officials from foreign countries,
- to persons who hold a post in an enterprise, where the decisive influence is held by foreign country,
- and to persons holding a post in an *international organisation*.

This amendment of the Czech Penal Code brought also a new definition of corruption under the provision 162a par 1. A bribe is an unjust benefit consisting in direct material enrichment, or some other advantage being provided or to be provided to the person being bribed, or with such person's consent to another person, and to which he is note entitled. No minimum value of a bribe is stipulated in the Penal Code and jurisdiction.

The amendment also increased the penal sanctions for bribery and it came into force on 8th June 1999.

To this amendment must be added provisions 160-162a concerning bribery in the Czech Penal Code. These provisions are compatible with the First Protocol to the PIF Convention, with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was ratified on 21 March 2000 and with the Criminal Law Convention on Corruption, which was ratified on 8 September 2000. These provisions are also quite compatible with the Article 5 of Corpus Juris 2000. However the problem of corruption in the private sector is yet unsolved.

The criminal sanction for bribery is undermined by a connection with a matter of public interest or by influence on a public official (both a national one and a foreign one – or international one – see above). The definition "*a matter of public interest*" means such matters, which providing all society or at least bigger group of citizens is interested in. Furthermore it is not important if a bribe is given before, during or after a matter of public interest is undertaken.

It follows that the use of these provisions in the private sector is very limited. Not all transactions in the private sector are done in the connection of a matter of public interest. Despite of that corruption in this sector has a very bad impact on business and social relationships as well. The corruption in the private sector is dangerous especially if it has a impact on the public sector or if it has a major national impact (e.g. in banking, education, health service, media).

Provision 49 of the Czech Commercial Code deals with in the private sphere. This provision deals with bribery as one of the techniques of unfair competition. There is a possibility in this case to prosecute the offender under the criminal offence Unfair Competition Provisions of Provision 149 of the Czech Penal Code or under the criminal offence Breaches of Mandatory Rules in Economic Relations according the provision 127 of the Czech Penal Code.

It means that there is no direct sanction for bribery in the private sphere, except bribery related to unfair competition or if a matter of public interest or influence on a public related to official are touched.

The role of criminal repression in Czech law is only subsidiary. Needless to say it is very difficult to discover and to prove corruption. Both persons accepting a bribe and giving a bribe benefit from this activity and they are not interested in disclosing this criminal act. It is obvious that the centre of anti-corruption measures cannot lie in the area of penal law. It is estimated that only about 1% of corruption activities are disclosed by standard criminal investigation. Consequently the role of prevention is completely irreplaceable.

Talking about the prevention of corruption in the Czech Republic it is necessary to think about its causes.

One of the causes of corruption is the intensity and extent of social changes. After 1989 large transfers of ownership rights connected with the process of privatisation and restitution have taken place. However, at the sale time all the control systems have been considerably weakened.

Many politicians of the first half of the 90-ies reduced the transition of society only to the transition of economics and tried to establish market economy almost at any price considering proper control system as an obstacle of free market and democracy. Nevertheless the experience of the last ten years shows that this approach was not right. If the transition of economics is not accompanied by higher moral standards of citizens' behaviour and especially by higher moral standards of public officials, then neither the economics nor the democracy can be well developed.

Another cause of corruption is wrong priorities and low moral awareness. Many of our politicians fell reluctant to underline the vital importance of moral standards thinking that the free market can solve everything. Low moral standards, however, directly relate to the level of corruption.

After 1989 a businessman who became rich by successfully evading tax laws became a hero for many people. This deformed picture of a hero was contributed ??? by financial scandals of political parties and by inadvertent comments of several politicians (as e.g. in 1992 one of our prominent politicians declared non-existence of dirty money in economics). Unfortunately this gave the wrong signal to many people that everything is allowed. Better results in combating corruption cannot be achieved without the change of general and business social climate.

As yet there is no transparent system of financing political parties and movements, defining of conditions for presents received from corporate bodies and individuals. Sanctions should be set for not meeting these standards. All income and all entities established by the political party must be registered and identified. The immunity for deputies should be strictly defined as well because it should not serve to avoiding responsibility for their illegal or criminal behaviour.

Another cause of corruption is quality of public administration. It is obvious that corruption is not so frequent when the state has a strong, qualified, efficient financially secured but not so numerous staff. As yet the status of Civil Servant has not been defined. A new law concerning Civil Service should legally restrict civil activities, promote their further education leading to higher qualifications and thus servants' ensure a better service to the public.

The new Police Act in relation to the prepared amendment to the Code of criminal Procedure should provide for a quick and effective penal procedure, which fulfils the conditions for a fair trial. The status of evidence acquired before a particular person has been charged with a criminal act should be charged. A public prosecutor should carry out an investigation in cases of corruption committed by members of the police. Specialised public prosecutors in regional offices should supervise the investigation of the most severe corruption cases. Non-penal powers of public prosecutors should be enhanced. Public prosecutor should initiate a civil or an administrative procedure or its review and to initiate a procedure before the Constitutional Court when a violation or a threat to a major public interest occurs.

Unfortunately there is also a dearth of non-penal laws to support an anti-corruption drive. In the Czech Republic there is no obligation to transfer money through banks. It is still possible to pay even large financial amounts in cash. The law concerning disclosing financial sources has not yet been adopted. This act is now being under preparation as well as the act concerning witness protection. The current standard of protection of witnesses and other vulnerable targets is still very low.

Last but not least the press freedom guarantee is very important. Several times journalists already revealed facts, which lead to the investigation of big cases of economic crime. Furthermore the Ombudsman Office has recently started to work and the Act on free access to information was adopted.

The Czech Republic has still much to do in the areas of prevention and investigation/prosecution of corruption. The problem lies not only in the lack of necessary acts but also particularly in the lack of people's moral awareness. Despite the fact that moral awareness cannot be codified it is a key problem without which corruption cannot be cut down successfully.

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THE ROLE OF THE EUROPEAN ANTI-FRAUD OFFICE IN THE PROCESS OF EU-ENLARGEMENT

1. Introduction

The process of the enlargement of the European Union has attracted public interest in many areas and raised concerns in many areas such as external borders, migration and asylum, future common agricultural policy and the institutional questions concerning votes in the Council and seats in the European Parliament. These issues have all been largely discussed at the IGC in Nice in December 2000 and even if the aim not to produce any "left-overs" could not be achieved, some considerable progress has been made in many of the very complex and highly political fields.

The matter of the protection of the financial interests of the European Union has on the other hand not been addressed as such at all. The declaration on establishing Eurojust does rather belong to the field of co-operation of the Member States in criminal matters and can easily be identified as an excuse for not dealing with the issue of the European Public Prosecutor at all [1], if not as a measure aiming at the prevention of any discussion on this matter. This omission is not only disappointing with regard to the protection of the financial interests of the EU inside the Union, but also worrying, taking into account the already existing obstacles for an effective detection, investigation and prosecution of fraudulent behaviour with an impact on EU funds. These obstacles derive not only from the diversity of national laws, but also from the simple fact that national judicial authorities are bound by national borders while criminals profit from the free movement of goods, services and people. These problems will of course increase with an ever larger Union with ever more national legal orders.

It has therefore become an even more important task to prepare the countries applying for accession to the European Union for the adoption and implementation of the acquis communautaire in the field of the protection of the financial interests and for an effective co-operation with the EU, notably with the Anti-Fraud Office OLAF. The present article describes how the Office contributes to this project and tries to explain the strategic approach of OLAF towards co-operation with applicant countries.

2. Evaluation of the alignment of national law with the acquis

2.1. The acquis communautaire in the field of the protection of the financial interests of the EU

Third pillar acquis

The acquis communautaire in the field of the protection of the financial interests of the European Union (PIF) consists of a limited number of legal instruments. The part of the third pillar acquis that foresees criminal or administrative liability and sanctions encompasses the Convention on the protection of the European Communities' financial interests (PIF-Convention) [2], the (First) Protocol to this Convention [3], the Second Protocol [4], the Joint Action on corruption in the private sector [5], the Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering [6] and the Council framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro [7].

These legal instruments cover a rather extensive part of substantive criminal law. They require a number of offences to be incorporated in national criminal law, such as a variety of different forms of fraud concerning both EU expenditure and income, passive and active corruption, also in the private sector, money laundering and counterfeiting. Each of these required incriminations has itself a considerable broad scope. The notion of EU-fraud

1 The Commission had made very substantial proposals in its additional contribution to the IGC and urged to adopt a least a general declaration that further steps would be taken in this respect. See COM (2000) 608 final : " The criminal protection of the Community's financial interests : a European Prosecutor. "
2 Official Journal C 316 , 27/11/1995 p. 49–57.
3 Official Journal C 313 , 23/10/1996 p. 2–10.
4 Official Journal C 221 , 19/07/1997 p. 12–22.
5 Official Journal L 358 , 31/12/1998 p. 2–4.
6 Official Journal L 166 , 28/06/1991 p. 77–82.
7 Official Journal L 140 , 14/06/2000 p. 1–3.

for example includes not only the " use or presentation of false, incorrect or incomplete statements or documents ", but also the " non-disclosure of information in violation of a specific obligation " and the " misapplication of such funds for purposes other than those for which they were originally granted ". The provision on money laundering contains far more than ten alternatives and the notion of counterfeiting includes actions like the possession, import, export and transportation etc. of counterfeit currency. Moreover, most of the instruments also require the incrimination of attempt and even of preparatory acts, of complicity and the association to commit the relevant crimes. The PIF-Convention itself provides criminal liability of " heads of businesses or any persons having power to take decisions or exercise control within a business [..] in cases of fraud affecting the European Community's financial interests [..] committed by a person under their authority acting on behalf of the business" and the Second Protocol as well as the Council framework decision on counterfeiting foresee the criminal or administrative liability for legal entities.

First pillar acquis

The " PIF-acquis " under the first pillar consists of a number of sectoral [8] and two horizontal regulations providing administrative sanctions and the right of the Commission to conduct administrative checks and inspections. Furthermore, and very important, many of them require Member States to communicate detected cases of fraud and other irregularities and to co-operate with the Commission and assist EU-investigators in carrying out checks and inspections. The horizontal framework regulation 2988/95 stipulates that effective and dissuasive administrative checks, measures and sanctions be introduced to ensure the proper application of Community law. The sanctions should apply to all relevant economic operators, including legal entities (Article 7). This regulation also gives the Commission power to carry out checks and inspections, including on-the-spot checks (Article 9). Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities specifies the investigative powers of the Commission and the duty of the Member States' authorities to co-operate. The Commission is granted the power to carry out on-the-spot checks and inspections shall on economic operators to whom Community administrative measures and penalties pursuant to Article 7 of the named regulation 2988/95 may be applied, where there are reasons to think that irregularities have been committed. It has to notify the Member State only, which means that it is in any case the Commission who conducts the investigation and not national authorities. According to Article 7 (1) " Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents. " This requires that candidate countries as well as Member States make respective changes to their national law to grant Commission inspectors the same rights as national inspectors. According to Article 9, Member States must give Commission inspectors such assistance as they need to allow them to discharge their duty where the economic operators resist an on-the-spot check or inspection. This of course is necessary, as the Commission, and this is true, does not possess any enforcement measures or rights, of its own.

Through regulation 1073/99 [9] the investigative rights of the Commission referred to above, are conferred upon OLAF. In the process of accession negotiations, it will therefore have to be monitored, whether the legal order of the candidate country already allows OLAF inspectors to carry out investigations, including on-the-spot checks at economic operators and whether national authorities are obliged to co-operate.

8 These will not be dealt with in this article, as they are too numerous and do rather fall under the Chapters concerning the sectoral policies. See e.g. for own ressources : Reg. No 1026/1999 of 10 May 1999 determining the powers and obligations of agents authorised by the Commission to carry out controls and inspections of the Communities' own resources; for agricultural policy (EAGGF-Guarantee Section): Reg. No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field; for structural funds: Commission Reg. No 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field; and for cohesion funds: Commission Reg. No 1831/94 of 26 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organisation of an information system in this field.

9 EC, and 1074/99 Euratom.

2.2. How OLAF evaluates the achievements and progress in the candidate countries

The Corpus Juris Study

Obviously the Commission and OLAF do not always have the expertise themselves to assess the process of alignment, especially in the field of national criminal law, in all candidate countries. Instead one has to rely on external studies, like the " Study on the feasibility of the implementation of the Corpus Juris in candidate countries " (so called Corpus Juris III). This study is being carried out by the ERA (Academy of European Law) and consists of national reports, in which national experts shall state whether their domestic law is in line with the acquis and the Corpus Juris (i.e. a proposal of material and procedural penal provisions for the protection of the European Finances) and/or if an alignment would be feasible. Subsequently, EU experts will provide horizontal reports, summarising the national reports and finally a global report will describe the situation as it is and the measures to be proposed.

The recent internal study

This implementation study is of course very useful for the accession negotiations, as it allows to some extent to assess, whether national law is already in line with the acquis and where it still has to be changed or amended to achieve this aim. The problem is though, that the national reports do not (always) deal with the acquis communautaire as a distinct aspect of alignment, but sometimes tend to treat the Corpus Juris as being part of it already. This makes it necessary not to rely only on the assessments made by the authors, but to go back to the content of their explanation while having only the acquis, and not the Corpus Juris in mind.

To this end, the author has carried out an internal study for OLAF on the basis of the national reports. The study can be regarded as a kind of " excerpt " from the national reports, " filtering " them to get a certain acquis substrate. This substrate also fulfils the function of concentrating the statements made in the national reports. One has to keep in mind, that the national reports, as they are dealing with the Corpus Juris as a whole, are on average 150-200 pages long.

As a first step, the relevant acquis communautaire has been collected and the provisions concerning material criminal law have been taken up in a comprehensive " list of the acquis ". Subsequently an evaluation table has been established, which contains questions, formulated on the basis of the acquis-list and covering it completely [10]. This table has then been used as a kind of checklist for the national reports. This allowed to find out quite exactly the lacunae of domestic law on the one hand and also the deficiencies of the national reports on the other hand. Where it was not possible on the basis of the national report, to assess whether national law is already in line with the acquis or not, this has been clearly stated. As a summary of these checklists a list of questions has been drawn up for every country, stating the uncertainties or clear gaps.

Future challenges

The above mentioned study only deals with the third pillar acquis and is moreover restricted in its scope to material criminal law. This means, that the first pillar acquis (i.e. administrative investigations, co-operation and sanctions) is not covered. The reason for this gap is on the one hand the lack of staff at OLAF. So far, only very few people are in charge of enlargement-related questions and none of them can dedicate his on law full time to this matter. On the other hand, the empirical basis is different. The Corpus Juris III-study only covers the issue to a limited extent. Of course, OLAF investigators do have practical experience in operational co-operation with the candidate countries which are different from one state to another, and recently a meeting has been held to exchange knowledge and experience between members of different units and directorates at OLAF, but the evaluation of alignment with the acquis would require a deeper analysis of the legal framework as well as of the administrative capacity of the services involved. Some expectations are therefore set on the assessment of the legal framework and administrative capacity in this field, which an external service (SIGMA) will carry out this year.

2.3. How OLAF contributes to the negotiations process

Chapters of the negotiation process

For the purposes of negotiations with the candidate countries, the acquis communautaire has been divided into 31 Chapters, each of them covering issues like " Free Movement of Goods ", " Taxation ", " Energy " and so on, most but not all of them corresponding to the competencies and expertise of one Directorate General (DG)

10 Extradition and mutual assistance are not covered, as they do clearly fall under the competence of DG JAI and moreover are very complex matters.

of the Commission. The subject matter of the protection of the financial interests of the European Union, the field of competence of OLAF, has been split though and actually figures under two Chapters : Chapter 24, " Co-operation in the fields of Justice and Home Affairs ", where the competence is being shared with DG Justice and Home Affairs, and Chapter 28, " Financial Control ", where DG Budget and DG Audit and Financial Control are mainly responsible. Under each of the respective Chapters, different issues are being dealt with, although a clear line of distinction cannot be drawn. The evaluation of the alignment of national criminal law with the acquis, i.e. with the third pillar instruments, figures mainly under Chapter 24, while Chapter 28 – with regard to OLAF – concerns rather the questions linked to administrative operational co-operation, administrative sanctions and recovery, i.e. the first pillar acquis [11].

Position Papers, DCPs, EUCPs etc.

For each of the Chapters, all candidate countries provides a so-called " Position Paper " in which they state, whether they do accept the acquis that has been presented to them, and to what extend, according to their opinion, they do already fulfil the requirements. This concerns not only legislation, but also – and this becomes more and more important – the administrative capacity to implement the acquis. Finally they are also supposed to describe their plans and the time-schedule for further alignment. These Position Papers are then being analysed, before DG Enlargement draws up a so-called " Draft Common Position " (DCP). This analysis is a very comprehensive and time-consuming process of evaluation. The relevant DGs involved in the respective Chapter are consulted and give their statements on the presented Position Paper. Subsequently technical consultation meetings are held if this is considered useful, with the candidate countries, in which the DGs involved can ask for clarifications of certain points of the papers, while at the same time the candidate countries have the opportunity to ask for clarifications of the relevant acquis and the expectations the Commission has. After these consultations, the countries do often provide " Additional Information Papers ", which then again are analysed by the relevant DGs and become part of the basis of the final assessment made by DG Enlargement in the DCP. The DCP is then sent to the Council (precisely : the Council Enlargement Group) where it is finally adopted by the COREPER, after further consultations, if necessary, between the Presidency, the Council Secretariat, the Enlargement Group and DG Enlargement. After the adoption it becomes the " European Union Common Position " (EUCP) and is presented to the candidate country. This process though is not linear. It might as well happen that a EUCP has already been presented and the candidate country, e.g. as a reaction to negative assessments made in it or further clarification being demanded, provides another additional information. DG Enlargement will in this case prepare a " revised DCP " after consulting the different DGs.

Furthermore, the negotiations with candidate countries are " monitored " from Chapter to Chapter through monitoring tables, which assess whether the commitments made are being fulfilled and whether new acquis can be presented. Again, all DGs involved are consulted and asked to assist DG Enlargement in filling in the tables.

Finally, DG Enlargement also undertakes a so-called " update screening " and provides regular reports on the progress made in each candidate country, again with the other DGs participating in establishing the drafts.

As derives from this short and rough presentation, the relevant DGs are consulted at many stages of the negotiation process, and so is OLAF. As the author personally took part in all technical consultations held with the applicant countries under Chapter 24 in 2001 (they were all held from February to April at DG Enlargement in Brussels), some of these questions worked out in the above-mentioned internal study could already by asked and as a result, additional information came in that answered some of them. OLAF will now give its statements to DG Enlargement on these additional information papers and subsequently on the (revised or new) DCPs. One has to admit though, that the contribution made is still somehow focussed on Chapter 24 and the third pillar acquis. This situation will have to be improved in the future by using the experience of the SIGMA-study and internal knowledge.

11 It would be misleading though, to say that Chapter 24 and the third pillar acquis concern criminal law, while Chapter 28 and the first pillar acquis concern administrative law, as some provisions of the named legal instruments leave it up to the national legislator to decide, whether he wants to transpose the provisions through penal or administrative law (see e.g. Art. 3 and 4 of the Second Protocol, which require " necessary measures " only, and expressly mention the alternative of " criminal or non-criminal fines " for legal entities).

3. Operational co-operation

Apart from the contribution to the accession negotiations by evaluating the progress made by candidate countries in bringing their national law in line with the acquis, a task carried out by OLAF as a Commission service, the Office does of course also co-operate with national authorities in its daily operational work, which it carries out independently. As the Commission has stated in a recent strategy paper for the fight against fraud [12] under 1.4.3., the strengthening of the co-operation with applicant countries becomes more and more important, as the policy of enlargement, " may also be exposed to risks of misappropriation from its primary objectives, in particular where significant funds are involved. It remains therefore essential to improve the level of co-operation with the authorities of the countries concerned. " One should be aware of the fact, that the EU budget position " pre-accession aid to applicant countries " amounts to 3'240 Mio € for 2001 [13].

Member States are obliged by Article 280 of the EC Treaty to protect the EU financial interest at the same level as they protect their own interests (par. 2) and are bound to co-operate with each other and the Commission (par. 3). Moreover the regulations mentioned above directly apply to them. Whereas the candidate countries on the other hand are not bound by any of these instruments before accession. Checks and investigations in cases of fraud can therefore only be carried out on the basis of specific legal instruments, such as the PHARE-, ISPA and SAPARD-agreements or the specific contracts concluded with beneficiaries [14]. Such agreements are partly already in place and partly still drafted [15]. Not least as a part of action 94 of the Commission reform [16], OLAF makes sure that new agreements contain such provisions.

In addition to the preparation of legal basis' for checks and investigations carried out by OLAF in applicant countries, a second important aspect is to ensure a good administrative operational co-operation between the Office and national authorities. As the already cited Commission strategy paper says : " To facilitate information exchanges and the necessary checks, the Commission will systematically examine the possibility of concluding administrative co-operation agreements or memoranda of understanding with all the responsible authorities to ensure the proper application of legislation and check on the eligibility and the correct use of funds in these countries. "

Such co-operation does already exist between OLAF and certain authorities in the applicant countries, especially in the area of customs, where specific provisions of the respective Europe-Agreements between the EU and each applicant country stipulate that national authorities shall carry out investigations or exchange information on request [17].

5. Olaf Polska as an example of a co-operation project

In Poland, an even closer form of co-operation has been developed by implementing a PHARE-project, that envisages to establish "a multi-disciplinary structure similar to the European Anti-Fraud Office which will be able to serve as a model to other applicant countries."[18] As a first step, a multidisciplinary unit (with expertise in police, customs, tax, audits as well as magistrates and judicial police) specialising in the fight against fraud and organised crime has been officially set up at the

12 Communication from the Commission - Protection of the Communities' financial interests - The fight against fraud - For an overall strategic approach COM (2000) 358 final.

13 Source : " General Budget of the European Union for the Financial Year 2001 – The Figures ", Budget position B7-0 (**http://europa.eu.int/comm/budget/pdf/budget/syntchif2001/en.pdf**).

14 As Article 11 (3) of the ISPA-framework regulation 1266/99 states : " Financing decision and any contracts or implementing instruments resulting therefrom shall expressly provide for inspection by the Commission and the Court of Auditors to be carried out on the spot, if necessary. " See also Art. 9 (3) of regulation 1268/99.

15 The current draft version of the " Multiannual Financial Agreement " between the Commission and the respective applicant country for example contains references to regulation 2985/96 and provides for the possibility of on-the-spot checks. The same is true for the budgetary provisions of the national PHARE-programmes for 2001.

16 " Action 94 Fraud "proofing" of legislation and contract management
To render the present system of fraud-proofing more effective, Commission services will be required, when proposing new legislation with a potential impact on the Community budget, to submit draft proposals to OLAF for a risk assessment during inter-service consultations. DG Budget will be assisted by OLAF in the review of the Commission's systems for contract management (e.g. standard contracts, central contracts database, management tools). OLAF will also provide advice on fraud-proofing throughout the legislative process. " Reforming the Commission - A White Paper - Part II - Action plan COM (2000) 200 final.

17 See for example Article 2 and 3 of the " Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part - Protocol 6 on mutual assistance in customs matters " (Official Journal L 360 , 31/12/1994 p. 2 – 210).

18 Communication from the Commission - Protection of the Communities' financial interests - The fight against fraud - For an overall strategic approach COM (2000) 358 final, under 2.3.

Inspectorate General of Customs (IGC) in Warsaw in the beginning of April 2001. It will be responsible for carrying out investigations both on EU-expenditure and income. It is envisaged to conclude co-operation agreements between the IGC and the different services responsible for the management and monitoring of pre-accession funds to allow the IGC to co-ordinate anti-fraud investigations. The unit will enjoy support during the launch period of at least 2 years from a team of experts from different Member States designated by OLAF. In the long run this unit could become an independent "OLAF Poland" with competencies and a structure similar to the European Anti-Fraud Office.

The unit at the IGC is in any case already reviewing national criminal and administrative law and the process of alignment with the acquis and assisting OLAF Brussels in providing DG Enlargement with this information. Furthermore, the daily contact with Polish officials of the IGC can be regarded as a institutionalised training in European law and practice.

6. Strategy for the future

When reflecting on OLAF's approach towards co-operation with applicant countries one has to keep in mind that the nature of the relations with their authorities are very different from the relations with Member States' authorities. OLAF staff consists of people who are citizens of Member States and most of them have formerly worked in national administration or as national experts they are even going to return to their former service after a certain period at the office. In any case, the Office does therefore have good and well-established contacts to the relevant Member State authorities the investigators have to co-operate with. In addition most authorities in the Member States do by now know OLAF and its work and are willing to give their assistance and help.

This is not always the case with applicant countries. First of all, it is hard to know which national service is competent for the investigations OLAF wants to see carried out and the national services on the other hand do not know the European Anti Fraud office which makes it hard for them to judge the importance of an issued request. Secondly, OLAF does very often not know the scope of powers of the different services, the way of working and the formal prerequisites for requests and so on. Finally, in many cases conflicts of interest or competencies between different authorities have proven to be a major deficiency, jeopardising efficient co-operation.

6.1. The aim of a central single contact point

The main aim of the Office therefore is, to have a central contact point in all applicant countries which would be competent to handle all cases of irregularities or fraud related to EC expenditure or income. Ideally the service would, like the unit at the IGC in Poland, itself be competent to carry out requested administrative investigations – on demand jointly with OLAF-investigators –, would assist OLAF in drawing up the report at the end of the investigation and even ensure the administrative judicial follow-up (administrative sanctions or criminal procedure). This of course would require the service to be located within the judiciary or at least to have very good relations with judicial authorities and the legal power to submit cases and ask for the opening of criminal investigations.

This ideal solution might not be possible in all countries and it is of course up to the discretion of each state how to organise their administration. In case that the central contact point is not given the named competencies it should at least work as a co-ordinating service in all cases of irregularities or fraud related to EC expenditure or income. This means it should have (legal) agreements with all authorities competent for management and inspections in the different fields (tax, customs, agriculture etc) and should make sure that OLAF-requests do fulfil the requirements and are directed to the competent authority. At the end of an investigation it should help OLAF investigators to draw up a report which is formally correct and can be used as evidence in administrative or Court procedures. Furthermore it should be prepared to organise seminars and training for staff at all authorities which do already or will in the future manage EU-funds or which are competent to detect irregularities in this field.

In the long run, one could then even think about building up a certain OLAF-like service, similar to the project in Poland. This service could, in addition to operational co-operation, exchange of information and the organisation of seminars and training, also fulfil the task of assisting OLAF Brussels (and indirectly the Commission as a whole) in monitoring the process of alignment of national law with the acquis, as described above, by providing translations and analysis of national law and establishing contacts with national legislative bodies in the applicant countries.

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6.2. Problems to be solved

One has of course to be aware that the model of co-operation as described above, is an ideal model as it requires a number of investments. First of all, there has to be a political decision, to establish such a single contact point and the appropriate service has to be chosen wisely. Secondly, there has to be a legal framework, allowing operational co-operation, i.e. allowing OLAF investigators to carry out on-the-spot checks, allowing the exchange of information, establishing the duty to communicate cases of irregularities, giving the national service investigative powers, allowing it to submit cases to the prosecutor's office etc. Thirdly, the service has to have the administrative capacity to carry out the tasks that have been assigned to it, i.e. staff, equipment, technology, knowledge and competence. Finally, it should of course be working according to good practice in Member States with regard to personal integrity, working methods and human rights. It is easy to imagine, that in most cases not all of these requirements will be fulfilled.

On the other hand also OLAF has to face certain problems when it comes to implementing the idea of such a co-operation with the candidate countries. The main problem being the lack of staff dedicated to this task. Even after a specific unit of the directorate A, called "support for candidate countries", will have been established, only very few people will be assigned to work in the field of enlargement as a distinct matter. The drafting of administrative co-operation agreements, the organisation of seminars, the contribution to the enlargement negotiations and in particular the establishment of a single contact point with an OLAF-like structure do require a lot of time and planning. The last point requires furthermore the secondment of a member of the OLAF staff to the national service, something which will not be possible to envisage for all applicant countries.

6.3. OLAF's approach towards applicant countries

OLAF's approach towards the co-operation with applicant countries has so far been rather "reactive" than "proactive" and this will presumably also be the future approach of the new unit. This does not mean that OLAF is not ready and willing to co-operate in choosing and establishing an appropriate single contact point, but it means that the Office will not take actions in this direction until the candidate country itself is ready to undertake at least some of the above mentioned commitments and investments. This readiness can be shown by contacting the Office and proposing practical measures to be taken by the candidate country. This will then also be judged in the negotiations as an applicant countries' willingness to implement the acquis communautaire under Chapter 28.

7. Conclusions

The European Anti-Fraud Office contributes to the preparation of the applicant countries for the adoption and implementation of the acquis communautaire in the field of the protection of the Communities' financial interests by assessing their alignment efforts and by establishing closer forms of co-operation with national authorities. The ideal aim would be a full transposition of the third and first pillar acquis and a powerful, co-operative and effective single contact point in each applicant country. Even if this aim might only be achieved to some extent, it is necessary to continue the work that has been done already and to assign sufficient staff to OLAF's new unit [20], enabling the Office to do so.

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19 This means that the operational co-operation will of course go on like it has before, but only as a part of the general investigative work of the Office, and not as a specific " enlargement "-related work.

20 Even if the unit will formally not be in charge of the tasks related to negotiations with applicant countries, i.e. relations to the Council and DG Enlargement, but instead is supposed to support these countries in all fields related to the equivalent protection of the EU's financial interests, it will of course anyway be involved in this process.

21 The author was a trainee at the European Anti-Fraud Office from October 2000 to February 2001 and later on carried out a study on the alignment of national criminal law with the acquis in the applicant countries as a consultant. The views expressed in this article are anyhow personal and cannot be regarded as official statements of the Office.

50 Vorschläge für eine integrierte Strategie zur Prävention und Bekämpfung der Korruption

I. Allgemeine Massnahmen

1. Innerhalb der Grenzen ihrer Kompetenzen sollte jede Behörde und jedes ihrer Mitglieder die Möglichkeit von Korruption in Betracht ziehen, wenn sie die Tätigkeit von Personen, die einem virtuellen Interessenkonflikt ausgesetzt sind, kontrolliert.
2. Wird ein Korruptionsfall entdeckt, sollen alle zuständigen Behörden sogenannte „spiralförmige Kontrollen“ durchführen; wichtig sind vor allem Koordination und Vermeidung negativer Kompetenzkonflikte. Anonymen Anzeigen sollte besondere Aufmerksamkeit geschenkt werden.
3. Auf nationaler und lokaler Ebene sollen von der politischen Gewalt unabhängige Rechnungshöfe eingesetzt und diesen spezielle Kompetenzen im Bereich der Korruption zugewiesen werden.
4. Die administrativen und finanziellen Untersuchungs- und Verfolgungsorgane sollen reorganisiert werden, damit eine effiziente und rationelle Mittelverwendung (die heute auf lokaler Ebene zersplittert ist) sichergestellt wird. Vor allem sollen bewegliche und aus verschiedenen Bereichen stammende Einheiten eingesetzt werden, welche auf die Bekämpfung und Wahrnehmung von Korruption spezialisiert sind und besondere Kontrollen nach einem gezielten System von Stichproben durchführen (vor allem im Bereich des Bauwesens).
5. Die öffentlichen Körperschaften sollen effektiv und ausnahmslos jedes mögliche Gerichtsverfahren, sowohl zivil-, straf- wie verwaltungsrechtlich, gegen Bestechende und Bestochene ausnutzen. Die Prozessfähigkeit soll auch zivilrechtlichen Organisationen zuerkannt werden.
6. Im Bankenbereich soll der Grundsatz der tadellosen Tätigkeit durch die Aufsichtsbehörden auf die direkte oder indirekte Teilnahme der Banken an jeder Korruptionstätigkeit ihrer Klienten – sei es öffentliche oder private Korruption, einschliesslich derjenigen im Ausland – ausgedehnt und angewendet werden.
7. Das Obligationenrecht soll durch Korruption beeinträchtigte Verträge für nichtig erklären. Das Handelsrecht soll für die Prüfer grössere Kontroll- und Meldepflichten vorsehen.
8. Die Gesetzgebung zur Bodennutzung soll einen finanziellen Ausgleich für alle Massnahmen, von denen Einzelne profitieren könnten, vorsehen (der Ausgleich soll durch die Einzelnen geleistet werden und nicht durch die Gemeinschaft).
9. Das Steuerrecht soll zusammenhängend revidiert werden, so dass Unternehmen keine Möglichkeit mehr haben, von ihrem Einkommen an Beamte entrichtete geheime Provisionen, sowie andere, mit der privaten Bestechung und der Parteifinanzierung verbundenen Vorteile, abzuziehen.
10. Die Wettbewerbsgesetzgebung soll geändert werden, damit die Wettbewerbskommissionen abschreckende Strafmassnahmen verhängen sowie die nötigen Untersuchungen durchführen können, vor allem gegen Unternehmen, die gesetzwidrige Kartellabsprachen getroffen haben.

II. Legislative Massnahmen betreffend die Institutionalisierung der Macht und die Beamten, welche folgendes vorsehen:

11. Beschränkung der zugelassenen Wahlkampfausgaben und eine gewisse Eingrenzung der Ressourcen der Politiker (mit dem Ziel der Transparenz von Finanzierungsquellen und der Unabhängigkeit von politischen Verantwortlichen).
12. Wahlverfahren für Richter, die vermehrt deren Unabhängigkeit von der politischen Gewalt gewährleisten, und die ebenfalls Unvereinbarkeitsregeln zwischen richterlichen Funktionen und politischen Wahlkom-petenzen auf anderen Staatsebenen festlegen.
13. Massnahmen, welche die Transparenz der durch Volksvertreter auf Staatsrechnung ausgeübten wirtschaftlichen Tätigkeiten gewährleisten (vor allem durch jährliche Veröffentlichung der durch öffentliche Körperschaften ohne Ausschreibung vergebenen Mandate).

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14. Massnahmen, die die Transparenz der privaten, finanziellen und wirtschaftlichen Interessen, an welche Wahlkandidaten gerichtlich, ja sogar moralisch gebunden sind, sicherstellen, sowie die Pflicht der gewählten Volksvertreter, in den Ausstand zu treten, wenn diese Interessen möglicherweise denjenigen der durch sie vertretenen Körperschaften widersprechen. Ausserdem soll eine wirkliche Regelung der Unvereinbarkeit erfolgen, die es den Volksvertretern verbietet, von Dritten Mandate anzunehmen, die zum Kompetenzbereich des Gremiums, dem sie angehören, zählen. Diese Pflicht gilt für alle Etappen der Staatstätigkeit.

15. Personen, die wegen Verstosses gegen der Korruption vorbeugende Normen verurteilt worden sind, sollen durch Unwählbarkeit in politische Funktionen bestraft werden.

16. Schaffung einer Volkskontrolle der öffentlichen Ausgaben durch die Institution oder Erweiterung des administrativen und des Finanzreferendums.

17. Entpolitisierung der Verwaltung, vor allem durch die Definition von Wahlkriterien für Beamte, welche die politische Zugehörigkeit der Kandidaten ausschliessen.

18. Einführung der Vermögens- und Lebensstandardkontrolle sowie der Kontrolle der persönlichen und der Familienbeziehungen von Beamten, die bei Entscheidungsprozessen mitwirken, die auf Korruption am anfälligsten sind.

19. Rotation von Effentlichen wie privaten Angestellten, deren Funktionen auf Korruption besonders anfällig sind.

20. Eine (wenigstens partielle) Alternative zur Rotation der Angestellten stellt eine Matrixzusammenstellung derjenigen Beamtengruppen, die mit der Korruption ausgesetzten Entscheidungen beauftragt sind, dar; die Teilnehmer an einem Entscheidungsprozess sollen zu verschiedenen administrativen Einheiten gehören.

21. Rigorose Anwendung der Kollektivunterschrift, damit jeder am Entscheidungsprozess teilnehmende Beamte erhöhte Verantwortung übernimmt;

22. Das strikte Verbot für Beamte, jedes Angebot von Geschenken oder von einem Vorteil, sei er auch nur indirekt, anzunehmen und die Pflicht, solche Vorfälle dem Vorgesetzten zu melden.

23. Die allgemeine formelle Pflicht für Beamte, der Direktion jeden Korruptionsverdacht gegenüber Mitarbeitern oder Untergebenen mitzuteilen (und Pflicht der Direktion, eine selbständige Untersuchung durchzuführen und die festgestellten Tatbestände bei den Strafbehörden anzuzeigen). Die Einhaltung dieser Pflicht darf aber dem Beamten keinen Schaden zufügen, selbst wenn sich der Verdacht als unbegründet erweisen sollte.

24. Die rigorose und ausgedehnte Bestimmung der Unvereinbarkeitsfälle (mit grundsätzlichem Ausschluss der Möglichkeit von Sonderberechtigungen) für Beamte mit Entscheidungsfähigkeiten, mit der Ausübung von akzessorischen öffentlichen oder privaten Tätigkeiten, die Interessenkonflikte verursachen könnten (in diesem Rahmen sollen auch Massnahmen gegen „pantouflage“ geprüft werden: im besonderen soll der Beamte, der den Staatsdienst verlässt, keine beruflichen Beziehungen mehr zu seinen ehemaligen Mitarbeitern pflegen dürfen; dieses Verbot könnte im Arbeitsvertrag verankert werden und sollte auf einer speziellen gesetzlichen Grundlage beruhen).

III. Massnahmen im Bereich des öffentlichen Beschaffungswesens

25. Ausdehnung des Begriffs des öffentlichen Auftrags (beispielsweise auf die Konzessionsvergabe) und der Möglichkeiten, offene Verfahren auf die Vergabe von öffentlichen Aufträgen anzuwenden (andere Verfahren sollen die Ausnahme bleiben), insbesondere durch die Wahl geeigneter Eingrenzungen.

26. Ausschreibungen, die auf Leistungen basieren (deren objektiver Wert durch einen unabhängigen technischen Dienst ermittelt wird) und für die Bewerber die Verpflichtung vorsehen, ein Ergebnis zu erreichen und nicht nur eine Leistung zu erbringen.

27. Die präzise und endgültige Bestimmung des Werkes und der Leistungen im Ausschreibungsdokument.

28. Die Aufträge sollen vermehrt dem kostengünstigsten Bewerber vergeben und/oder die Vergabekriterien sowie deren jeweilige Wichtigkeit bestimmt werden.

29. Allgemeines Verbot jeder Interaktion zwischen Entscheidungsträgern und Bewerbern.

30. Systematische Pflicht, die eingereichten Offerten öffentlich aufzulegen.

31. Einführung einer strafrechtlichen Vorschrift, die spezifisch Abkommen zwischen Bewerbern bestraft.

32. Strikte Trennung der Kompetenzen in den verschiedenen Phasen des Vergabeverfahrens bis zur Prüfung der

geleisteten Arbeiten, einschliesslich einer rigorosen Kontrolle der Abrechnungen.

33. Endgültiger Ausschluss von allen öffentlichen Aufträgen, Zugangsverbot zu den Subventionen, zu Ausfuhrkrediten, usw., von jedem Unternehmen, das an Korruptionshandlungen teilgenommen hat: der Ausschluss soll in den spezialisierten offiziellen Zeitschriften veröffentlicht werden.

34. Einführung von Antikorruptionsklauseln in den Ausschreibungen, um sehr harte Konventionalstrafen aussprechen zu können, falls Korruptionshandlungen entdeckt werden.

35. Pflicht zur vermehrten Transparenz in bezug auf die Motivation der Auswahl der Zuschlagsbehörden, und Recht der nicht berücksichtigten Bewerber, in einem formellen Entscheid davon Mitteilung zu erhalten.

IV. Strafrechtliche Massnahmen

36. Das Rechtsgut im Korruptionsbereich beinhaltet nicht nur den Schutz des freien Wettbewerbs; vielmehr geht es um die Gewährleistung der Objektivität und der Unparteilichkeit von Entscheidungen und der öffentlichen Tätigkeiten (Nichtkaüflichkeit). Dies muss betont werden.

37. Die Unterscheidung zwischen „aktiver“ und „passiver“ Korruption ist heute nicht nur überholt, sondern auch ungeeignet: sie soll aufgehoben werden, v.a. weil sie korrupte Beziehungen auf stereotype Weise darstellt und aufgrund eines Werturteils entsteht (als ob der „gute“ Beamte nur Opfer des „bösen“ dritten Bestechers sein könnte).

38. In der gleichen Richtung soll sich die neue Anklage von ausländischen Beamten nicht darauf beschränken, die Tat eines Dritten oder eines Privaten zu bestrafen, sondern auch diejenige einer für einen ausländischen Staat oder eine internationale Organisation handelnden Person.

39. Nach dem Legalitätsprinzip soll die Anklage auf Beamtenkorruption weiterhin eine gleichwertige Beziehung zwischen dem nicht gebührenden Vorteil und einer bestimmten oder bestimmbaren Handlung eines Beamten, in Verbindung mit seiner amtlichen Tätigkeit, fordern. Hingegen soll die Vorzeitigkeit des Vorteilsangebotes oder -ersuchens zur Amtshandlung (sei sie mit den Amtspflichten vereinbar oder nicht) nicht mehr gefordert werden: auch die dieser Handlung nachfolgenden Geschenke und Belohnungen müssen bestraft werden.

40. Das Verbot der Annahme jeglicher Vorteile soll in den (eidgenössischen, kantonalen und kommunalen) Statuten oder Dienstreglementen deutlich festgelegt werden; in diesem Bereich ist Transparenz von zentraler Bedeutung.

41. In diesem Sinne soll die zentrale Bezugnahme auf die „sozial übliche“ Vorteile vermieden werden und durch die Berücksichtigung sowohl der Absichten der Parteien als auch den materiellen Wert der im Spiel stehenden Interessen ersetzt werden.

42. Alle Geschenke und weiteren Vorteile, die Dritten (Familie, Beziehungen, politischen Parteien) angeboten oder für sie ersucht werden, sollen explizit verboten werden.

43. Der privaten Korruption darf nicht weniger Aufmerksamkeit geschenkt werden und sie darf keiner milderen Bestrafung unterliegen als die öffentliche Korruption.

44. Handeln mit Einflussnahme (der zur Zeit von dem schweizerischen Strafrecht vollkommen ignoriert wird) soll gemäss der strafrechtlichen Konvention des Europarats zur Bestechung zur strafbaren Handlung erklärt werden. Private Korruption und Handeln mit Einflussnahme gehören vollkommen zu den Bestechungsinteraktionen.

45. Der (schweizerische) Gesetzgeber soll endlich den Gedanken aufnehmen, dass eine Gesellschaft auch Straftaten begehen kann: in diesem Sinn soll die strafrechtliche Verantwortung von juristischen Personen, Gesellschaften und Unternehmen, in den allgemeinen Strafrechtsgrundsätzen vorgesehen und durch effiziente Sanktionen bestraft werden: nicht nur durch Geldstrafen, sondern auch durch die Suspendierung, ja sogar den Ausschluss vom Zugang zu öffentlichen Aufträgen und Krediten.

V. Massnahmen im Bereich der Justiz

46. Es ist wichtig, dass die Gerichte die schon im Strafrecht enthaltenen Sanktionen und Nebenstrafen sachgemäss anwenden (u.a.: Amts- und Berufsverbot; Einziehung von aus Korruption stammenden Vermögenswerten; Zuschüsse für die Geschädigten; Urteilsveröffentlichung): ihre nicht nur reaktive, aber auch präventive, ja sogar wiedergutmachende

Tragweite kann sich als viel effizienter als gewisse Hauptstrafen erweisen.

47. Um die Arbeit der Richter zu unterstützen ist es unerlässlich, der Gerichtsbarkeit die nötigen zeitlichen, materiellen und personellen Mittel zur Verfügung zu stellen; dies soll den politischen Willen zeigen, die oft komplizierten Bestechungsfälle (vor allem wenn sie mit Wirtschafts- oder organisierter Kriminalität verbunden sind) zu lösen.

48. Es ist ebenso wichtig, dass die politischen Verantwortlichen wie auch alle Mitglieder der Gerichtsbarkeit auf die internationale Strafrechtshilfe grosse Rücksicht nehmen, und dass sie ihre direkte Wirkung, ohne unnötige Hindernisse zwischen den Richtern selbst, entfalten kann.

49. Grundausbildung und ständige Spezialisierung von Beamten, die sich mit Wirtschaftskriminalität- und Bestechungsfällen befassen, sind unerlässlich [1].

50. Schliesslich soll die Justiz Anzeigen im Bereich der Korruption die nötige Aufmerksamkeit schenken und vernünftige Untersuchungen einleiten, um die gestellten Fragen aufzuklären, ohne *a priori* die Personen, welche die Anzeige machen, zu verdächtigen.

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1 "*Der Professionalismus soll verbessert werden, und Spezialisten sollen entsprechend für ihre Verantwortungen bezahlt werden*" hat uns ein Untersuchungsrichter im Rahmen unserer Forschungsarbeit erklärt.

2 Cf. Nicolas QUELOZ, Marco BORGHI, Maria Luisa CESONI, *Processus de corruption en Suisse*. Bâle/Genève/Munich, Helbing & Lichtenhahn, 2000. Maria Luisa Cesoni hat die empirische Studie mitgeleitet. Jedoch ist sie nicht mit jedem dargebotenen Vorschlag einverstanden.

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