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Convention against Corruption**

**Executive summaries**

**Note by the Secretariat**

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\* CAC/COSP/IRG/2012/1.



## **II. Executive summaries**

### **Bulgaria**

#### **Legal system**

The United Nations Convention against Corruption (UNCAC) was signed on 10 December 2003 and ratified by the National Assembly on 15 August 2006. According to article 5, paragraph 4, of the Constitution, “International treaties, ratified in compliance with the constitutional procedure, published and entered into force for the Republic of Bulgaria are part of the domestic law and have supremacy over those domestic provisions which contradict them”. This rule has been applied consistently by Bulgarian courts. In principle, the Bulgarian competent authorities are in a position to directly apply the UNCAC provisions, except for the criminalization provisions.

#### **Overall findings**

There have been considerable efforts to adopt reforms of Bulgaria’s legal, and particularly, penal law system, to address issues of corruption. This is also attributed to the country’s anti-corruption initiatives having been subject to evaluation by other international and regional mechanisms with a mandate on anti-corruption related issues or issues linked to corruption (Council of Europe/GRECO; Council of Europe/MONEYVAL; OECD Working Group on Bribery in International Business Transactions; European Commission Cooperation and Verification Mechanism).

As a result, Bulgaria has adopted a number of significant improvements of penal procedures against corruption and can demonstrate a higher number of indictments for cases involving high-level corruption, although still few cases have been concluded in court.

Bulgaria’s institutional framework against corruption revolves around two main bodies: the Commission for Prevention and Counteraction against Corruption (CPCC), established in 2006, and the Centre for Prevention and Counteraction of Corruption and Organized Crime (BORKOR). The latter is still in the process of institutionalization. The Commission is in charge of coordinating activities for the implementation of anti-corruption policies within the framework of the National Anti-Corruption Strategy and its action plan, adopted in 2009 and 2010 respectively. The main tasks of the BORKOR will be to conduct analysis, planning and development of measures aimed at preventing corruption practices.

The main challenge for the coming years will be to ensure that legal reforms are accompanied by administrative reforms geared towards enhancing inter-agency coordination and promoting effective implementation of relevant domestic laws. A core element for successful anti-corruption action will also be the identification of ways and means to address delays in investigations and judicial proceedings that may frustrate efforts to efficiently curb corruption-related offences. At the policy level, anti-corruption work will further benefit from more streamlined and coordinated mechanisms for the collection of relevant data and statistics, which are necessary for the design of ad hoc crime prevention and criminal justice strategies.

Another challenge which is currently encountered at the legislative level is to ensure that the Working Group for drafting a new Criminal Code, which began its work in November 2009, will produce substantive results. In this connection, the Bulgarian authorities welcomed the readiness of UNODC to provide, if needed and upon request, legislative expertise and advice, to support the deliberations and proceedings of the Working Group.

## **Criminalization and law enforcement**

### **Criminalization**

The provisions of the Bulgarian legislation incriminating corruption-related conduct have been amended in the past on several occasions to ensure compliance with international anti-corruption standards. In this connection, the substantive criminalization provisions of the Bulgarian legal framework comply, to a large extent, with the requirements set forth in the UNCAC. The majority of the UNCAC-based offences are established in the Criminal Code. The offence of embezzlement of property in the private sector is not stipulated as a separate crime in the Criminal Code, but prosecuted by analogy on the basis of the corresponding provisions on the embezzlement of property in the public sector, taking into account the capacity of the person as an official in the meaning of Article 93 of the Criminal Code, as well as the non-public nature of the embezzled property.

Illicit enrichment is also not incriminated as a separate crime per se. Constitutional limitations pertaining to the right to be presumed innocent until proven guilty under the law hinder the implementation of article 20 of the UNCAC in the Bulgarian legal order. Moreover, no plans exist to include such an offence in a future revised text of the Criminal Code. In a more general context, however, the concept of acquisition of illegal gains as a result of criminal acts related to corruption may lead to property sanctions, including seizure and confiscation of proceeds of crime or property derived from, or used in the commission of, such criminal acts. Legislation on declaration of assets and conflict of interest is in place covering a wide range of “persons holding public offices” and providing for administrative sanctions.

The concept of “official” is broadly defined domestically to include “any official holding responsible official position”. As to the nature of the “undue advantage”, there is no distinction of payments or gifts on the basis of the amount of money given: even a small payment as a bribe is punished.

The reviewers made the following remarks for the attention of the Bulgarian authorities:

- There is a need to define the offence of active bribery in the public sector, as well as, for purposes of consistency, that of trading in influence, in a way that expressly and unambiguously covers instances where the advantage is not intended for the official him/herself but for a third party (third-party beneficiary), whether a natural person or a legal entity. On this particular issue, the review team took into account the ongoing process of the Working Group for drafting a new Criminal Code and hopes that the Group would take appropriate measures to further clarify the application of the

concept of third-party beneficiary also in the cases of active bribery and trading in influence.

- Moreover, the specific incrimination of the conduct of an intermediary under Article 305a of the Criminal Code was seen as a remainder of past Bulgarian legislation which has nowadays become redundant after the amendment of the Bulgarian Criminal Code in 2002 whereby all the actions of bribery were included as objective elements of the relevant offence; further, its scope of application has been limited to cover cases where a bribe was given to an intermediary and that person failed to deliver it. The review team made these remarks bearing in mind the ongoing work of the Working Group for drafting a new Criminal Code and with the aim to facilitate this work.
- More efforts to continue to clarify the interpretation of the domestic legislation may be needed to define the difference between the objective elements of active and passive bribery, on the one hand, and their attempt, on the other, as well as to clarify the interpretation of legislative amendments relating to the inclusion of both material and non-material advantages in the bribery provisions of the Criminal Code.

The Bulgarian legislation does not limit the range of the predicate offences as a result of which proceeds have been generated that may become the subject of money-laundering offences. The relevant provision of the Criminal Code addresses all types of offences of both criminal and administrative nature as predicate offence, regardless of their gravity, thus going beyond the UNCAC requirements.

The Bulgarian authorities indicated that the existing money-laundering provision in the domestic legislation (article 253) is broadly formulated and permits the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds of crime.

While noting Bulgaria's considerable efforts to achieve compliance of the national legal system with the UNCAC provisions in the criminalization area, the reviewers identified grounds for further improvement and, in this regard, highlighted the following issues for the attention of the competent authorities:

- Reconsider the usefulness of maintaining the self-standing provision on the criminalization of the conduct of an intermediary in cases of bribery and, if deemed appropriate, trading in influence. In this connection, explore the possibility of making amendments in the text of the relevant provisions on bribery and trading in influence to include *expressis verbis* the phrase "directly or indirectly", in line with the UNCAC;
- Construe the offences of active bribery in the public sector, as well as trading in influence, in a way that unambiguously covers instances where the advantage is not intended for the official him/herself but for a third party (third-party beneficiary);
- Continue to clarify the interpretation of the domestic legislation relating to the inclusion of both material and non-material advantages in the bribery provisions of the Criminal Code;

- Continue to clarify the interpretation of the domestic legislation to define the difference between the objective elements of active and passive bribery, on the one hand, and their attempt, on the other, and, consequently, ascertain whether the provisions on attempt have — in principle — become irrelevant also in court practice;
- Where deemed appropriate, taking into account the optional nature of article 28 of the UNCAC, as well as the relevant national jurisprudence, systematize and make best use of information related to how direct or circumstantial evidence is brought before the court and assessed by the judges;
- Continue to clarify, where deemed appropriate, the interpretation of domestic legislation to widen the scope of article 206 of the Criminal Code in line with article 22 of the UNCAC so that it includes as the object of embezzlement in the private sector “any property, private funds or securities or any other thing of value” and not only “a movable object of another”;
- Ensure that copies of the domestic laws giving effect to article 23 of the UNCAC (Laundering of proceeds of crime) and of any subsequent changes to such laws or a description thereof are furnished to the Secretary-General of the United Nations.

The Bulgarian authorities indicated as a challenge the implementation of Article 282 of the Criminal Code (“criminal breach of trust”) which was designed to deal with other socio-political systems and economic conditions and is, thus, not applicable in cases where the benefit is intended for legal entities based on private capital. Cases of crimes under article 282 are often terminated or result in acquittals under the established court practice to exclude liability in this text to a wide range of persons that do not fall under the term “officials”. Therefore there is a need for a new criminal-law approach and legal regulation of the so-called “crimes in office”.

### **Law enforcement**

The sanctions applicable to persons who have committed corruption-related offences in the public sector appear to be sufficiently dissuasive bearing in mind the maximum applicable penalty. The imposition of a fine is always an additional penalty. The general criminal law provides for statutory minima with regard to those sanctions. The maximum penalties applicable to corruption-related offences in the private sector are lower compared to those involving a public official, but still within the average level of punishment. Additional sanctions such as confiscation of property, deprivation of certain rights are also applicable to those offences or crimes.

Overall, the Bulgarian legislation was found in compliance with article 29 of the UNCAC on the statute of limitations, although not entirely comprehensive information was available regarding the statute of limitations regime applicable in civil and administrative law for legal persons, as well as the suspension of the statute of limitation period in cases where the alleged offender has evaded the administration of justice.

Bulgaria has chosen to put in place a legal framework for the establishment of administrative liability of legal persons involved in the commission of UNCAC-based offences. It was reported by Bulgaria that, despite the lack of statistical information on the application of the sanctions in practice, the monetary sanctions against legal persons were considered to be enough effective, proportional and dissuasive, especially in the light of the relatively low level of incomes. Moreover, the legislation provides expressly that the sanction cannot be inferior to the economic equivalent of the benefit, they appear to be relatively lower, compared to what is generally expected. The governmental experts suggested that the national authorities explore the possibility of increasing the level of monetary sanctions against legal persons for corruption-related offences in cases where the advantage accruing to the legal person as a result of foreign bribery is not “property”, or if the value of the advantage cannot be ascertained.

The Constitution identifies persons who enjoy immunity from criminal prosecution for the performance of their functions, including the President and Vice-President of the Republic (except for high treason and violation of the Constitution); the members of the National Parliament (except for a serious criminal offence); the members of the Constitutional Court; the candidates for parliamentary, presidential, European Parliament and local elections (except for a serious criminal offence).

The Bulgarian Constitution explicitly provides for the independence of the judicial authorities. As part of the judicial system, the Prosecutor’s Office enjoys constitutionally-based independence from the impact of any external factors, which may influence the legal and impartial implementation of his/her functions and powers. The legal powers of the prosecutor are provided in the Constitution, the Law on Judiciary and the Penal Procedure Code, which strictly specify the conditions for prosecution and basically do not foresee discretion for the prosecutor in discharging his/her functions or powers.

Special departments within the Prosecutor’s Office to counter corruption have been established. Since 2009, the Law on Judiciary has enabled the Chief Prosecutor, together with the heads of ministries and State institutions, to establish specialized interdepartmental units, in order to assist the investigation under the procedural direction of a prosecutor chosen by him.

Bulgaria’s new strategy for the reform of the judiciary, while acknowledging the existing shortcomings of judicial practice, draws special attention to institutional strengthening and mobilization of the capacity of the judiciary to improve the quality of justice and the efficiency of the system. The strategy focuses on three priority objectives: better management and good governance within the judiciary, placing the citizens in the centre and countering corruption in the judicial system. It received broad support from politicians, the judiciary and civil society. The success of reform will depend on its effective implementation by all institutions involved.

Of crucial importance is the action to address shortcomings regarding the accountability of the judiciary. In recent cases of alleged corruption, trading in influence and mismanagement in the Bulgarian judiciary, a concrete reaction by disciplinary and judicial authorities was noted. The Bulgarian authorities are encouraged to build upon such reaction and continue to strengthen the

accountability of the judiciary through a consistent and strict application of all legal and disciplinary means to sanction corruption.

Reforms in the Ministry of the Interior were aimed at improving its effectiveness in the fight against corruption. The necessary institutional capacity was created for the prevention, detection, interception and investigation of corruption activities through the establishment of three specialized directorates. The Ministry of the Interior is empowered to investigate 97 per cent of the criminal offences under the Criminal Code. The latest amendments of the Penal Procedure Code that entered into force on May 2010 repeatedly strengthened the investigative capacity of the Ministry of the Interior.

Through the Law on Forfeiture of Proceeds of Crime (LFPC) of 2005, Bulgaria has established the legal framework to freeze and forfeit the proceeds of crime. Most of the UNCAC-based offences fall within the scope of the law, with the exception of bribery in the private sector. In order to ensure the efficiency of relevant measures, a Commission on establishment of property acquired from criminal activity (CEPACA) under the LFP was created. The Commission has initiated 21 proceedings for the establishment of property belonging to persons who have committed a crime under the UNCAC.

Procedures for the protection of witnesses within the framework of criminal proceedings are established in accordance with the Criminal Procedure Code and the special Law on the Protection of Persons Threatened in Connection with Criminal Proceedings of 2004.

Rules for the protection of whistle-blowers are only included in the Law on Prevention and Disclosure of Conflict of Interest of 2008 without comprehensive provisions on the protection of persons providing relevant information on corruption-related acts. The existence of such legislation would significantly enhance domestic efforts to prevent and detect corruption and, therefore, is highly recommended.

The Bulgarian authorities indicated as good practice the way in which the national legislation provides for mechanisms permitting persons suffering damages from crime to initiate legal proceedings against the offender. Civil claims can be filed against the defendant and/or the persons who bear civil responsibility for his/her actions. Compensation is owed both for material and immaterial damages. The victim may establish him/herself as civil claimant only in the context of both court and pretrial proceedings.

The cooperation of a perpetrator of a corruption-related offence with the law enforcement authorities is considered as a circumstance mitigating criminal liability in the criminal process. A special provision in the Criminal Code on active bribery stipulates that any person who has offered, promised or given a bribe is not punished if he/she has been blackmailed by the official, the arbitrator or by the expert to do that or if he/she has informed the authorities immediately and voluntarily. A similar approach is followed in the money-laundering provision, whereby the perpetrator is not punished when, before money-laundering is completed, puts an end to his/her participation and notifies the authorities thereof.

The lifting of bank secrecy is provided through court permission and where there is evidence of committed criminal offences, including corruption offences. In light of

possible delays that may occur with respect to the obtaining of court orders for the lifting of bank secrecy, a relaxation of the relevant standards and procedures may need to be considered, taking into account the overall approach of the national legislation as to the valid authority to provide authorization.

The rules of criminal jurisdiction, as contained in the Criminal Code, apply to all bribery and trading in influence offences. Jurisdiction is established over acts committed within the territory of Bulgaria, acts committed by Bulgarian nationals, as well as acts committed abroad by foreigners affecting the interests of the Republic of Bulgaria or of a Bulgarian citizen and acts committed abroad by foreigners wherever stipulated by an international agreement to which the Republic of Bulgaria is a party. The jurisdiction is also established over offences committed only partly in Bulgaria.

Overall, with regard to the UNCAC requirements in the area of law enforcement, the following additional observations were made:

- Explore the possibility of increasing the level of monetary sanctions against legal persons for corruption-related offences in cases where the advantage accruing to the legal person as a result of foreign bribery is not “property”, or if the value of the advantage cannot be ascertained;
- Explore the possibility of establishing a comprehensive system for the protection of reporting persons (whistle-blowers) who report in good faith and on reasonable grounds to the competent authorities any facts concerning UNCAC-based offences. In this connection, consider the following action:
  - o Define a wide scope of relevant legislation to address such issues as institutional recognition of reporting, career protection of reporting persons and provision of psychological support to them, as well as their transfer within the same organization and relocation to a different organization; and
  - o Enhance training for public officials to report suspicions of corruption within the public administration;
- Consider the expansion of the scope of legislation regulating the mitigation of punishment and/or exemption from criminal liability of collaborators with law enforcement authorities to cover specific instances of a broader range of UNCAC-based offences and not only those of active bribery and money-laundering;
- Explore the possibility of entering into agreements or arrangements, in accordance with domestic law, with other States parties to allow the law enforcement authorities of those States to propose a mitigated sanction in exchange for substantial cooperation with regard to a corruption offence;
- Consider the expansion of the scope of the Law on forfeiture of proceeds of crime to cover bribery in the private sector as well;
- Ensure that all appropriate measures are in place to further reinforce the proper administration of frozen, seized or confiscated property derived from, used — or destined for use — in the commission of offences established domestically in accordance with the UNCAC;



- Where deemed appropriate, ensure further clarity of legislation regulating the re-assignment of public officials accused of an offence covered by the UNCAC, bearing in mind the need to respect the principle of the presumption of innocence;
- Ensure that the gravity of corruption-related offences are taken into account by the national authorities when considering the eventuality of early release or parole of persons convicted of such offences;
- Continue national efforts to combat corruption through independent law enforcement bodies focusing, in particular, on addressing implementation challenges in this field, as well as strengthening the accountability of the judiciary through a consistent and strict application of all legal and disciplinary means to sanction corruption;
- Ease the formal requirements for obtaining authorization to lift bank secrecy in the context of domestic investigation of corruption cases.

### **International cooperation**

While UNCAC enjoys direct applicability in Finland some concern about the “non-self executing” provisions of the treaty remain. In this regard, Finland should continue assessing whether some UNCAC provisions require implementing legislation to make them fully operational.

### **Extradition**

A two-tier system on extradition has been put in place in Bulgaria. With regard to other Member States of the European Union, the surrender of fugitives is carried out in line with the requirements of the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States of the European Union. The Framework Decision was domesticated in Bulgaria through an ad hoc law in 2005, while the part of the law on the execution of European Arrest Warrants entered into force after the accession of Bulgaria to the European Union.

With regard to other countries, although Bulgaria does not make extradition dependant on the existence of a treaty, it is bound by existing multilateral treaties, such as the Council of Europe Convention on Extradition and its two Additional Protocols and the United Nations Convention against Transnational Organized Crime. Bulgaria has also concluded bilateral agreements on extradition with Spain, Azerbaijan, China, Armenia, Lebanon, Uzbekistan, India, the United States of America and South Korea.

Bulgaria recognizes the UNCAC as a legal basis for extradition, although no such request has been made. In the absence of an international treaty, the domestic extradition legislation shall apply on a basis of reciprocity.

Double criminality is always a requirement for granting extradition. Exceptionally, the double criminality requirement is not needed when executing a European Arrest Warrant, as the Framework Decision removes this condition in respect of a very broad list of offences, including corruption offences.

Bulgaria allows the surrender of its nationals only on the basis of a European Arrest Warrant on the condition that, after the trial in the issuing State, the person sought is to be returned to Bulgaria in order to serve the custodial sentence or detention order.

In cases where Bulgarian authorities deny to extradite a fugitive to serve a sentence solely on the ground of his/her nationality, the domestic law obliges them to submit the file to the respective prosecutor for the purposes of conducting a criminal prosecution, if there are grounds for doing so. It is also a common practice that the requested Bulgarian authorities advise the requesting State to file a request for international validity of the sentence on the basis of the Council of Europe Convention on international validity of criminal judgments.

In terms of actual cases of denial of extradition requests, indicative examples include refusals on the basis of the statute of limitations, as well as when extradition is sought for political offences.

A common extradition process in which Bulgaria is involved as a requested State may take up to two or three months to be completed, with the exception of complicated cases and always subject to the cooperation of the requesting State. With regard to the execution of a European arrest warrant, the domestic law prescribes shorter time frames and the entire procedure should come to an end basically within 60 days.

### **Mutual legal assistance**

Mutual legal assistance in criminal matters is afforded in accordance with the provisions of the Penal Procedure Code, which contains a non-exhaustive list of types of assistance that can be provided in relation to investigations, prosecutions and judicial proceedings. The scope of mutual legal assistance is not limited by the law and encompasses all other forms of legal assistance that can be provided either pursuant to international agreements to which Bulgaria is a party or on the basis of reciprocity. Assistance can also be provided in relation to civil and administrative matters which may give rise to criminal proceedings. The provisions of the UNCAC on mutual legal assistance have direct application by virtue of article 5, paragraph 4, of the Bulgarian Constitution. Bulgaria has concluded bilateral agreements for mutual legal assistance with the United States of America and South Korea.

The Penal Procedure Code lists the grounds for refusal of a mutual legal assistance request, among which bank secrecy is not included. Additionally, double criminality is not a condition for the provision of assistance.

The designated central authority to deal with relevant requests is the Ministry of Justice. Requests for assistance need to be accompanied by a translation into Bulgarian or English.

So far, there have been no mutual legal assistance requests explicitly based on the UNCAC. The Unified Information System of 2008 ensures the registration of all requests. For the period before 2008, information is difficult to trace.

The time frame for dealing with MLA requests varies depending on the applicable international instruments, the type of assistance and the complexity of the case. On average, it does take four to six months to execute MLA requests.

Amendments to the Penal Procedure Code with regard to the provisions concerning mutual legal assistance in criminal matters were drafted by a Special Working Group after an in-depth analysis of the existing international agreements in the field of international cooperation in criminal matters to which Bulgaria is a party. Specifically, Bulgaria has put in place measures to give practical effect to the requirements foreseen in article 46 of the UNCAC.

#### **Other forms of international cooperation**

The transfer of sentenced persons is regulated by the following: multilateral ad hoc conventions by which Bulgaria is bound (Council of Europe Convention on the Transfer of Sentenced Persons and its Additional Protocol) or agreements containing provisions on this form of cooperation, including the UNTOC and the UNCAC; European Union secondary legislation; bilateral agreements, such as those with Turkey and Lebanon; and national legislation (Penal Procedure Code). In the absence of international agreements the transfer of sentenced persons could be carried out on the condition of reciprocity.

The provisions on transfer of criminal proceedings have been assessed and modified as a result of the work of a Special Working Group on the amendment of the Penal Procedure Code. There have been no registered cases regarding transfer of proceedings on the basis of the UNCAC.

Bulgaria reported on the central role of the Ministry of Justice in facilitating and coordinating law enforcement cooperation. Among the existing channels of law enforcement cooperation used by Bulgaria are the European Judicial Network, Eurojust, Europol and INTERPOL. Direct channels of communication have been created between national prosecution offices and foreign counterparts aiming at facilitating secure and fast exchange of information.

During the period 2003-2010, Bulgaria has signed bilateral agreements in the field of police cooperation with Bosnia and Herzegovina, Romania (focusing specifically on corruption prevention and counteractions), the Russian Federation, Poland and Austria.

The UNCAC is treated as a legal basis for cooperation and its provisions shall apply in the absence of bilateral agreements. Bulgaria is a party to a range of multilateral agreements, which build up the necessary legal framework for conducting joint investigations in more than one country. In addition, bilateral agreements to carry out joint investigations have been concluded with Germany, Belgium, Spain, France, Norway, Romania, Turkey and the United Kingdom. Similar agreements are expected to be concluded with Serbia, Montenegro and the former Yugoslav Republic of Macedonia. An agreement on exchange of law enforcement experience and trainings has been concluded with Estonia. Joint investigations can be carried out on a case-by-case basis after careful examination of the circumstances and the need for establishing the team.

Bulgaria further reported on the international framework by which it is bound regarding the use of special investigative techniques, including the Convention implementing the Schengen Agreement of 1985; the 2000 EU Convention on Mutual Assistance in Criminal Matters; the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters of 1959; and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and

Psychotropic Substances. In each of the recent bilateral agreements mentioned above, there are provisions on the use of special investigative techniques. The Law on special intelligence offers the domestic legal framework for the regulation of relevant issues. In addition, eleven controlled deliveries were carried out in 2007, three in 2008 and fourteen in 2009.

The following remarks are made with the intention to assist the national authorities in rendering international cooperation mechanisms more robust and effective:

- While acknowledging that the domestic extradition system does not require as a prerequisite the existence of a treaty, continue to explore opportunities to actively engage in bilateral and multilateral extradition arrangements with foreign countries (particularly non-European countries), with the aim to enhance the effectiveness of extradition;
- Explore the possibility of relaxing the strict application of the double criminality requirement in cases of UNCAC-based offences that go beyond those relating to the execution of European Arrest Warrants, in line with article 44, paragraph 2, of the UNCAC;
- Continue to ensure that any crime established in accordance with the UNCAC is not considered or identified as a political offence that may hinder extradition;
- Continue to make best efforts to ensure that extradition proceedings are carried out in the shortest possible period;
- Further strengthen the capacity and effectiveness of the Unified Information System as the centralized mechanism for gathering, processing and circulating information and statistics on the operational aspects of extradition and MLA proceedings and continue efforts to establish a new integration system for the prosecutorial authorities which will enable the compilation of statistics and the generation of thematic reports based on them;
- Consider the allocation of additional resources to strengthen the efficiency and capacity of international cooperation mechanisms.

## **Indonesia**

### **Legal system**

The Indonesian legal system is a civil law system built on the legacy of the Dutch colonial rule. Due to historical reasons, three distinct legal systems co-exist in modern Indonesia: *Adat* law (customary law), Dutch colonial law and Islamic law.

The incorporation of the United Nations Convention against Corruption into the Indonesian legal system was ensured by Law No. 7/2006, by which Indonesia ratified the Convention. The law of ratification of the Convention ranks below the Constitution but same ranks with other laws.

## **Criminalization and law enforcement**

### **Criminalization**

The offences established in accordance with the Convention are found mainly in Law No. 31/1999 on Corruption Eradication, as amended by Law No. 20/2001, the Criminal Code, and Law No. 8/2010 on the Prevention and Eradication of the Crime of Money-Laundering.

Indonesia has criminalized an important number of corruption and related offences. These include active and passive bribery of national public officials, abuse of functions, participation in an offence and attempt, embezzlement of property in both the public and private sectors, laundering of proceeds of crime, and concealment. A comprehensive range of offences, including any offence committed abroad and punishable with a penalty of imprisonment for four years or more, is a predicate offence to money-laundering.

With regard to liability of legal persons, Indonesian authorities recognised that the law on corporate liability is still rudimentary, and confirmed their commitment to broaden its application. The reviewers welcomed Indonesia's self-assessment and commitment.

Indonesian legislation does not contain a general definition of the abuse of functions offence, even though existing norms reflect most of its definition. It was observed that the law requires that the abuse is made with a view to enrichment, which implies receiving a material advantage, while the Convention is broader and covers any advantages including those of a non-material nature. Article 3 of Law No. 31/1999 contains a reference to the detrimental effect of the perpetrator's behaviour to the finances of the State. This pre-occupation with the need to show a loss to the State might limit the fight against corruption.

The reviewers noted that abuse of functions is punishable with life imprisonment, while the bribery offence is punishable with between one to five years of imprisonment. This discrepancy may require a reassessment of these penalties.

Bribery of foreign public officials and officials of public international organizations, trading in influence, illicit enrichment, and bribery in the private sector have not yet been established as offences. Consideration has been given towards their criminalization in the draft law on corruption eradication and the draft law on asset forfeiture. The reviewers urge this process to continue.

The following recommendations have been identified as strengthening and improving the current criminalization provisions.

- Consider reassessing the penalties applicable to the bribery and embezzlement offences;
- Criminalize active bribery of foreign public officials and officials of public international organizations, and consider criminalizing passive bribery of these officials;
- Remove articles 12B and 12C from Law No. 31/1999 as amended by Law No. 20/2001, which, by defining an aggravated form of bribery (art. 12B)

and providing immunity for an official who reports receipt of a bribe within 30 days of receiving it (art. 12C), present problems of compliance with articles 15 and 37 of the Convention;

- Ensure that the terminology used in the legislation about embezzlement covers clearly any property or any other thing of value, in accordance with article 17 of the Convention;
- Ensure that the existing norms on abuse of functions cover also non-material advantage, and consider revising the laws to remove the reference to state loss.

### **Law enforcement**

Legal provisions pertaining to the investigation and prosecution of corruption and related offences are mainly found in the Criminal Procedure Code and the Criminal Code of Indonesia.

Investigative functions are fulfilled by the KPK (Corruption Eradication Commission), the AGO (Attorney General's Office) and the Police. The KPK in principle has jurisdiction in top-level cases. In other proceedings, the AGO has the primary jurisdiction, although the KPK has the power to supervise and/or take over proceedings. The Police also investigate corruption offences. The KPK can investigate specific categories of high-ranking officials without seeking prior written approval of the Minister of Home Affairs or the President. Anti-corruption actions by the KPK, the AGO and the Police are supported by the work of the PPATK (Indonesian Financial Intelligence Unit).

The KPK has privileged access to banking information. However, for other agencies, the Chairman of the Central Bank "may issue permission" (art. 2, Law No. 8/1998).

The KPK must prosecute a case that it investigates. However, not all cases handled by the AGO are brought to court. Discretionary powers may be exercised to discontinue a case based on grounds such as lack of evidence, public interest, and *de minimis*. In particular, the AGO can be instructed to set aside a case for the sake of protecting the public interest even if the case is technically sound (*deponering*). This practice would appear to be against the spirit of the Convention, and risks creating the impression of political interference and leaving an unclear result that is unsatisfactory for all concerned. The reviewers recognized that it is rarely used in practice, but it is objectionable in principle and is open to abuse in a corruption case. The reviewers recommended that this issue be addressed in the process of the revision of the anti-corruption law.

Minor bribery cases among policemen are not brought to court, but are dealt with by an internal ethics committee.

The statute of limitations cannot be suspended. The prescription starts running from the time of the commission of an offence. For corruption and related offences, the prescription is 12 years (for crimes punishable with more than three years of imprisonment) and 18 years (for crimes punishable with life imprisonment).

Provisions on obstruction of justice are considered satisfactory. However, it is rarely possible to bring cases of obstruction of justice to the court.

Prosecutors do not have the authority to offer any mitigation of punishment or guarantee immunity from prosecution to a person who provided substantial cooperation in the investigation or prosecution of a corruption case. They can only take note of cooperative behaviour and make recommendations to the judge, who makes the final decision on sentencing.

Under Law No. 43/1999 on Government Officials, a civil servant suspected of having committed an offence is temporarily suspended from office and is dismissed after having been convicted for a crime liable to imprisonment of four years or more. Law No. 19/2003 on State-Owned Enterprises and Law No. 19/2003 on Limited Liability Companies contemplate the disqualification of persons convicted of a corruption offence from holding office in such enterprises and companies.

Witnesses, experts and victims are protected under Law No. 13/2006 on the Protection of Witnesses and Victims. The LSPK (Witness Protection Agency) is dedicated to their protection. Under the Criminal Procedure Code, a person who experiences loss as a result of an offence has a right to institute a claim for compensation where criminal procedures are ongoing.

The following recommendations have been identified to strengthen or improve relevant existing legislation.

- Consider using the criminal courts to prosecute minor cases of bribery committed by policemen;
- Consider establishing procedures through which a public official accused of an offence established in accordance with the Convention will be suspended at the point of investigation and removed post-conviction;
- Consider reviewing the information-gathering powers of the PPATK in the light of Law No. 8/2010, taking into account good practices in other countries;
- Consider carrying out a study on the implementation of provisions on obstruction of justice to identify enforcement issues and technical assistance requirements;
- Consider amending the statute of limitations so that (i) the period starts only when the crime comes to the notice of the prosecutor, and (ii) the period will be interrupted in cases where the alleged offender has evaded the administration of justice;
- Consider allowing also the AGO and the Police to investigate high-ranking officials without seeking prior permission;
- Consider either abolishing the power of an investigator to change the type of detention from imprisonment to city arrest or exercising such power under strict judicial supervision;
- Ensure a complete management of seized, frozen and confiscated property;
- Ensure that the gravity of the offence of corruption is taken into account when early release or parole of convicted persons is considered;
- Ensure the protection of reporting persons;

- Consider taking additional measures so that corruption may be considered a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instruments or take any other remedial action;
- Ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation in the absence of prior criminal cases;
- Explore the possibility of guaranteeing non-punishment or mitigated sanctions for perpetrators of corruption offences who spontaneously and actively cooperate with law enforcement authorities;
- Ensure that bank secrecy can be overridden by other agencies effectively.

## **International cooperation**

### **Extradition**

The conditions and procedures regulating extradition to and from Indonesia are found in Law No. 1/1979 on Extradition. Dual criminality is a requirement for extradition.

Extradition from Indonesia is granted based on the existence of a treaty. In the absence of such a treaty, extradition may be conducted in the conditions that there is a “good relationship and if the interest of the Republic of Indonesia requires it”. Indonesia can grant extradition on the basis of the Convention if the requesting State is party to the Convention. Indonesia has seven bilateral extradition treaties with neighbouring countries.

Extradition shall be conducted for the offences listed as extraditable. With regard to requests involving offences that are not included in the list of extraditable offences, extradition may also be conducted based on the “policy” of the requested State party. Extradition shall not be denied on the sole ground that the offence is considered to involve fiscal matters.

Extradition shall not be conducted in cases of political offences. Exceptionally, the offender may be extradited in certain types of political offences only if there is an agreement between Indonesia and the concerned country.

Nationals of Indonesia are in principle not extraditable. Exceptionally, extradition may be conducted if the person concerned would be better adjudicated where the offence was committed.

Overall, Indonesia has in place an important number of measures required by the Convention. The following steps could further strengthen existing extradition procedures.

- Consider indicating in the law a time limit for deciding to extradite to ensure expeditious procedure;
- When denying an extradition request against a national, ensure that the case is considered for prosecution in Indonesia;



- With regard to extradition requests against a national and relating to the enforcement of a sentence, ensure the enforcement of the sentence in Indonesia if the extradition request is denied.

### **Mutual legal assistance**

The conditions and procedures regulating mutual legal assistance are found in Law No. 1/2006 on Mutual Legal Assistance in Criminal Matters. In addition to the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, Indonesia is bound by two bilateral agreements with Australia and the People's Republic of China.

Mutual legal assistance is afforded based on the existence of a treaty. Without such a treaty, mutual legal assistance may be provided "based on good relationship under the reciprocity principles". Mutual legal assistance can be afforded in the absence of dual criminality.

Mutual legal assistance in relation to legal persons has not been ensured. Consideration was given towards ensuring it in the draft law on mutual legal assistance in criminal matters.

Requests must be addressed to the central authority — the Ministry of Law and Human Rights — that passes to the KPK all requests within its remit. Requests must indicate the desired time limit for their execution. In practice, however, when receiving a request that does not indicate such a deadline, Indonesia obtains clarification from the requesting State. When the provided information is not sufficient for approval, Indonesia may ask for additional information.

Indonesia has executed all mutual legal assistance requests received.

Overall, Indonesia has in place most of measures required by the Convention. The following steps could further strengthen existing mutual legal assistance procedures.

- Explore the possibility of reconsidering the conditions on which mutual legal assistance can be afforded without a treaty in order to enable, at least, non-coercive measures of mutual legal assistance to be provided;
- Enable mutual legal assistance in relation to offences for which a legal person may be held liable;
- Ensure that information can be transmitted to another State party without prior request;
- Explore the possibility of providing competent authorities (National Police Office, AGO, KPK) with the authority to override bank secrecy in the execution of mutual legal assistance requests;
- Explore the possibility of designating the KPK as the central authority for all corruption cases;
- In consistency with the practice, specify in the laws that the condition of indicating a desired time limit for request execution is not mandatory, and that Indonesia shall consult with the requesting State when the information contained in the request is not sufficient for approval;

- Explore the possibility of ensuring that the execution of a request can be postponed on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding in Indonesia;
- Ensure that mutual legal assistance cannot be refused on the ground that it may burden the assets of the State by providing that the costs will be borne by the requested State, unless otherwise agreed;
- Although information available to the general public has been transmitted to a requesting State, ensure that such practice is specified in the law;
- Explore the possibility of transmission of information and documents which are not available to the general public to a requesting State.

### **Law enforcement cooperation**

Indonesian law enforcement agencies are required to share information with foreign agencies in cooperation between law enforcement agencies. Indonesia has concluded bilateral agreements with 15 countries and has been negotiating agreements with five other countries. Indonesia has not entered into bilateral or multilateral agreements on the transfer of sentenced persons.

The KPK has established a formal partnership with 20 institutions from 15 countries. The PPATK has cooperated with 30 foreign Financial Intelligence Units. The Police have some experience in joint investigations in a few cases pertaining to terrorism. Some joint investigations in corruption cases have been established between the KPK and other foreign agencies. However, Indonesia still needs to enhance its joint investigations in corruption cases.

Indonesian Police Liaison Officers and Prosecutors are posted in 20 countries based on bilateral agreements. 15 countries have police attachés in Jakarta. The Police have seven cooperation arrangements with foreign law enforcement agencies.

The reviewers stressed that it would be important to enhance public trust towards the Police before considering conveying to it the power to intercept communications at the investigation stage with regard to corruption cases.

### **Overall findings**

Since democracy was restored in 1999, Indonesia has made a forceful start on tackling corruption, both through legislation and the creation of the KPK with investigative and prosecutorial powers. There is a high political commitment to eradicate corruption in both the public and private sectors. The National Strategies and Action Plans on Corruption Eradication 2010-2025, developed by the Government in consultation with various representatives of the civil society, identify strategic efforts in the framework of accelerating corruption eradication, including steps to implement the Convention in Indonesia.

A draft law on corruption eradication has been in preparation, as well as others dealing with non-conviction based forfeiture, extradition, mutual legal assistance, and the KPK. The need to amend relevant existing laws regulating these subjects is justified or clarified by the findings above.

### **Good practices**

The KPK and the Court of Corruption were considered good practices with regard to their capacity, mandate and positive results of their work.

Established in 2002, the KPK is a special independent Government body that deals with top-level cases of corruption. The KPK appears to have necessary independence and considerable powers under Law No. 30/2002 on the Commission for the Eradication of Criminal Acts of Corruption. It has brought cases against former Ministers, Members of Parliament, senior officials, Mayors, company directors, and one of its own staff. The KPK is widely trusted by the public and is greatly respected by international law enforcers and NGOs. The reviewers recommended that any legislative changes that take place on eradication of corruption do not result in any changes to the current legal mandate of the KPK to investigate and prosecute cases of corruption that fall within its mandate.

The Court of Corruption has proved an effective partner for the KPK in handling corruption cases. The first Court of Corruption was established by Law No. 30/2002 and was based in Jakarta to have jurisdiction over cases brought by the KPK. Since 2010, other Courts of Corruption have been established all over the country. There will be 33 Courts of Corruption in total by 2012. The reviewers fully supported the Government's plan to expand the number of such courts so that they could handle not only the KPK's cases but all corruption cases.

### **Challenges**

The reviewers concluded that the main challenge in implementation lies in enhancing cooperation between enforcement agencies — the KPK, the AGO and the Police. The reviewers welcomed the heightened awareness by all these agencies of the challenge posed by the lack of cooperation and coordination, and their will to deal constructively with these challenges and overcome them. Additional steps to improve and strengthen cooperation and coordination are essential.

The reviewers stressed that cooperation would be enhanced by a comprehensive analysis of the state of corruption, its structure, dynamics and trends, as well as analysis of the activity on detection and prevention of crime in order to identify the main future directions for countering corruption. To this end, the central collection of statistics, unified reporting on corruption cases and consolidation of the reports by a single body, and regularly convened coordination councils of the law enforcement and supervising bodies are needed.

### **Technical assistance**

Technical assistance would assist Indonesia in the following areas: criminalization of bribery of foreign public officials and officials of public international organizations, liability of legal persons, obstruction of justice, transfer of criminal proceedings, joint investigations, the use of special investigative techniques, and mutual legal assistance. There is also a need for technical assistance to train investigators and prosecutors in the "follow-the-money" approach and promote greater use of the anti-money-laundering legislation.

**Reporting and notification obligations**

The reviewers invited Indonesia to fulfil its notification obligation under articles 23.2(e) and 44.6(a) of the Convention.

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