

**CZECH REPUBLIC**  
**REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997**  
**RECOMMENDATION**

**A. IMPLEMENTATION OF THE CONVENTION**

**Formal Issues**

The Czech Republic signed the Convention on December 17, 1997. On 29 April 1999, the Czech Parliament passed the necessary amendments to the Czech Criminal Code in order to be able to ratify and implement the Convention. The implementing legislation entered into force on 9 June 1999, and the instrument of ratification was deposited with the OECD on 21 January 2000.

**Convention as a Whole**

The Czech authorities are of the opinion that Czech law dealt with bribery offences already quite sufficiently even before the ratification of the Convention. Therefore, the Czech authorities considered that only limited modifications of the legislation were necessary in order to assure the equivalence among bribery of domestic and foreign public officials. Such modifications occurred mostly in the area of penal law. Their purpose is to make sanctions more proportionate and dissuasive. Furthermore, a new definition of the terms “bribe” and “public official” has been introduced.

The Czech authorities are currently preparing additional implementing legislation, namely in the area of accounting and auditing. This process is subject to a more complex evaluation in order to achieve European standards. It is expected to become effective on 1 January 2001.

It remains the issue of the status of the Convention vis-à-vis domestic legislation. Pursuant to the Czech authorities, provisions in international treaties requiring action from parties (e.g. to establish bribery of foreign public officials as a criminal offence) are binding on the Czech Republic as a state only. Provisions governing international legal cooperation (Art. 4(3), Art. 9 and 10) shall be applied as “lex specialis” in relation to provisions of the Czech law.

**1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL**

Section 161, paragraph 2b, establishes the offence of bribery of a public official. Section 161 reads as follows:

“(1) Whoever in connection with procuring affairs in the public interest provides, offers, or promises a bribe shall be sentenced to imprisonment for up to one year or to a monetary fine.

(2) A perpetrator shall be sentenced to imprisonment of one year to five years or to a monetary fine

a) if he/she commits the act referred to in paragraph 1 with the intent of procuring a substantial benefit for himself or for another person or to cause substantial harm or other particularly serious effect to another person;

b) if he/she commits the act referred to in paragraph 1 vis-à-vis a public official.”

Concerning the meaning of “procuring affairs in the public interest”, the Czech authorities point out that this notion has a broader meaning than “acting or refraining to act in relation to performance of official duties”. It means an activity relating to the performing of tasks of public (common) interest. It does not only cover decision-making of state and administrative bodies, but also other activities in the course of satisfying of citizens’ and legal persons’ interests in matters of material, social, cultural and other needs<sup>1</sup>.

Section 161, paragraph 1, covers, for instance, the bribery of a person responsible for preparing of examinations for admission to a *state university*. By contrast, bribery of persons responsible for recruiting new employees in a *private enterprise* would not be covered.

Section 161, paragraph 1, therefore covers cases of “commercial bribery” only if there is a connection with procuring affairs in the public (common) interest. Commercial bribery as such is covered by the Commercial Code<sup>2</sup>.

Section 162a, paragraph 1, defines the term “bribe”. It “means an unlawful advantage consisting in direct material enrichment or other advantage that the person being bribed or another person receives or is to receive with its consent, and for which there is no entitlement.”

Section 89, paragraph 9, and section 162a, paragraph 2, of the Criminal Code define the term “public official”. Section 89, paragraph 9, reads as follows:

„A public official“ shall mean an elected (public) representative or other person authorized by the state administration or local (municipal) authority, a court or other state organ, or a member of the armed forces or armed corps insofar as he takes part in the fulfillment of the tasks set by society and the state, for which he/she exercises authority entrusted to him/her as a part of his/her responsibility for fulfillment of such tasks. When exercising entitlements and competency according to special legal provisions a public official shall also mean a natural person holding the position of a forest guard, water guard, nature guard, hunting guard or fishing guard. Criminal liability and protection of a public official under individual provisions of this Code shall require that a crime be committed in connection with the official’s authority (competency) and responsibility.”

Section 162a, paragraph 2, adds to this definition “foreign public officials” (see section 1.1.6. below).

## **1.1 The Elements of the Offence**

### **1.1.1 any person**

Section 161 of the Criminal Code applies to any person. The Czech authorities confirm that this term covers natural persons.

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<sup>1</sup> R 16/1988, page 76.

<sup>2</sup> Section 49 etc.

### **1.1.2 intentionally**

The offence of bribery of a domestic or foreign public official needs to be committed intentionally. Pursuant to section 4 of the Criminal Code, a criminal offence is committed intentionally if the offender (a) wanted to infringe or endanger, in a manner stipulated in this Code, an interest protected by this Code, or (b) was aware that he/she could cause by this act such infringement or danger and, if he/she caused it, agreed with its result. This covers *dolus eventualis*.

According to the Czech authorities, there is no requirement that the offender wishes to receive an illicit favour. On the other hand, the offender must know that the bribed person is someone empowered to deal with matters of public interest to which the bribe relates.

### **1.1.3 to offer, promise or give**

Section 161 applies to a person who “provides, offers, or promises” a bribe.

The Czech authorities explain that „*to give a bribe*“ does not only mean its direct delivery (in cash or in kind), but also an indirect delivery of a material advantage or other advantages or services. The „*promise of a bribe*“ means the commitment to give a bribe. „*To offer a bribe*“ means that the offender manifests his/her will to give a bribe in order to achieve his/her request concerning a public interest affair. This can be an explicit or implicit offer. With respect to the timing, the offender may offer to give a bribe immediately after acceptance of the offer or in the future, before achieving his/her request in relation with dealing with public interest affairs or afterwards.

On the other hand, section 163 deals with “effective repentance”. Accordingly, “the criminal nature of bribery (section 161) and indirect bribery (section 162) shall not apply if the offender has provided or promised a bribe solely because he/she has been requested to do so and reported the fact voluntarily and without any delay to the prosecutor or police authority.”

It seems that section 163 is in contradiction to the requirements of Article 1 of the Convention, because the latter does not provide for the possibility to abstain from punishability in case of “effective repentance”.

The Czech authorities emphasise that the offender may only enjoy this defence if the following three conditions are met:

- the only reason for bribing must be a request made by a public official;
- the offender must report the criminal offence immediately<sup>3</sup>;
- the offender must report it voluntarily, without considering the risk of penal prosecution etc.

In view of the Czech authorities, the law enforcing bodies can easily collect evidence in such a case and start penal prosecution against the person who requested a bribe. The bribe would no longer be dangerous to society.

### **1.1.4 any undue pecuniary or other advantage**

The new section 162a, paragraph 1, defines a bribe as an “unwarranted advantage consisting in direct material enrichment or other advantage that the person being bribed or another person receives or is to receive with its consent, for which there is no entitlement.”

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<sup>3</sup> I.e. as soon as possible. This implies that the person cannot wait until he/she has consulted a legal adviser or has returned to the Czech Republic - in case that the offence has been committed abroad.

An “unlawful advantage or advantage for which there is no entitlement” is usually a direct property benefit, be it financial or material<sup>4</sup>. It can, however, also be an advantage of another type, e.g. a counter-service. The value of the bribe is not relevant in this context. As far as the performance of state power or administration is concerned, the Czech legal order does not tolerate bribes at all, including bribes of negligible value<sup>5</sup> (i.e. less than 2 000,- CZK)<sup>6</sup>.

The Czech authorities confirm that in relation to the performance of public administration Czech law does not know the term “socially acceptable gifts”.

### **1.1.5 whether directly or through intermediaries**

The Czech authorities explain that section 161 covers both cases of direct bribery and bribery through an intermediary.

The person to whom the bribe is given, offered or promised, may be the person procuring affairs of public (common) interest, or an intermediary between the briber and such person. The intermediary can be punished for the offence of indirect bribery (trading in influence), according to section 162 of the Criminal Code, provided that he/she does not co-operate with the public official and uses his/her influence only, but does not give or promise a bribe. Otherwise, the intermediary is a participant in the criminal offence of receiving a bribe pursuant to sections 160, 10 of the Criminal Code, if he/she co-operates with the public official, or a participant in the criminal offence of offering a bribe pursuant to sections 161, 10 of the Criminal Code, if he/she co-operates with the briber.

### **1.1.6 to a foreign public official**

Section 161, paragraph 2b, covers any “public official”. The term “public official” is defined in section 89, paragraph 9, and the new section 162a, paragraph 2, of the Criminal Code. Whereas section 89, paragraph 9, deals with *domestic* public officials, section 162a, paragraph 2, covers *foreign* public officials.

Pursuant to section 162a, paragraph 2, the term “public official” means “besides the persons referred to in section 89, paragraph 9, also any person occupying a post

a) in a legislative or judicial authority or the public administration authority of a foreign country, or

b) an enterprise, in which a foreign country has the decisive influence, or in an international organisation consisting of countries or other entities of international public law,

if the execution of such a function is connected with authority in handling public affairs and the criminal act was committed in conjunction with such authority.”

The Czech authorities confirm that the term “foreign country” includes “all levels and subdivisions of government, from national to local”.

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<sup>4</sup> See R 17/1978, page 106.

<sup>5</sup> For instance, courts determined that giving 100 kg of nutrition for cattle or speeding up of repair of a car in a state-owned enterprise constitutes a bribe.

<sup>6</sup> 1 USD = 36,5 CSK; 1EUR = 35,5 CSK (as of February 2000).

### **1.1.7 for that official or for a third party**

Pursuant to section 162a, paragraph 1, a bribe means an unwarranted advantage “for the person being bribed or another person”.

On the other hand, section 161, paragraph 2, distinguishes between bribery of public officials (subparagraph b) and bribery of other persons (subparagraph a). Whereas in the case of bribery of other persons, an advantage *for another person* is explicitly mentioned, this term is missing concerning the bribery of public officials.

The Czech authorities point out that section 161, paragraph 2b, refers to the act of bribing, and that the term “bribe” in section 162a, paragraph 1, includes an advantage for a third person. Section 161, paragraph 2b, therefore indirectly covers a bribe for another person than the foreign public official.

### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Section 161 covers the offence of bribery “in connection with procuring affairs in the public interest”. Furthermore, section 162a, paragraph 2, requires - in connection with the definition of a “public official” - that “the criminal act was committed in conjunction of (public) authority”. According to section 89, paragraph 9, criminal liability of a public official requires that a crime be committed in connection with the official’s authority (competence) and responsibility.

There is the issue whether these requirements might be more restrictive than those established by the Convention and paragraph 3 of the Commentaries. The Czech authorities confirm that they consider the wording in sections 161, 162a, and 89, paragraph 9, as being equivalent to the relevant text of the Convention.

### **1.1.9/1.1.10 in order to obtain or retain business or other improper advantage/in the conduct of international business**

Section 161, paragraph 2b, goes beyond the requirements of the Convention and does *not* necessitate that the offender acts in order to obtain or retain business or other improper advantage/in the conduct of international business.

## **1.2 Complicity**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Pursuant to section 9, paragraph 2, of the Criminal Code, in the event that the offence has been committed collectively by two or more persons, each person shall be liable individually as if he/she has committed the offence alone. There is no requirement that all the co-offenders participate in the offence in the same manner. Some partial involvement, even in a subordinate role, is sufficient, provided that all the offenders had the same intention and the acts committed individually were, in objective and subjective terms, a part of the same activity that in whole constitutes a criminal behaviour.

Section 10 defines the term “participant”. According to its paragraph 1, a participant in a completed criminal offence, or in an attempt to commit a criminal offence, is a person who intentionally

- a) organized or directed the commission of a criminal offence (the organizer),

- b) instigated another person to commit a criminal offence (the instigator),
- c) granted another person assistance in committing a criminal offence, particularly by providing the means for committing such criminal offence, removing obstacles, giving advice, strengthening the person's intent, or promising assistance after the commission of a criminal offence (an assistant).

These categories would seem to cover complicity, including aiding and abetting or authorisation as required by the Convention.

Pursuant to paragraph 2, the criminal liability and punishability of a participant shall be governed by the provisions on the offender's criminal liability and punishability, unless the Criminal Code provides otherwise.

### **1.3 Attempt and Conspiracy**

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

Sections 7 and 8 of the Criminal Code govern attempt and conspiracy in a common way for all types of offences. Thus, there is no different treatment with respect to bribery of domestic or foreign public officials.

#### ***Conspiracy***

Section 7 deals with the offence of conspiracy. Pursuant to its paragraph 1, conduct that threatens society and that consists in the organising of an especially serious criminal offence, the acquisition or adaptation of means or tools for the purpose of committing a crime or conspiracy, assembling, instigating or giving assistance for such purpose, or other intentional creation of conditions for committing a criminal offence shall be considered as preparation of a criminal offence, even if such criminal offence is not attempted or committed.

The term "especially serious criminal offence" is defined in section 41, paragraph 2, of the Criminal Code. It covers criminal offences listed in section 62 of the Criminal Code and those intentional criminal offences punishable by a maximum term of imprisonment of at least eight years. The offence of (active) bribery of domestic or foreign public officials is neither included in section 62, nor is it punishable by a maximum term of imprisonment of at least eight years<sup>7</sup>.

#### ***Attempt***

Section 8 deals with the offence of an attempt. According to its paragraph 1, conduct that is dangerous to society, and directed towards the completion of a criminal offence, and which has been undertaken by the offender with the intent to commit it, shall be considered as an attempt to commit the criminal offence, if it was not completed.

The Czech authorities consider an attempt of bribery of a public official a conduct that is dangerous to society.

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<sup>7</sup> Only passive bribery of a foreign public official falls under the latter category, provided that the offender commits the act with the intent of procuring a major benefit for himself/herself or another person, or if he/she commits such an act as a public official with the intent of procuring a substantial benefit for himself/herself or for another person (see section 160, paragraph 4).

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

### **2.1 Criminal Responsibility**

Czech criminal law is based on the principle of individual criminal liability of natural persons. Therefore, it does not establish collective criminal liability or responsibility for the fault of another person. In case of legal persons, it is always a natural person acting on behalf of the legal person that bears criminal responsibility for the criminal behaviour defined in the Criminal Code.

The Czech authorities consider establishing criminal responsibility of legal persons in the context of a general re-codification of the Criminal Code. A draft concept is expected for autumn 2000.

### **2.2 Non-Criminal Responsibility**

Legal persons bear administrative and civil responsibility and may be sanctioned accordingly (see sections 3.5. and 3.8 below).

## **3. ARTICLE 3. SANCTIONS**

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

### **3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official**

#### *Natural Persons*

Pursuant to section 161, paragraph 2b, the offence of bribery of domestic and foreign public officials may be punished with imprisonment of one to five years or a monetary fine. The Czech authorities point out that this penalty results from the 1999 amendment of section 161 in connection with the ratification of the Convention. Previously, the maximum punishment was only imprisonment of up to three years or a fine.

Pursuant to section 53, paragraph 1, the pecuniary penalty may range from CZK 2,000 to CZK 5 million, provided that the offender acquired or attempted to acquire a property benefit by the criminal activity.

Sections 33, 34 of the Criminal Code establish Guidelines for imposing penalties. They list specific situations that the court shall take into account as attenuating or aggravating circumstances, such as a

state of severe agitation of the offender or the existence of a particularly contemptible motive for the crime.

Aggravated cases of bribery are defined by the amount of benefit or damage involved. According to the Czech authorities, bribery of a domestic or foreign public official is always considered as an aggravated case of bribery because of the higher degree of social danger that it creates. Only as far as the offence of *passive* bribery is concerned, does the Criminal Code establish an *explicit* provision dealing with aggravated cases.

The Czech authorities confirm that a fine can be imposed in addition to imprisonment.

For a comparable crime like larceny, punishment is imprisonment of up to two years or forfeiture of a specific asset pursuant to section 247 of the Criminal Code. If significant or major damage has been caused, imprisonment may range from two to eight years, or five to twelve years respectively. Such penalties also exist for the offences of embezzlement<sup>8</sup> and fraud<sup>9</sup>.

The Czech authorities confirm that no comparable punishment exists for the offence of bribery of public officials if the offender causes significant or major damage. However, they consider harmonisation of sanctions for similar types of criminal offences in the framework of the planned re-codification of the Criminal Code.

### ***Legal Persons***

There are no criminal sanctions (fines) imposed on legal persons.

## **3.3 Penalties and Mutual Legal Assistance**

### ***Treaty-Based Legal Assistance***

Mutual legal assistance may be rendered according to pertinent international treaties to which the Czech Republic is a party. It is not conditioned to a certain severity of the offence under Czech legislation.

The Czech authorities confirm that they consider multilateral treaties, such as the Convention, a sufficient legal basis for mutual legal assistance.

### ***Non-Treaty-Based Legal Assistance***

Legal assistance in criminal matters is governed by Section 384 of the Code on Criminal Procedure. It refers to the regulations governing the relations with foreign countries in civil matters. Pursuant to section 56 of the Act on International Private and Procedural Law, Czech judicial authorities shall grant legal assistance to foreign judicial bodies if the requirement of reciprocity is met. Legal assistance may only be rejected if the request is contrary to public order.

## **3.4 Penalties and Extradition**

The Czech authorities confirm that international treaties to which the Czech Republic is a party do not require a minimum penalty lower than 1 year for extradition purposes. These treaties therefore cover the offence of bribery of a foreign public official.

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<sup>8</sup> Section 248 of the Criminal Code.

<sup>9</sup> Section 250 of the Criminal Code.

In the absence of a treaty, section 379 of the Code on Criminal Procedure permits extradition of a person to a foreign country under certain conditions. In particular, it is required that the offence is punishable in both countries, the extradition for such offence is admissible, the punishability of the offence has not expired, and the alleged offender is not a Czech national. The provision only applies in cases where a foreigner staying in the Czech Republic committed the offence abroad<sup>10</sup>. Pursuant to section 382, paragraph 1, of the Code on Criminal Procedure, extradition to a foreign country requires a permit by the Minister of Justice, once a competent court has decided that extradition is admissible.

The Czech authorities confirm that they consider the Convention itself as a sufficient legal basis for extradition.

If a foreigner committed an offence in the Czech Republic, section 379 of the Code on Criminal Procedure does not apply. In this case, prosecutors, the police and investigators are obliged to start investigation and prosecution.

### **3.5 Non-criminal sanctions applicable to legal persons for bribery of foreign public officials**

If a bribe was given in order to obtain an official permission to perform a certain activity without fulfilling all conditions necessary for obtaining such authorisation, the performance of this activity may be considered, if all conditions are met, as an administrative offence. As a result, the permission may be revoked pursuant to section 62 of the Administrative Order. Prior conviction of the natural person who has acted for the legal person is required. This sanction is intended to force even financially strong persons to comply with the legal requirements particularly in the field of administrative law.

An amendment to the Act No. 199/1994 Coll. on Public Procurement was adopted by the Government on 18 January 2000 and will enter into force on 1 June 2000. It takes into account, among others, the requirements of the Convention. The new section 63 will enable the supervisory authority to exclude applicants from the bidding process for up to five years if they were convicted of an offence of, inter alia, bribery of a foreign public official. Excluded may also be applicants who committed such a criminal act as entrepreneurs in their capacity as natural persons, partners in a commercial company or members of a supervisory or steering board of an applicant.

According to the Czech authorities, no other administrative sanctions exist with regard to legal persons concerning cases of bribery.

### **3.6 Seizure and Confiscation of the Bribe and its Proceeds**

A court may impose the forfeiture of an asset if during criminal proceedings the bribe is secured. Pursuant to section 55, paragraph 1, of the Criminal Code the court may, inter alia, impose forfeiture of the asset that was supposed to be used to commit the offence, that was actually used, or that the offender acquired by his/her criminal offence, or as a reward for such a criminal offence. Forfeiture is also permitted in relation to assets that the offender obtained, even only partially, in exchange for assets obtained through the offence or as remuneration for the offence. This applies, inter alia, to situations where the proceeds are not available<sup>11</sup>. However, forfeiture is not allowed if the value of such assets acquired in exchange is negligible compared to the value of the assets obtained through the offence.

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<sup>10</sup> B 3/75-41.

<sup>11</sup> Section 55, paragraph 1 c, d, of the Criminal Code. See also R 60/1956 and R 87/1958.

Pursuant to paragraph 2, the court may order forfeiture only if the asset belongs to the offender. According to paragraph 3, the forfeited asset shall become the property of the state.

In view of the Czech authorities, forfeiture of the bribe may always be secured during criminal proceedings because it is part of evidence.

The Czech authorities also refer to section 51 of the Criminal Code. Pursuant to its paragraph 1, owing to the circumstances of the committed criminal offence and the offender's personal situation, the court may order forfeiture of his/her property, if the offender has been sentenced to an unsuspended term of imprisonment for a premeditated criminal offence by which the offender acquired, or attempted to acquire, a property benefit. This provision covers cases of aggravated bribery. Forfeiture is not permitted in connection with the imposition of a fine.

The Czech authorities confirm that forfeiture depends on the criminal responsibility of the briber.

The question has been raised whether the Czech authorities are able to confiscate the bribe and/or its proceeds if the briber has invoked the provision on "effective repentance" pursuant to section 163 of the Criminal Code. The Czech authorities explain that due to the legal invalidity of the act induced by bribery no proceeds can be obtained.

The Czech authorities confirm that procedures are the same for the offence of bribery of domestic and foreign public officials.

### **3.8 Civil Penalties and Administrative Sanctions**

Pursuant to section 451 of the Civil Code, the court may render a civil law judgement on the transfer of "unjustified endorsement". An "unjustified endorsement" is defined "as a material benefit acquired by performance of an act for which there was no legal reason, or which was based on an invalid legal act, or by performance in respect of a legal ground that did not materialise, as well as material benefit from dishonest sources". The Czech authorities confirm that they consider gains from an offence of bribery as being derived from "dishonest sources". Section 451 of the Civil Code, as any other sanction under civil law, applies to both natural and legal persons.

Furthermore, there exists a civil penalty under the Commercial Code. Pursuant to section 44, paragraph 2e, of the Commercial Code bribery is one form of unfair competition. Section 49 of the Commercial Code defines "bribery" as an action (conduct) "whereby:

- a) a competitor offers, promises or renders, directly or indirectly, any benefit to an individual who is a member of a competitor's statutory body (or similar body), or a competitor's employee (or an individual of similar status), in order to achieve, by means of (individual's) unfair conduct, a priority, to the detriment of other competitors, for himself or for another competitor, or another unlawful advantage in competition; or
- b) the individual referred to in letter a) directly or indirectly demands, solicits the promise of, or accepts, any kind of benefit for the same purpose."

According to section 53 of the Commercial Code, persons whose rights have been violated or threatened as a result of unfair competition can demand that the violator abstain from his/her action and eliminate the improper state of affairs (resulting from it). They can also demand appropriate satisfaction, which may be rendered in money, damages, and surrender of unjustified enrichment.

Administrative sanctions are dealt with in section 3.5. above.

## **4. ARTICLE 4. JURISDICTION**

### **4.1 Territorial Jurisdiction**

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Czech law applies to offences committed on Czech territory. According to section 17, paragraph 2, of the Criminal Code, a criminal offence shall be considered as having been committed on the territory of the Czech Republic if an offender acted there, even if the violation of, or threat to, an interest protected under this Code resulted, or was to result, completely or partly abroad. The same applies if an offender violated or threatened on its territory an interest protected under this Code, or if the consequence of such a criminal offence was to have occurred on its territory at least partly, even though the criminal offence was committed abroad.

The Czech authorities confirm that a telephone call, fax, etc. would be sufficient to establish territorial jurisdiction.

Pursuant to section 17, paragraph 3, of the Criminal Code, offences committed outside the Czech territory on board of a Czech vessel or aircraft are also subject to Czech law.

Pursuant to section 20a of the Criminal Code, Czech jurisdiction also applies if an international treaty binding on the Czech Republic explicitly says so. Vice versa, the above-mentioned provisions on territorial jurisdiction do not apply if they are not permitted under an international treaty binding on the Czech Republic.

### **4.2 Nationality and other Extraterritorial Jurisdiction**

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

#### ***Jurisdiction over Nationals***

According to section 18 of the Criminal Code, Czech law applies to offences committed abroad by a Czech national or a stateless person with permanent residence in the Czech Republic. It is not required that the offence is also punishable in the country where it has been committed. Since the Criminal Code explicitly covers the offence of bribery of foreign public officials, Czech nationals committing such an offence abroad may be prosecuted in their home country.

Section 18 of the Criminal Code also covers the situation where the offence has taken place in a third country (e.g. a Czech national bribes a public official of country A in country B). Section 161 of the Criminal Code does not require that the foreign public official be bribed in his/her home country.

There is still the issue of corporate (non-criminal) liability for bribery by non-Czech nationals, agents of a Czech company who commit the act abroad. According to the Czech authorities, the nationality of

agents, employees or board members is not relevant in this context. Such a company shall be excluded from public procurement procedures (see section 3.5. above).

### ***Jurisdiction over Non-Nationals***

Pursuant to section 20, paragraph 1, of the Criminal Code, Czech law applies to an act committed abroad by a foreigner or a stateless person who is not a permanent resident of the Czech Republic, if the act is also punishable under the law of the country where it has been committed, and if the offender is apprehended in the Czech Republic and was not extradited for criminal prosecution to a foreign state. According to section 20, paragraph 2, such offender shall not be sentenced to a more severe punishment than that stipulated under the law of the state where the criminal offence has been committed.

### **4.3 Consultation Procedures**

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Pursuant to section 383a of the Code on Criminal Procedure, the Supreme Prosecution Office decides on the request of a competent foreign body to transfer criminal proceedings against a Czech national who committed an offence in that country to the Czech Republic.

Section 383b of the Code on Criminal Procedure enables the Supreme Prosecution Office - and the Ministry of Justice after the charge is brought - to transfer criminal prosecution to the home country of the offender.

There are no strict conditions for a transfer of prosecution to a foreign country and vice versa. A decision is taken in each individual case with regard to the purpose of the criminal proceedings<sup>12</sup>.

Furthermore, multilateral or bilateral international treaties apply as „lex specialis“. In particular, this relates to the 1972 European Convention on Transfer of Criminal Proceedings, and Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters. They extend the possibilities to transfer the proceedings beyond those provided under domestic legislation. Prior consultations with the partner country in case of transfer of the criminal proceedings may take place although only some bilateral treaties provide this option explicitly.

### **4.4 Review of Current Basis for Jurisdiction**

Article 4.4 requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

The Czech authorities declare that they will review the recently amended legislation once they have gained some experience with its practical application.

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According to section 1 par. 1 of the Code on Criminal Procedure, the purpose of criminal proceedings is to ensure proper identification of criminal offences, to justly punish the offenders according to law and to promote compliance of citizens with laws and rules of civic social (common) life.

## **5. ARTICLE 5. ENFORCEMENT**

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

### **5.1 Rules and Principles regarding Investigations and Prosecutions**

The Czech authorities confirm that criminal proceedings in case of bribery of a foreign public official are subject to the same rules and principles as any other criminal proceedings. Czech criminal law does not distinguish between criminal proceedings according to different types of offences.

Pursuant to section 2, paragraph 1, of the Code on Criminal Procedure, nobody may be prosecuted as an accused person otherwise than on lawful grounds and by the way prescribed by this law. According to section 2, paragraph 3, the prosecutor is obliged to prosecute all criminal offences that become known to him/her unless the law, or promulgated international agreements binding on the Czech Republic, states otherwise.

Pursuant to section 172, paragraph 1, of the Code on Criminal Procedure, the investigator may terminate criminal prosecution if, inter alia, it is evident that the action being subject to prosecution did not happen, the action is not a criminal offence, it has not been proved that the action was committed by the charged person, or the punishability of the action expired.

According to section 173, paragraph 1, of the Code on Criminal Procedure, the investigator shall suspend criminal prosecution, if, inter alia, the matters cannot be properly clarified due to absence of the charged person, the charged person due to serious disease cannot participate in court proceedings, or the charged person was extradited or expelled from the country.

A victim (i.e. a competitor) may appeal against a decision not to prosecute in accordance with sections 159, paragraph 5, and paragraph 172, paragraph 3, of the Code on Criminal Procedure.

### **5.2 Considerations such as National Economic Interest**

The Czech authorities confirm that investigation and/or prosecution of the bribery of a foreign public official must not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Pursuant to section 67, paragraph 1, of the Criminal Code the statute of limitation ranges from three to twenty years. For offences that are subject to a maximum punishment of imprisonment not less than three years, it is five years. This covers the offence of bribery of foreign public officials.

Pursuant to section 67, paragraph 2, the statute of limitations shall not include (a) a period during which the offender could not be tried because of a legal impediment, (b) a period when the offender was abroad, and (c) the probationary period if there is a conditional stay of criminal prosecution.

According to section 67, paragraph 3, the statute of limitations shall be interrupted

- a) if the offender is informed about the accusation of a criminal offence affected by statute of limitations and subsequent steps are directed towards criminal prosecution of the offender by a police body, investigator, prosecutor or the court, or
- b) if during a period of limitation the offender commits a new criminal offence which is punishable under this Code by the same or more severe punishment.

Pursuant to section 67, paragraph 4, a new period of limitation shall commence to run if the initial period of limitation is interrupted.

The commission of the criminal offence triggers the running of the statute of limitations.

## **7. ARTICLE 7. MONEY LAUNDERING**

Article 7 of the Convention requires that where a Party has made bribery of a domestic official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

The Czech authorities confirm that bribery of a domestic or foreign public official, as any criminal offence that is connected to any economic benefit, is a predicate offence for the purpose of application of the Czech legislation relating to money laundering. They refer to section 1, paragraph 2, of the Act No. 61/1996 Coll. concerning Certain Measures Against Legalisation of Proceeds of Criminal Activity and amending legislation relating thereto. This provision defines “proceeds” as „economic benefit derived from criminal action which has the features of a criminal offence”.

There is the issue whether the term “proceeds” covers the bribe that is still in possession by the offender. The Czech authorities point out that if a bribe was only offered/promised, they can still confiscate it according to Section 55, paragraph 1b, of the Criminal Code, because it is “an asset determined to be used to commit a crime”.

Sections 251, 251a of the Criminal Code deal with the offence of money laundering. Pursuant to section 251, paragraph 1, anyone who conceals, transfers to himself/herself or uses an asset that was obtained by a crime committed by another person, or that was acquired for such an asset, shall be punished by imprisonment for up to two years or a fine. Pursuant to paragraph 2, imprisonment for one to five years shall be imposed if the offender has gained a substantial benefit by committing the offence under paragraph 1. According to paragraph 3, imprisonment for two to eight years or forfeiture of property shall be imposed if the offender has gained a major benefit by committing the offence under paragraph 1.

According to section 251a, paragraph 1, anyone who authorises another person to disguise the origin or to prevent determining the origin of an asset obtained by criminal activity shall be punished by imprisonment of up to two years or by a monetary punishment. Pursuant to paragraph 2, imprisonment for one to five years shall be imposed if the offender has committed the offence under paragraph 1 as a member of an organized group, or has gained by the offence a substantial benefit. According to paragraph 3, imprisonment for two to eight years or forfeiture of property shall be imposed if the offender committed the offence under paragraph 1 in relation to assets originating from trafficking in narcotic drugs or psychotropic substances or other very serious criminal offence, or gained a major benefit by committing the offence under paragraph 1.

The terms “substantial benefit” and “major benefit” are defined in section 89, paragraph 11, of the Criminal Code. Accordingly, “substantial benefit” means a benefit at least equal to one hundred times the minimum monthly wage stipulated in a Government Decree. A “major benefit” is a benefit at least equal to five hundred times such wage. Pursuant to the Czech authorities, this implies that a substantial benefit has to be at least 200.000 CZK, a major benefit at least 1 million CZK.

The term “very serious criminal offence” is defined in section 41, paragraph 2, of the Criminal Code (see section 1.3. above).

## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations on the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

### **8.1 Accounting and Auditing Requirements**

The Accounting Act No. 563/1991 Coll., as amended by the Act No. 117/1994 Coll. and Act No. 219/1997 Coll., prohibits to keep and maintain books of accounts except those permitted by the aforementioned Act. The relevant provisions are sections 6, 7, 11 - 16, 29, and 33.

Pursuant to section 7, accounting units „shall keep their accounts in a complete manner, with proper support, and correctly, so that they fairly present the accounting events which are the object of accounting“, i.e. balance and flow of assets, liabilities, equity, costs, revenues, or income and expenses.

According to section 7, subsection 2, section 13 and 15, the completeness of accounts demands that all accounting events in the accounting period be recorded in the books of accounts. Pursuant to section 6, subsection 1, and section 11, all accounting events should be documented with accounting documents that prove the records in the books of accounts according to section 6, paragraph 2, section 13 and 15.

Pursuant to section 13, subsection 1, accounting records in the book (journal) should be chronologically arranged because this book should prove the recording of all accounting events in the accounting period. According to section 12, subsection 3, accounting entries should be made in a way that guarantees their durability and prevents unauthorised changes and modifications of these entries. According to section 29, accounting units are also obliged to take inventory /stocktaking of their assets and liabilities.

According to section 33, subsection 6, all accounting documents, including financial accounting reports, shall be protected against misuse, damage, destruction, or loss.

Pursuant to section 20, paragraph 1, accounting units shall have their financial statements audited and shall publish certain information from their financial statements if under statutory provisions they are obliged to do so. According to paragraph 2, business companies to which paragraph 1 does not apply, and for which it is mandatory to establish registered (share) capital or basic capital, as well as co-operatives, shall have their financial statements audited if in the preceding year

- (a) their net turnover (revenues less value added tax or turnover tax, if these are included in revenues) exceeded CZK 40,000,000; or
- (b) their net business assets exceeded CZK 20,000,000.

Section 20, paragraph 2, deals with capital business companies that are required to have a registered minimum capital, and with co-operatives. Capital companies include limited liability companies and joint stock companies.

Pursuant to section 14, paragraph 6, of the Act on Auditors and the Chamber of Auditors of the Czech Republic, the failure to prepare financial accounting records - in the case of audited subjects - in compliance with the procedures stipulated by the Ministry of Finance based on the Accounting Act is mentioned in the auditor's report. The statement of the auditor can be used in criminal proceedings.

The independence of auditors is ensured in the provision of section 13 of the Act on Auditors and the Chamber of Auditors of the Czech Republic.

A draft amendment to the Act on Auditors and the Chamber of Auditors of the Czech Republic was submitted to the Government. It is expected to enter into force on 1 January 2001. It will, inter alia, implement in a more detailed manner the requirements resulting from the Revised Recommendation.

## **8.2 Companies Subject to the Accounting and Auditing Requirements**

Pursuant to its section 1, paragraph 1, the Accounting Act applies to all legal entities and natural persons carrying on business or other gainful activity under another legislative Act<sup>13</sup>, insofar as such persons are required to support for taxation purposes those of their expenses incurred in generating, assuring and maintaining their income. According to the Czech authorities, this obligation applies to trading companies, banks, insurance companies, state-owned companies, and other subjects like non-profit organisations, municipalities, and natural persons - entrepreneurs.

Section 20, paragraph 1, of the Accounting Act establishes which companies are subject to an auditing requirement (see the previous section).

## **8.3 Penalties**

Section 37, paragraphs 1-3, of the Accounting Act contains sanctions in case of a violation of the accounting principles described above. According to paragraph 1, in accordance with another legislative Act, the authorities specified therein may impose upon accounting units fines of up to CZK 500,000,- for any non-fulfilment of their duties under this Act that results in incomplete, unsupported or incorrect accounting. If this non-fulfilment of duties prevents proper determination of the tax base, the fine may be increased to up to CZK 1,000,000.

The Czech authorities are of the opinion that the current sanction is not dissuasive enough. They have therefore proposed an amendment to the Accounting Act. The suggested higher level of fines amounts to 1 - 7 per cent of the total sum of the assets in the accounting unit's balance sheet. The draft amendment is currently discussed in Parliament. It is expected that the new Act will enter into force on 1 January 2001.

The Czech authorities point out that the failure to keep accountancy in compliance with the Accounting Act, and the failure to prepare financial accounting reports in accordance with the procedures stipulated by the Ministry of Finance based on the Accounting Act, may be considered as a criminal act. Section 125 of the Criminal Code deals with misrepresentation of data in economic and business records. According to its paragraph 1, whoever does not keep books of account, accounting entries or other documents serving to reflect the position of his/her economic management and property, or their

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<sup>13</sup> This refers mainly to the Commercial Code.

supervision, although under the law he/she is obliged thereto, shall be sentenced to a term of imprisonment of from six months to three years, or prohibition of a specific activity or to a pecuniary penalty. The same applies to anybody who presents false or grossly distorting data in such books of account, accounting entries or other documents, or who destroys, damages, makes useless or conceals such books of account, accounting entries or other documents, and thus endangers someone else's property rights or the timely and proper tax assessment.

Pursuant to paragraph 2, the same sentence shall be imposed on a person who provides false or grossly distorted data in documentation required for entry into the Commercial Register. According to paragraph 3, an offender who by his/her act under paragraphs 1 or 2 causes substantial damage to someone else's property or some other particularly serious consequence shall be sentenced to a term of imprisonment from one to five years.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party co-operate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

### **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

For mutual legal assistance in *criminal* matters, the Czech authorities refer to sections 3.3. and 3.4 above.

The Czech judicial authorities and the Ministry of Justice may provide mutual legal assistance in *civil* matters according to:

- a) relevant provisions of bilateral international treaties on mutual legal assistance;
- b) relevant provisions of multilateral international treaties on mutual legal assistance;
- c) relevant provisions (Section 56 and 57) of Act No. 97/1963 on International Private and Procedural Law, in case when neither a) nor b) can be applied because there are no such relevant treaties.

The following types of contact are foreseen concerning mutual legal assistance:

- a) direct contacts between judicial authorities of the Czech Republic and judicial authorities of Poland, Hungary and Slovak Republic; and between Czech judicial authorities and consular departments of foreign diplomatic missions resident in the Czech Republic;
- b) contacts according to the Hague conventions<sup>14</sup>;
- c) contacts through the Ministry of Justice in other cases.

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<sup>14</sup> Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, concluded on November 15, 1965 and Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded on March 18, 1970.

As “judicial authorities” are considered Czech or foreign courts and other foreign authorities performing judicial functions and international legal assistance. The described means of legal assistance are provided in civil and commercial matters only. Therefore, the Czech authorities may not be able to support decisions of some foreign administrative bodies unless the relevant foreign court or court-like authority deals with the matter in form of civil proceedings and makes appropriate requests.

The Czech authorities confirm that they consider the Convention itself as a sufficient legal basis for mutual legal assistance.

### **9.1.1/9.1.2 Criminal Matters/Dual Criminality**

The Czech authorities declare that according to established practice in the Czech Republic, in cases of mutual legal assistance in criminal matters dual criminality is required only to perform house inspections or to record a person’s phone calls. The reason is that such measures are considered as serious violations of the right of privacy. The Czech authorities consider that the requirement of dual criminality is met between Parties to the Convention.

Mutual legal assistance may also be provided to Member States of the 1959 European Convention on Mutual Legal Assistance in Criminal Matters according to its Article 1, provided that at the moment of the request the judicial bodies of the requesting state have jurisdiction over the given offence. This applies even in case of administrative law offences.

### **9.1.2 Non-Criminal Matters**

Mutual legal assistance in non-criminal proceedings is governed by the Act on International Private and Procedural Law<sup>15</sup>. Accordingly, a request of a country that has launched criminal proceedings against a legal person and with which the Czech Republic does not have an international treaty will not be contrary to the principle of public order in the Czech Republic. The same applies with regard to a country that is a member of the Convention.

### **9.3 Bank Secrecy**

According to section 38, paragraph 1, of the Law No. 21/1992 Coll. on Banks as amended, all bank transactions, financial bank services, including the state on accounts and deposits, are covered by bank secrecy. However, pursuant to section 38, paragraph 2, it is not considered a violation of bank secrecy, if, inter alia, information on a client and his/her transactions are provided in connection with criminal proceedings. According to section 38, paragraph 3, such information may be demanded by, inter alia, a court in civil judicial proceedings, the competent authority in criminal proceedings on conditions set up by a special law, or financial authorities in tax proceedings.

The Czech authorities confirm that according to section 8 of the Code on Criminal Procedure these requirements are also applied to requests by foreign countries requesting access to bank records with respect to criminal matters.

Pursuant to section 79a of the Code on Criminal Procedure, the chairman of a panel or, in the preparatory proceedings, the prosecutor, investigator or police authority may decide about the securing of financial means on a bank account. This is permitted if the discovered facts show that these financial means are determined for committing a crime, were used for committing a crime or are the yield of a criminal activity. Pursuant to section 384, paragraph 2, of the Code on Criminal Procedure, a court may

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<sup>15</sup> See section 3.3. above.

also decide, upon proposal of a prosecutor, on the preliminary securing or forfeiture of property in accordance with an international agreement to which the Czech Republic is a party.

## **10. ARTICLE 10. EXTRADITION**

### **10.1/10.2/10.5 Extradition for Bribery of a Foreign Public Official/Dual Criminality**

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Czech authorities confirm that bribery of a foreign public official is an extraditable offence under Czech law and the extradition treaties to which the Czech Republic is a party.

Pursuant to section 379, paragraph 1, of the Code on Criminal Procedure, dual criminality is a precondition for extradition. The Czech authorities consider this condition to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention.

### **10.3 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Section 21 of the Criminal Code prohibits the extradition of Czech nationals. However, pursuant to section 18 of the Criminal Code, Czech law applies to offences that were committed abroad by Czech nationals or stateless persons having their permanent residence in the Czech territory. Such persons can therefore be prosecuted in the Czech Republic.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

On 21 January 2000, the Czech Republic notified that the responsible authorities are as follows:

- For the purpose of Article 4, paragraph 3, and Article 9 of the Convention, the responsible authorities shall be the Supreme Prosecutor's Office of the Czech Republic in the stage before the case is brought before the court, and the Ministry of Justice thereafter;
- For the purpose of Article 10 of the Convention, the responsible authority shall be the Ministry of Justice.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

Pursuant to section 24 of the Income Tax Act No. 586/1992 Collection of Laws as amended, only “expenses or costs incurred to generate, assure and maintain the taxable income shall be deducted in an amount documented by the taxpayer or in the amount stipulated in this Act and in other statutory provisions“.

The Czech authorities confirm that they do not consider a bribe as an expense that is necessary for generating, assuring and maintaining the taxable income<sup>16</sup>. Moreover, they are preparing an amendment to the Income Tax Act that will explicitly prohibit deducting a bribe extended to a foreign public official as an expense effective for taxation purposes. It is expected to enter into force on 1 January 2001.

The Czech authorities confirm that prior conviction by a court is not a prerequisite for denying tax deductibility.

Moreover, it is required that the taxpayers themselves demonstrate by some reliable document that they deal with “expenses” according to the law. Pursuant to sections 9, 31 of the Administration of Taxes Act No 337/1992, Coll. on the Substantiation of Facts, the taxpayer is obliged to prove all the facts decisive for the correct determination of the tax base. If the tax administrator detects a significant curtailment of taxes, he/she is obliged to pass on the relevant information to the prosecution agencies.

Those facts must also be introduced in the tax return. The taxpayer must substantiate these facts on request by the tax administrator in the course of the tax proceedings. According to the Czech authorities, one can assume that no taxpayer submits any document concerning a bribe to the financial authority because of the risk of penal prosecution.

The Czech authorities also point out that the general rule of the Czech tax laws mentioned above is based on the principle of determination of the tax base from the difference between income /revenues and expenses that follows from the bookkeeping of the taxpayer. In view of the Czech authorities, it is not permitted to record a bribe as an accounting event, and it does therefore not influence the tax base, because bribery of a foreign public official is a crime under Czech law.

Pursuant to its section 1, the Income Tax Act applies both to personal income tax and corporate income tax.

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<sup>16</sup> There exists no relevant case law.

## EVALUATION OF THE CZECH REPUBLIC

### General Remarks

The Working Group complimented the Czech authorities for their thorough implementation of the Convention into Czech legislation. Delegates appreciated the co-operation of the Czech authorities in the evaluation process, including their complete and speedy replies to questions that had been raised.

The Working Group considered in light of the available documentation and explanations provided by the Czech authorities that the Czech legislation overall conforms to the standards of the Convention. Deficiencies were identified with regard to the fact that Czech criminal law includes the concept of “effective repentance”, and concerning the responsibility of legal persons. The Working Group urged the Czech authorities to take remedial action as soon as possible<sup>17</sup>.

### I. Specific Issues

#### 1. Non-punishability in case of “effective repentance”

According to section 163 of the Criminal Code, bribery of a domestic or foreign public official is not considered an offence if the perpetrator provided or promised the bribe only because he/she was asked to do so and reported the fact voluntarily and without delay to a state attorney or police.

Although the Convention does not exclude the application of general defences as general provisions of the Criminal Codes of the parties, the general feeling of the Working Group was that the defence of “effective repentance” presents a potential for misuse.

The Czech authorities pointed out that in their view the conditions for invoking section 163 are narrowly defined. Furthermore, they consider that the provision effectively enables law enforcement bodies to collect evidence and to initiate legal proceedings against the person who received the bribe.

Nonetheless, the Working Group remained concerned that this defence may go beyond the general defences mentioned above, and that its application may lead to a loophole in the implementation of the Convention.

There is the additional issue whether Czech law allows confiscating the bribe if the briber has invoked the defence of “effective repentance”. The Czech authorities explained that in this case confiscation is not permitted because of the non-punishability of the briber.

The Working Group considers the issue of “effective repentance” to be of a broader nature. It encouraged the Czech Republic to consider making the necessary changes and will specifically focus on this issue during the monitoring Phase 2.

#### 2. Responsibility of legal persons

Czech Criminal Law does not know the concept of criminal responsibility of legal persons. There is also no possibility to impose fines on legal persons for bribery of foreign public officials. There is only a liability under administrative law relating to public procurement and under civil law concerning unfair competition (additional administrative or civil sanctions under Article 3.8.).

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<sup>17</sup> This does not prejudice the outcome of the Phase 2 examination (see item 1 below).

The Working Group considered that this situation falls short of the requirement of the Convention that parties at least establish effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for the offence of bribery of foreign public officials (Articles 2, 3.2.).

The Working Group took note of the announcement of the Czech authorities that they are preparing to establish criminal responsibility of legal persons in the context of a general re-codification of the Criminal Code, and that a draft is expected for autumn 2000. It encouraged the Czech authorities to finalise the legislative process as soon as possible.

## **II. Non-deductibility of bribes**

Pursuant to section 24 of the Income Tax Act, only expenses or costs incurred to generate, assure and maintain the taxable income shall be deducted in an amount documented by the taxpayer or in the amount stipulated in this Act and in other statutory provisions. The Working Group was satisfied with the statement by the Czech authorities that that they do not consider a bribe as an expense for generating, assuring and maintaining the taxable income. It welcomed that the Czech authorities intend to introduce an explicit prohibition of the deductability of bribes by 1 January 2001 in order to confirm this legal situation.