

## BULGARIA

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Bulgaria signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD on December 22, 1998. On January 15, 1999, it enacted implementing legislation in the form of the Law on Amendment to the Bulgarian Penal Code<sup>1</sup>, which came into force on January 29, 1999.

##### Convention as a Whole

To meet the requirements of Article 1 of the Convention, Bulgaria established criminal liability for the active bribery of a foreign public official through an amendment to the Penal Code. The Law on the Amendment to the Penal Code amends article 304 of the Penal Code by extending the punishment provided for the active bribery of a Bulgarian “official” to the offence of bribing a “foreign official”, through the addition of paragraph 2 (see below). It also amends article 93, which contains the definition of a Bulgarian official, by adding a definition of “foreign official”.

Under Article 5(4) of the Constitution of the Republic of Bulgaria it is stated that international treaties that have been ratified, published and entered into force are part of the country’s internal law, and that they “take precedence over conflicting domestic legislation”. In a decision of the Constitutional Court (N7/1992) the following interpretation was given to Article 5(4) of the Constitution in relation to international criminal treaties:

*International treaties which have been ratified, published in State Gazette and have come into force, and which qualify certain acts (actions or omissions) as crimes, such act not being criminal under domestic penal law of the Republic of Bulgaria, shall constitute part of the law of the land to the extent only that they may clarify the substantive meaning of crime qualifications as established in the Penal Code, or elements thereof, or if they give rise to obligation envisaging modification of legislation.*

It is the opinion of the Bulgarian authority responsible for the preparation of the Bulgarian response to the questionnaire that the Constitution requires that, where there is a discrepancy between an internal law and a convention that has been ratified, the internal law be changed in order to comply with the convention.

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

Bulgaria translates article 304 of the Bulgarian Penal Code, which contains the offence of bribing a foreign public official, as follows:

*1. A person who gives a gift or any other material benefit to an official in order to perform or not to perform an act within the framework of his service, or because he has performed or has not performed such an act, shall be punished by deprivation of liberty for up to three years.*

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<sup>1</sup> The Law on Amendment to the Bulgarian Penal Code was published in State Gazette N7 on 26/01/99.

2. The punishment provided in paragraph (1) shall be imposed also on a person who gives bribe to a foreign official in relation to the performance of international business activity.

3. *If in connection with the bribe the official has violated his official duties, the punishment shall be deprivation of liberty for up to five years, where this violation does not constitute a graver punishable crime.*

(underlining was added to indicate amendment)

Bulgaria explains that article 304(1) on domestic bribery applies mutatis mutandis to article 304(2) on foreign bribery.

Three defences to the offence of bribing a foreign public official are available under the Penal Code. They are not contemplated by the Convention. The first two are available under article 306 of the Penal Code, which provides that “a person who has given a bribe shall not be punished”:

- a) if he has been blackmailed by the official or by the expert to do so, or
- b) if of his own accord he has informed the authorities.

The third defence available in relation to the bribery of a foreign public official is contained in article 307 of the Penal Code, which provides that where a person provokes the giving or receiving of a bribe, “the person provoked shall not be punished”.<sup>2</sup>

The Bulgarian authorities explain that the elements of the defences of “blackmailing” and “provoking” are provided for in the case law. In addition, they explain that the defences only release an offender from the imposition of sanctions, not criminal liability. They have been applied only in rare and exceptional cases and where there was convincing evidence. Moreover, the person invoking the defence must prove that the defence applies. If a person invokes one of these defences and cannot prove it, he/she will be prosecuted for false statement in addition to bribery.

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

### **1.1.1 any person**

Article 304(2) applies to “a person” who gives a bribe to a foreign official. Bulgaria explains that this means any person who is criminally responsible, and pursuant to article 31 of the Penal Code, a criminally responsible person is a person who is at least 18 years old and has committed the crime “in the state of being responsible for his acts”.

Article 33 of the Penal Code states that a person “who has acted in a state of insanity--where due to retarded mentality or derangement of his consciousness of prolonged or short duration, the person has not been able to understand the nature and meaning of the act or to manage his actions” is not a criminally responsible person.

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<sup>2</sup> This defence is discussed in more detail later under 1.2 on “Complicity” as it seems to relate to “incitement”.

### **1.1.2 intentionally**

Bulgaria indicates that an offence under article 304(2) is committed when a person “intentionally gives any undue pecuniary or other material advantage... to a foreign public official in the conduct of international business.”

Intent is defined as follows in article 11 of the Penal Code:

*(1) An act dangerous to society<sup>3</sup> shall be considered culpably committed where it is intentional or committed through negligence.*

*(2) An act shall be considered intentional where its perpetrator was conscious of its nature of being dangerous to society, foresaw its consequences as dangerous to society and wished or allowed the occurrence of such consequences.*

In addition, pursuant to article 304(3), the penalty is increased where an official “has violated his official duties”. Bulgaria explains that under article 304(3), the person giving the bribe is liable to an increased penalty where it was his/her intention that the foreign official violate his/her duties (i.e. the person gives the bribe with the purpose of abetting the official in violation of his/her duties or in committing the crime).

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

Article 304 of the Penal Code only expressly applies to the giving of a bribe. The Bulgarian authorities confirm that “offering” and “promising” a bribe are not covered. They explain that this issue will be addressed in the new Penal Code to be adopted by the end of 2000.

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

Article 304(1) expressly refers to “a gift or any other material benefit”, but Bulgaria explains that the offence applies to the giving of “any undue pecuniary or other valuable advantage”. This element appears to be narrower than prescribed by the Convention because it appears to exclude intangible benefits.

“Undue” has been defined in the case law as meaning that the public official has no right to receive for himself/herself or a third person the gift in question for his/her officially performed acts or omissions.

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

Although neither article 304(1) nor article 304(2) expressly refers to the issue of bribes made through intermediaries, Bulgaria states that the offence applies to the giving of a bribe to a foreign public official “directly or through intermediaries”. In the case where a person bribes a foreign public official through an intermediary and the mediation fails, the case shall be treated as an attempt.<sup>4</sup>

Additionally, article 305a of the Penal Code imposes a penalty on the person who acts as an intermediary for a person giving a bribe to a foreign public official. It provides as follows:

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<sup>3</sup>. The term “dangerous to society”, defined in the Penal Code (articles 9 and 10), is “an act that threatens or harms the person, the rights of the citizens, the property, the legal order established by the Constitution in the Republic of Bulgaria or other interests protected by the legal system.

<sup>4</sup>. See discussion on attempts under 1.3 on “Attempt and Conspiracy”.

*A person who mediates for giving or receiving of a bribe, if the perpetrated act does not represent a graver crime, shall be punished by deprivation of liberty for up to three years.*

Under Bulgarian case law, a person who mediates the offering, giving, requesting or receiving of a bribe is an accomplice (abettor or accessory) to the person who gives or accepts the bribe. Bulgaria explains further that article 305a applies when the mediation is successful, and that article 305a should apply if the mediation fails.

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

Article 304(2) of the Penal Code expressly applies to bribes given to a “foreign official”, not to a “foreign public official” as provide in the Convention. This mirrors the domestic bribery offence, which simply applies to an “official”. The definition of “foreign official” is contained in an amendment to article 93 of the Penal Code, which provides as follows:

*A “foreign official” is any person exercising:*

- a) duties in a foreign country’s public institutions (office or agency);*
- b) functions assigned by a foreign country, including by a foreign public enterprise or organisation;*
- c) duties or tasks (assignments) of an international organisation.*

This definition follows the structure of the definition in Article 1.4.a of the Convention, but there appear to be some substantive differences.

In paragraph (a) it is not expressly stated that the definition applies to a person holding a legislative, administrative or judicial office regardless if the person is appointed or elected. However, Bulgaria confirms that the definition applies to a person holding a legislative, administrative or judicial office regardless if he/she is appointed or elected.

Paragraph (b) follows the corresponding part of the definition in Article 1.4.a of the Convention to the extent that it refers to a foreign public enterprise. However, it doesn’t specify that the person must be exercising a public function, and it refers to a foreign public organisation instead of a public agency.

Paragraph (c) differs from the corresponding part of the definition in Article 1.4.a of the Convention in that it doesn’t restrict the definition to an international organisation that is a public international organisation. But Bulgaria confirms that it is the intent that the definition be restricted in this way.

Bulgaria confirms that the term “foreign state” applies to “all levels and subdivisions of government, from national to local”, as is provided in Article 4 of the Convention in respect of the term “foreign country”.

Moreover, according to the Bulgarian authorities, the definition in article 93 of the Penal Code shall be applied in conformity with the requirements of the Convention.

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

Neither article 304(1) nor 304(2) of the Penal Code expressly refers to third party beneficiaries. But Bulgaria states that the offence of bribing a foreign public official applies where the benefit is for a third party, including a political party. In support thereof, Bulgaria draws attention to article 303, which establishes the liability of an official who receives a bribe where, with his/her consent, the gift or material benefit has been given to another person.

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

Article 304(1) of the Penal Code applies to the giving of a gift, etc., to an official in the following two separate cases:

1. Where the gift is given in order to obtain the performance or non-performance by an official of “an act within the framework of his service”.
2. Where the gift is given to an official “because he has performed or has not performed such an act”.

Thus, in the first case it applies to the future acts and omissions of officials, and in the second case to the past acts and omissions of officials. In addition, Article 304(3) of the Penal Code provides for a more serious penalty where an official has violated his/her official duties.

### **1.1.9 in order to obtain or retain business or other improper advantage**

Article 304 of the Penal Code is not restricted to bribes given “in order to obtain or retain business or other improper advantage”. Consequently, small facilitation payments made to induce public officials to perform acts of a routine nature that are part of their functions are not exempted from the purview of the foreign bribery offence.

### **1.1.10 in the conduct of international business**

Article 304(2) of the Penal Code applies to bribes given to foreign public officials “in relation to the performance of international business activity”, not, as the Convention provides “in order to retain business or other improper advantage in the conduct of international business”. However, Bulgaria explains that article 304(2) prohibits the giving of bribes to public foreign public officials “in the conduct of international business”.

The Bulgarian authorities confirm that article 304(2) should apply in the case where a bribe is given to obtain an advantage such as a permit or licence that would enable a person to conduct business in a foreign country, but state that at this time there is no case law to support this interpretation.

## **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”.

There are general principles governing complicity in articles 20 to 22 of the Penal Code which apply to the bribery of a foreign public official. Under article 21 of the Penal Code, which apply to the bribery of a foreign public official, a person who aids or abets a crime is liable to the same punishment provided for in respect of the full offence, except that due consideration must be given to the “nature and degree” of the person’s participation. A person who aids or abets is only responsible for what he/she has “intentionally” abetted or assisted.

“Incitement” is covered by article 20 of the Penal Code and “authorisation” is prohibited under article 285.

In addition, article 307, which applies to the bribing of a foreign public official, prescribes an offence in relation to the provoking of a bribe. It provides as follows:

1. *A person who with premeditation creates a situation or conditions for provoking the giving or receiving of bribe, for the purpose of unmasking a person who gives or receives a bribe, shall be punished by deprivation of liberty for up to one year or by corrective labour.*
2. *In such cases the person provoked shall not be punished.*

Although the Bulgarian authorities explain that there is case law on this defence and that it is usually invoked in relation to entrapment by the police, it may provide a loophole in the implementation of the Convention.

### **1.3 Attempt and Conspiracy**

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

The Bulgarian authorities explain that the general principles under articles 17 to 19 of the Penal Code governing an attempt apply to article 304. Pursuant to these Penal Code provisions, an attempt to bribe a foreign public official would entail an actual attempt to give a bribe that has somehow been thwarted.

Under article 18, an attempt is punishable by the same punishment provided for in respect of the full offence, but due consideration must be given to the “degree of implementation of the intent” and the reasons why the crime was not fully committed.

Bulgarian law differentiates between “preparation” (article 17) and “attempt” (article 18). Mere preparation is not punishable unless provided for in relation to the offence in question. Under Bulgarian law, it is not criminalised in relation to bribery.

## **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”.

The Bulgarian legal system does not provide for the criminal responsibility of legal persons. However, Bulgaria will consider introducing civil and/or administrative measures to address this issue.

## **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**

Bulgaria explains that the Penal Code provides for the same penalties in relation to domestic and foreign bribery. For the primary bribery offence the punishment is a “deprivation of liberty for up to three years”.<sup>5</sup>

Where the official has “violated his official duties” the penalty is a “deprivation of liberty for up to five years, where this violation does not constitute a graver punishable crime”.<sup>6</sup> Bulgaria explains that the offence under article 304(3) incorporates two crimes: active bribery; and incitement of the official to violate his/her duties. Thus, where the violation of the official duties (the malfeasance) is punishable by a deprivation of liberty for more than five years, the person who has given the bribe should be liable for the primary bribery offence under article 304(1) or (2), and separately for the incitement to the more serious malfeasance.

Article 305a, provides for a “deprivation of liberty for up to three years” where a person mediates the giving or receiving of a bribe, if the “act does not represent a graver crime”.

Article 307, provides for a penalty for up to one year or corrective labour<sup>7</sup> where “a person with premeditation creates a situation or conditions for provoking the giving or receiving of a bribe, for the purpose of unmasking a person who gives or receives a bribe”.

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

Bulgaria states that the penalties of deprivation of liberty in cases of bribery of a foreign public official are sufficient to enable effective mutual legal assistance. There is no indication in the relevant provisions of the Penal Procedure Code that mutual legal assistance is dependant on the existence of a deprivation of liberty in relation to the offence in question.

### **3.4 Penalties and Extradition**

Bulgaria states that the penalties of deprivation of liberty in cases of bribery of a foreign public official are sufficient to enable extradition. Under article 439a(2) of the Penal Procedure Code<sup>8</sup> “a person shall be extradited only if the crime for which extradition is requested constitutes a crime under Bulgarian law, and is punished by a deprivation of liberty for no less than one year or by more severe punishment”.

### **3.5 Non-Criminal Sanctions for Legal Persons**

Bulgaria does not indicate that legal persons are subject to any non-criminal sanctions for the bribery of a foreign public official, but as mentioned in relation to the discussion on the responsibility of legal persons, Bulgaria will consider introducing civil and/or administrative measures to address this issue.

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<sup>5</sup> See article 304(1) for domestic bribery and 304(2) for foreign bribery.

<sup>6</sup> See article 304(3) for domestic and foreign bribery.

<sup>7</sup> Pursuant to article 43 of the *Penal Code*, corrective labour is a punishment that is served at the place where the convict is employed, and for persons who are not employed, at an institution, enterprise, co-operative or public organisation. 10 to 25 percent of the convict’s remuneration (as stated in the sentence) is deducted in favour of the state.

<sup>8</sup> New, SG No. 64/1997

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

Article 3.3 of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

Under article 44 of the Penal Code, “confiscation” is available as a punishment in respect of “grave” cases of passive domestic bribery. This involves the appropriation without compensation of property that belongs to the offender.

Pursuant to article 53 of the General Part of the Penal Code, notwithstanding penal responsibility, “objects” may be confiscated that were intended or have served for the perpetration of an intentional crime, or were the subject of an intentional crime. Article 53 specifies that the “object” of a crime under articles 301 to 307 (i.e. passive and active bribery, including the active bribery of foreign public officials) shall be seized in favour of the State, and where it is missing a sum equal to its value shall be adjudged.

Under article 53 the following “objects” can be seized:

1. An object belonging to the convict that was intended or served for the perpetration of an intentional crime.
2. An object belonging to the culprit that was the subject of an intentional crime in the cases expressly provided for in the Special Part of this Code.
3. An article that has been the subject or the means of a crime, the possession of which is forbidden.
4. An object acquired through a crime, if it does not have to be returned or restored. And where the acquired object is not available or has been disposed of, an equivalent amount shall be adjudged.

Thus it appears that both the bribe and the proceeds of bribery would be subject to seizure under the Penal Code.

The Bulgarian authorities confirm that where the perpetrator of a bribe successfully invokes one of the defences to bribing a foreign public official (i.e. blackmail, informing the authorities and provocation), confiscation under article 44 of the Penal Code would not be available, but seizure of the bribe and that which has been “acquired” through the bribe would be subject to seizure under article 53.

### **3.7 Monetary Sanctions in Place of Confiscation of Proceeds**

Section 307a provides that where the object of the crime under articles 301 to 307 “is missing a sum equal to its value shall be adjudged”.

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

Bulgaria does not indicate that it can impose additional civil or administrative sanctions upon a person already subject to a criminal sanction for bribing a foreign public official.

## **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.

Article 3 of the Bulgarian Penal Code contains the relevant provisions on territorial jurisdiction. It states that:

1. The Penal Code shall apply to all crimes committed on the territory of the Republic of Bulgaria.
2. The issue of liability of foreign citizens who enjoy immunity with respect to the penal jurisdiction of the Republic of Bulgaria shall be decided in compliance with the norms of international law adopted thereby.

The general provision on territorial jurisdiction is contained in the first paragraph. It does not elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction. However, the Bulgarian authorities confirm that subsection 3(1) does indeed apply where a crime is committed in part in Bulgaria.

The exception in the second paragraph seems to apply to cases of diplomatic immunity of foreign citizens in Bulgaria.

## **4.2 Nationality 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”.

Bulgaria establishes jurisdiction over its nationals for crimes committed abroad through article 4(1) of the Penal Code, which states that:

*The Penal Code shall apply to the Bulgarian citizens also for crimes committed by them abroad.*

Bulgaria states that according to this principle, it shall establish its jurisdiction in respect of the bribery of a foreign public official.

### **4.2.1 Additional Jurisdiction**

Jurisdiction is also established, pursuant to Article 5 of the Penal Code, in relation to crimes of a general nature committed by non-Bulgarians abroad “whereby the interests of the Republic of Bulgaria or of Bulgarian citizens have been affected”. Bulgaria confirms that this provision applies to the offence of bribing a foreign public official.

## **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.

Bulgaria submits article 4 of the Penal Procedure Code in relation to the issue of consultations. It contains the following three principles relevant to the issue of consultations:

1. Penal proceedings initiated by authorities in another state and a sentence that has entered into force in another state shall not be an obstacle to initiating penal proceedings in Bulgaria for the same crime in relation to the same person. [article 4(1)]
2. Bulgaria shall not execute the sentence of a court in another state. [article 4(2)]
3. The first two principles shall not apply if an agreement for legal aid that stipulates otherwise has been concluded with the foreign country. [article 4(3)]

Bulgaria adds that although it has not signed the Council of Europe's Convention on the Transfer of Criminal Proceedings, if a Party to the Convention requests a transfer of proceedings, consultations to this effect would be possible.

## **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**

Bulgaria has indicated that there are no special rules or principles governing investigations.

With respect to prosecutions, which are called "penal proceedings" in the Bulgarian legislation, articles 20 to 22a contain provisions on the "institution, termination and suspension" thereof. Under article 20 the "competent state body" (the Ministry of Justice or the General Prosecutor) is obligated to institute penal proceedings where the conditions specified by the Penal Procedure Code are present. Article 21 lists the grounds for excluding the institution of penal proceedings and grounds for their termination. These include grounds such as the act does not constitute a crime or the expiration of the statute of limitations. Another ground is that "the perpetrator has been exempted from penal responsibility by the application of measures for social influence or education, or by the imposition of an administrative punishment". The Bulgarian authorities confirm that the purpose of the latter ground is not to exclude penal proceedings where national interests are involved.

Article 20(3) provides the grounds for not instituting and for terminating penal proceedings in relation to a "complaint" by an "aggrieved party". For instance, no proceedings shall be instituted, etc. where the "aggrieved person and the perpetrator have reached a reconciliation".

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

Bulgaria states that the investigation and prosecution of the bribery of a foreign public official cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural persons involved.

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

Article 6 of the Convention requires that any statute of limitations 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.

The relevant following relevant limitation periods are provided under article 80:

- 10 years for acts punishable by a deprivation of liberty for more than three years.
- 5 years for acts punishable by a deprivation of liberty for more than one year.
- 2 years for all the remaining cases.

The relevant bribery offences are punishable by a deprivation of liberty of up to 3 years<sup>9</sup>, for up to 5 years<sup>10</sup> and for up to one year<sup>11</sup>.

Additionally, article 81(2) provides that the limitations period (“term of statutory prescription”) shall be interrupted by every act of the prosecutorial body, and where the term is interrupted, a new term shall commence after completion of the act. Article 81(2) provides further that in any case the statute of limitations shall not exceed by one half the term provided under article 80.

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

Article 7 of the Convention requires that where a Party has made bribery of a domestic public 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.

Article 253 of the Penal Code, which contains the relevant provisions on money laundering in respect of domestic and foreign bribery, states as follows:

1. *A person who concludes financial transactions or other transactions with funds or property of which he knows or supposes that they have been acquired by crime, shall be punished by deprivation of liberty for one to five years and a fine of three million to five million Bulgarian levs.*
2. *The punishment shall be deprivation of liberty for one to eight years and a fine of five million to twenty million Bulgarian levs, if the deed has been committed:*
  1. *by a group of persons with premeditation, or by an organization;*
  2. *two or more times;*
  3. *by an official within the sphere of his office.*
3. *Where the funds or property are in extremely large amounts and the case is extremely grave, the punishment shall be deprivation of liberty for three to twelve years and a fine of ten million to twenty million Bulgarian levs, and the court shall suspend the rights of the guilty person under Article 37, subparagraphs 6 and 7.*
4. *The object of the crime shall be expropriated in favour of the state, and if it is missing or has been alienated, payment of its counter value shall be adjudicated.*

Bulgaria confirms that article 253 applies regardless if a person concludes a financial transaction with the intention to conceal or convert the funds of property. Moreover, it applies to the bribe as well as to the proceeds of the bribe.

Bulgaria explains that that an organisation under subparagraph 2(1) includes a legal person, and that the purpose of this provision is to indicate that membership in an organisation is a condition for

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<sup>9</sup> primary bribery offence [article 304(2)], bribery by person who mediates (article 305a).

<sup>10</sup> bribery with intent that official violate official duties [article 304(3)].

<sup>11</sup> Bribery creating situation for provoking for purpose of unmasking (article 306).

imposing a more severe penalty on the natural person that has committed the crime “within the activity of the organisation”.

Bulgaria does not intend that an “official” under subparagraph 2(3) include a “foreign official”.

With respect to how it is determined whether a case is “extremely grave”, Bulgaria refers to the following definition of “particularly grave case” in article 93(8) of the Penal Code:

“Particularly grave case” is that in which the crime perpetrated, in view of the harmful consequences that have occurred and of other aggravating circumstances, reveals extremely high degree of social danger of the act and the perpetrator.

Finally, the Bulgarian authorities provide that the money laundering provisions apply regardless of where the bribery occurred.

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

Article 8 of the Convention requires that within the framework of its laws and regulations regarding 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.

### **8.1/8.2/8.3 Accounting and Auditing Requirements, Application and Penalties**

#### **8.1.1/8.2.1/8.3.1 Requirements, etc. in Respect of Enterprises**

Under article 5 of the Accountancy Act<sup>12</sup> the following principles must be observed in the preparation of the records of enterprises to ensure that they present a true financial picture<sup>13</sup>:

1. The enterprise shall be a going concern.
2. Continuous posting.
3. Comparability between income and expenses.
4. Priority of content over form.
5. True and fair picture.
6. Materialness.
7. Caution.
8. Historic cost.
9. Independence of the different reporting periods.
10. Value linkage between the final and the initial balance sheets.
11. Documentary motivation of the business transactions.
12. Possible preservation of the accounting policy.

These principles closely correspond to accounting principles that prohibit the establishment of off-the-books accounts, the making of off-the-books transactions, and the recording of non-existent

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<sup>12</sup> Pro., SG, No. 4/15 January 1991, amd. No. 26/1992, No. 55/1993, No. 21, 33 and 59/1996, No. 52/1997, No.21/1998.

<sup>13</sup> See art. 1(2) of the Accountancy Act, which states that the Act shall regulate the preparation of financial reports so that they present a “true picture of the material and financial condition”, etc. of an enterprise.

expenditures and liabilities with incorrect identification of their object. Bulgaria provides that an offence is committed under the Accounting Act when an enterprise fails to maintain its records in compliance with article 5.

Article 1 of the Accounting Act regulates the accounting practices of “enterprises”, which are defined under the Act as “any economically separate legal entities, sole proprietorships and companies without legal personality performing any activity permitted by the law”.

In addition, Bulgaria indicates that article 308 of the Penal Code is relevant to the use of false documents for the purpose of hiding the bribery of foreign public officials. Bulgaria points out that a person who draws up a false “official document” or alters the contents of an “official document” for the purpose of using it commits a forgery offence contrary to article 308 of the Penal Code. The penalty for this offence is a deprivation of liberty for up to three years. An “official document” is defined under article 93(5) of the Penal Code as “a document issued in compliance with the established procedure and format by an official within the scope of his duties, or by a representative of the public within the range of functions entrusted to him”.

Bulgaria further indicates that there are other provisions in the Penal Code relevant to the use of false documents.

### **8.1.2/8.2.2/8.3.2 Requirements in Respect of Accountants and Auditors**

The Bulgarian authorities state that the Law on Public Financial Control requires that the books and records of certain enterprises be audited and places an obligation on an auditor to report infractions to a prosecutorial authority.<sup>14</sup> The categories (public and private) to which this requirement applies are listed under article 2.

With respect to the requirements in relation to accountants, article 57a(1) of the Accountancy Act provides that a certified accountant is prohibited from the following:

1. Issuing a statement that does not provide a fair reflection of the accounting information that has been provided by the enterprise.<sup>15</sup>
2. Makes public any information related to the activity of the enterprises audited, which information damages its prestige.<sup>16</sup>
3. Fails to comply with the requirements of the national standards for auditing and the verification of annual financial reports.<sup>17</sup>

The penalty for an offence under this article is “a fine of up to 50 minimum monthly wages”, or a deprivation of “the right to verify annual financial reports for a term of 2 years” or indefinitely in the case of particularly serious violations. The prohibition against making public any information related to the activity of an enterprise that damages its prestige might be construed as preventing an accountant from reporting offences committed by an enterprise.

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<sup>14</sup> Article 15/6/

<sup>15</sup> See art. 57a(1)1 of Accountancy Act.

<sup>16</sup> Ibid. art. 57a(1)2.

<sup>17</sup> Ibid. art. 57a(1)3.

## 9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

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

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

#### 9.1.1 Criminal Matters

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.

Article 461 of the Bulgarian Penal Procedure Code states that Bulgaria shall provide legal assistance in criminal matters pursuant to the request of another state in the following two cases:<sup>18</sup>

1. Pursuant to the provisions of an international treaty to which Bulgaria is a party; or
2. According to the principle of reciprocity.

Bulgaria indicates that it is able to provide prompt and effective legal assistance pursuant to its bilateral and multilateral treaties<sup>19</sup> or conventions on mutual legal assistance, including the European Convention of 1959, and pursuant to the principle of reciprocity. The Ministry of Justice is responsible for responding to requests for mutual legal assistance.

Where mutual legal assistance is rendered on the basis of reciprocity, this is done on a case-by-case basis, and there are not any other compulsory requirements that must be satisfied.

Pursuant to article 462 of the Penal Procedure Code Bulgaria may refuse mutual legal assistance “if the implementation of the request could threaten the sovereignty, the national security, the public order and other interests, protected by law”.

Article 461(2) of the Penal Procedure Code states that mutual legal assistance shall comprise the following:

1. *delivery of subpoenas and court papers;*
2. *appropriation and delivery of objects with which the crime has been perpetrated, or of property acquired by means of crime; interrogation of a person accused, of a defendant and a witness;*

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<sup>18</sup> See art. 461(1) of Bulgarian Penal Procedure.

<sup>19</sup> Bulgaria has concluded MLA treaties with Greece, Spain, Cyprus, Poland, Hungary for Czechoslovakia (Czech Republic and Slovakia), Romania, Azerbaijan, Armenia, Georgia, former Soviet Union (Russia, Ukraine, Belarus, Kazakhstan, Tajikistan, Turkmenistan), for Yugoslavis (Yugoslavia, Croatia, Slovenia, Macedonia, Bosnia and Herzegovina), Turkey, China, Syria, Yemen, Tunisia, North Korea, Kuwait, Cuba, Libya, Mongolia, Algeria, Vietnam.

*assigning expert commission and accepting its conclusions; conducting inspection on site; search and appropriation; search for and identification of persons;*

3. *delivery of material evidence, information and papers;*

4. *providing information about verdict on the person.*

In addition, article 463(2) of the Penal Procedure Code provides for the temporary transfer of a person detained in custody for the purpose of being interrogated as a witness in a foreign country, but only in exceptional cases decided at the discretion of the relevant district court, and only where the person gives his/her permission.

### **9.1.2 Non-criminal Matters**

Bulgaria does not indicate that it can provide mutual legal assistance to other Parties in relation to non-criminal proceedings against a legal person.

## **9.2 Dual Criminality**

Under the European Convention of 1959 and some other relevant bilateral treaties, mutual legal assistance is conditional on dual criminality. Bulgaria adds that dual criminality is not formally required when the principle of reciprocity applies.

## **9.3 Bank Secrecy**

Pursuant to subparagraph 1 of article 52(5) of the Bulgarian Law on Banks, the district court may order the disclosure of information on the transactions and account balances of individual clients to a prosecutor upon the presentation of data on a crime that has been committed. The district court judge shall rule in camera on an application for disclosure within 24 hours of its receipt, and the court ruling shall not be subject to appeal.<sup>20</sup>

As noted earlier, pursuant to article 462 of the Penal Procedure Code Bulgaria may refuse mutual legal assistance “if the implementation of the request could threaten the sovereignty, the national security, the public order and other interests, protected by law”. However, Bulgaria indicates that bank secrecy is not routinely invoked pursuant to this provision.

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

### **10.1 Extradition for Bribery of a Foreign Public Official**

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 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

Bulgaria states that the bribery of a foreign public official is an extraditable offence. In addition, article 439a of the Penal Procedure Code provides that a person shall be extradited provided that all of the following requirements are met, unless otherwise stipulated in an international treaty<sup>21</sup>:

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<sup>20</sup> Article 52(6) of the *Bulgarian Law on Banks*.

<sup>21</sup> See article 441 of the Bulgarian Procedure Code.

1. The extradition is sought pursuant to an international treaty.<sup>22</sup>
2. The condition of reciprocity is met.<sup>23</sup>
3. The crime for which extradition is sought is a crime under Bulgarian law (dual criminality) and is punished by a deprivation of liberty for no less than one year or by a more severe punishment.<sup>24</sup>

## **10.2 Legal Basis for Extradition**

Bulgaria states that in the absence of an extradition treaty with another Party, it will consider the Convention as a legal basis for extradition in respect of the offence of bribing a foreign public official.

It also states that it shall consider the Convention a guarantee of reciprocity within the meaning of article 439a of the Penal Procedure Code. The Convention does not, however, remove the requirement that the offence be punished by a deprivation of liberty for no less than one year, in relation to requests for extradition made by the Parties thereto.

## **10.3/10.4 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.

Bulgaria cannot extradite its nationals. Article 439b(1) of the Penal Procedure Code prohibits the extradition of Bulgarian citizens “for trial or for serving of punishment in another country”. Additionally, Bulgaria explains that article 25.4 of the Bulgarian Constitution states that no citizen of the Republic of Bulgaria shall be extradited to another state.

The Bulgarian authorities add that where nationality is the sole reason for declining a request to extradite a person for the bribery of a foreign public official, the case shall be submitted to the competent Bulgarian authorities if the offence is within the scope of the Penal Code and where this requirement is provided for by a relevant international treaty.

## **10.5 Dual Criminality**

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.

As mentioned above, dual criminality is required pursuant to article 439a(2) of the Penal Procedure Code. However, Bulgaria provides that notwithstanding article 439a(2), it shall deem dual criminality to exist if the offence is within the scope of the Convention. It will also deem dual criminality to exist where the offence in question corresponds to the offence described in article 305a (mediation of giving or receiving a bribe) and article 307 (provocation of giving or receiving a bribe) of the Penal Code.

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<sup>22</sup> See art. 439a(1) of Bulgarian Procedure Code

<sup>23</sup> Ibid.

<sup>24</sup> See art. 439a (2) of Bulgarian Procedure Code.

## **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.

The Republic of Bulgaria has not notified the Secretary-General of the OECD of the responsible authorities. Nevertheless, at present requests for extradition and mutual legal assistance may be forwarded to the authorities listed under the relevant sections of the Penal Procedure Code<sup>25</sup> as follows:

- Extradition -- The Prosecutor General where extradition is requested to try a person; and the Minister of Justice where the request is for the serving of a punishment.
- Mutual Legal Assistance -- The Ministry of Justice and Legal Euro-Integration.

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

### **3. TAX DEDUCTIBILITY**

The Corporate Income Tax Law provides a list of expenses that are tax deductible, and bribes to foreign public officials are not on the list.

A criminal conviction is not required for a claim in this regard to be non-deductible. If the tax authorities believe that a company is attempting to deduct expenses in relation to a bribe given to a foreign public official, the burden is on the company to prove that the tax authorities are incorrect. In addition, pursuant to article 174 of the Penal Procedure Code, the tax authorities are obliged to inform the prosecution authorities of suspected criminal offences.

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25 . See section 440 in relation to a request for extradition and section 464 in relation to a request for mutual legal assistance.

## EVALUATION OF BULGARIA

### General Remarks

The Working Group compliments the Bulgarian authorities for the rapid ratification of the Convention and notes that Bulgaria is the first non-member country to become a party of the Convention. The Working Group notes that the Convention was published in the Bulgarian Official State Gazette on 6 July 1999 and thus, in conformity with article 5 (4) of the Constitution of the Republic of Bulgaria, is a part of the country's internal law. The Group further notes that Bulgaria has chosen to extend the already existing provisions of active bribery of officials to also include foreign officials.

The Working Group has focused on the specific issues identified below.

### Specific Issues

#### 1. Elements of the offence

##### 1.1 To offer, promise or give

Article 1.1 of the Convention indicates that it shall be a criminal offence "to offer, promise or give any undue pecuniary or other advantage".

Article 304 (1) of the Bulgarian Penal Code defines bribery as being an act of a person who gives a gift or any other "valuable" advantage to an official. Therefore, the current Bulgarian legislation does not criminalise the acts of "promising" and/or "offering" a bribe. The Bulgarian authorities acknowledged that "promising" or "offering" a bribe was not covered by their legislation, but informed the Group that this issue will be addressed in the new Criminal Code, which is to be adopted by the end of 2000.

In order to meet the standards of the Convention, the Working Group strongly recommends that the Bulgarian authorities expand the scope of the offence of bribery, so as to include the "promising" and "offering" of a bribe as soon as possible.

##### 1.2 Any undue pecuniary or other improper advantage

The Convention specifies that it is an offence to offer, promise or give any undue pecuniary or other improper advantage.

The Bulgarian legislation, however, limits itself to a reference to undue pecuniary or other "valuable" advantage. Therefore, it appears to be narrower than the Convention and to exclude some type of advantages from the scope of the offence.

The Bulgarian authorities have expressed their intention to review the relevant legislation in order to be in full compliance with the Convention.

#### 2. The defences

The Convention does not exclude the application of general defences as general provisions of the Penal Codes of the parties.

The Bulgarian law however provides for three defences specific to bribery namely « blackmail », « information of the authorities » and « provocation ». The general feeling of the Working Group is that these defences present a potential for misuse.

The Bulgarian authorities provided only an oral explanation about the existence of relevant national case law. They pointed out that these defences were rarely used.

The Group remains seriously concerned about these defences as far as they may go beyond the general defences mentioned above. Their application may indeed lead to a significant loophole in the implementation of the Convention. The Group encourages Bulgaria to make the necessary changes and will specifically focus on this issue during the monitoring Phase 2.

### **3. Responsibility of legal persons**

Article 2 of the Convention indicates that "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official."

In spite of this, no provisions have been made to this effect under the Bulgarian legislation. The Group was informed that Bulgaria would consider the possibility of introducing civil and/or administrative measures to address this issue.

In order to meet the standards of the Convention, the Working Group strongly recommends that the Bulgarian legislation be amended as soon as possible so as to provide for the responsibility of legal persons.

### **4. Seizure and confiscation of the bribe and its proceeds**

The relationship between the defences analysed above by the group and the possibility for the seizure and confiscation of the bribe and its proceeds deserve further clarification.

The Bulgarian authorities confirmed that they can seize but not confiscate the bribe and/or its proceeds where one of the defences has been successfully invoked.

## **Conclusion**

The Working Group acknowledges the work accomplished by the Bulgarian authorities. It expressed concern that the legislation does not yet fully meet the standards of the Convention and strongly encourages the Bulgarian authorities to make the necessary changes in their legislation by the end of Phase 1 evaluation.