Why Delays the Ratification of the PFI Convention in Hungary?

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I. Introduction

Twelve years have passed since the PFI Convention of 26 July 1995 was signed.[1] During this period, there were permanent efforts on the part of the EU to urge the Member States to ratify the Convention and its Protocols.[2] These efforts were successful in the case of 15 Member States. These states had ratified the Convention and the 1st Protocol by the end of 2002. The Convention entered into force on 17 October 2002. Three years after the accession, the willingness to ratify the PFI Convention in the new Member States has decreased. This statement is also true for Hungary. In order to search for the reasons for the non-ratification, we have to go back before the accession date of 2004. In the pre-accession period, Hungary attempted to fulfil all the requirements of the EU which were prescribed in the regular reports of the Commission and to respond to the new challenges posed. At the end of the 90's and beginning of the 21st century, Hungary introduced several new regulations into Act IV of 1978 of the Hungarian Criminal Code (hereinafter: HCC). The last modifications, which concern our topic, were undertaken in 2001 by Act CXXI.

II. Corruption

Hungary ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 17 December 1997 and the Council of Europe Criminal Law Convention on Corruption on 22 November 2000. Concurrently, with the ratification of the OECD Convention, Hungary amended its Criminal Code by Act LXXXVII of 1998 and the new Title VIII on Crimes against the Propriety of International Affairs was inserted in Chapter XV containing provisions on the purity of state administration, administration of justice, and public life. A new amendment by Act CXXI of 2001 widened the scope of this chapter by separately criminalizing the bribery in justice and public administration in both active and passive forms (Article 255 of HCC).

Sections 258/B-258/E regulate the criminal act of bribery within international relations. Without going into detail, I would like to emphasize that the already existing factual elements of bribery have been adopted in the regulations. This corresponds to the requirements of both the above-mentioned conventions and the EU Convention on the fight against corruption.[3] Moreover, it goes beyond those requirements, which did not require the declaration and punishment of passive bribery as crime; the Hungarian law renders it punishable as well (Section 258/D). The scope of foreign officials was extended to all kinds of foreign officials. Prior to Act CXXI of 2001, the circle of foreign officials was comprised only of (1) persons who served in international organizations as established by international treaties, provided that their activity was integral to the proper functioning of these organizations, or (2) persons who were elected members of the assembly, public bodies of international organizations, or who were members of an international court, provided that their activity was integral to the proper functioning of the court; in all cases it was a prerequisite that the Republic of Hungary has jurisdiction on its territory or over its citizens.

Act CXXI of 2001 narrowed the scope of “advantage”, which is one of the elements of the legal definition of bribery. Prior to this Act, the notion of “advantage” included all types of advantages. The Act limited them to “unlawful” advantages.

III. Money Laundering

Hungary also ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime on 2 March 2000. Money laundering has been a crime in Hungary since 1994.

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Since then, the definition of the offence was amended four times. Chapter XVII Sections 303-303/B on Money Laundering was last amended by Act CXXI of 2001. The characteristics of these provisions are that not only the laundering of the proceeds of crime by the offender is punishable, but also the laundering of the proceeds of crimes committed by persons other than the money launderer himself.

IV. Criminal Liability of Legal Persons

The debate on the liability of legal persons began at the end of the 90's. By then, the main obstacle to the liability of legal entities was the classical doctrinal system of criminal law which was and is based on the constitutional principle of culpability of natural persons. The second counter-argument was that the international conventions – except for the Council of Europe Criminal Law Convention on Corruption – do not require the creation of criminal liability of legal persons. These arguments were supported by several leading law experts and academics.[4]

The solution – which was also politically motivated – was a compromise. The individual liability of natural persons remained the basic principle of the criminal law, but Act CXXI of 2001 introduced a new criminal measure into the HCC against legal entities. Act CIV of 2001 to amend the criminal law introduced measures against legal persons in Section 70 point 8 HCC. The detailed rules of these measures are contained in Articles 1-6 of Act CIV of 2001 on the criminal law rules applicable to legal persons. Potential sanctions against legal persons are the termination of the legal person, restriction of its activity, and fines.

As far as the personal scope is concerned, these rules are applicable to legal entities if the crimes were intentionally committed in order to gain pecuniary advantage for that entity and the crime was committed in the sector of activity of the entity by an executive director, a member of the supervisory board, an official, a member of the legal person who has the power to represent the legal person or is an authorized person of the legal person. The second group of offenders can be the members/employees who committed the crime in the sector of activity of the legal person, provided that the crime could have been prevented by fulfilling the obligation of supervision and control of the leading official of the legal person.

V. Financial Control and Subsidy Fraud

By the end of the 90's, the regular Commission reports on Hungary's progress towards accession criticized that only a basic system of control and recovery of EC funds existed in Hungary and proposed more expedient procedures.[5] The 2002 Report already stated that an anti-fraud inter-ministerial co-ordination Committee had been created in November 2001, which is to contribute to safeguarding the financial interests of the Community.[6] The AFCOS unit now exists within the organization of the Hungarian Customs Service under the Ministry of Finance.

By the end of 2000, the definition of fraud did not fulfil the criteria of protecting the Communities' financial interests. The definition of fraud, which is based on the classical criminal law elements, did not provide a solution for this problem. The requirements for the accession of Hungary to the EU were the creation of new criminal rules in this field. This problem was resolved by the above-mentioned Act CXXI of 2001 which amended Chapter XVII on Economic Crimes. Title IV of the HCC now contains a new section on the "breach of the financial interests of the European Communities".[6] Section 314 practically repeats the wording of the definition of fraud of Article 1-3 of the PFI Convention.

The offence can be punished with no more than 5 years of imprisonment. According to paragraph 3, the offender can be punished with no more than 5 years of imprisonment if he or she is the head of a business, or

a member or employee of a firm entitled to supervise or control its activity according to the firm's statutes, assuming that he or she committed the breach of financial interests of the EC in favour of the firm and that the crime could have been prevented by fulfilling the obligation of supervision and control.

VI. Conclusions

These regulations were positively evaluated by the 2002 Regular Progress Report of the Commission. However, since 2001, no criminal law provisions have been created. It would have been logical for the Hungarian Government to submit the PFI Convention and its Protocols to Parliament for ratification shortly after Hungary's accession to the EU, as it did in other cases, even though there is no deadline for transposition of the PFI Convention in the new Member States.

The silence has three main reasons: The first general reason must be seen in close connection to national sovereignty. It seems obvious that, in the Member States of the European Union, complete national sovereignty in the field of criminal law no longer exists. The various framework decisions of the past eight years relating to criminal law and criminal procedural prove that the approximation of the rules of criminal law and procedure is unavoidable. Despite this development, the Member States are attempting to preserve the remains of their sovereignty as long as it still can be done. One of the techniques is to remain silent and act as if the PFI Convention had been forgotten.

The second reason is that the transformation of the legal system was only intended for accession purposes. It was a task which had to be fulfilled. Hungary did it and is now inside the doorway as a member of the EU. After the accession, Hungary is in no hurry in this field. If the EU urges the ratification, it can refer to the rules of the Hungarian criminal law which guarantee a solid basis for the protection of the ECs' financial interests.

The third reason – being synonymous with the official standpoint of Hungary – is that Hungary has fulfilled the obligations of harmonization of criminal law rules concerning the protection of the ECs' financial interests. Leading to the current criminal law, the Act CXXII of 2001 is the clause for the harmonization of the area of the protection of the financial interests. It takes into consideration the following:

- Articles 1-3 of the Convention on the protection of the European Communities' financial interests,
- Articles 1-3 of the First Protocol to the Convention on the protection of the European Communities' financial interests, and
- Articles 1-2 and 5 of the Second Protocol Convention on the protection of the European Communities' financial interests.[7]

It should be noted that approximately thirty investigations were initiated by either the Hungarian Police or Customs Services under these new rules in the past three years but, so far, only one case has been brought before the court.

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1. Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, p. 49.↩
2. Protocol to the Convention on the protection of the European Communities' financial interests, OJ C313, 23.10.1996, p. 2; Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities' financial interests, OJ C151. 20.5.1997, p. 2; Second protocol to the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, p. 12.↩
3. Convention drawn up on the basis of Article K.3 (2) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union,. OJ C 195, 25.6.1997, p. 2.↩
4. Erdei, Árpád (2000) Hogyan lehet terhelt a jogi személyből avagy a jogi felfogás változásának ára. In: (ed.Gellért,Balázs) Békés Imre Ünnepi Kötet, ELTE Állam- és Jogtudományi Kar, Budapest; Sárközy, Tamás (2002) Büntetőjogi intézkedések a jogi személyekkel szemben? Magyar Jog 7.↩
5. 2000 Regular report from the Commission on Hungary's progress towards accession of 8 November 2000 p.77.↩
6. 2002 Regular Report on Hungary's progress towards accession, COM(2002) 700 final, p. 113.↩

7. The regulation came into force after the accession of Hungary to the EU.↩

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