

Peter Hack: Anti-corruption legal instruments.

In the main part of this article I'll focus on the anti-corruption legal instruments in the field of criminal law, and criminal procedural law, but before doing that, I have to emphasize, that corruption is a much broader term than what we find in criminal law. Nobody can truly believe that the fight against corruption can be fought just by the police, law enforcement agencies, and the criminal justice system. The "criminal" part of corruption obviously is just the very tip of the iceberg.

When legislation deals with the phenomenon of corruption, there is a great temptation to amend the criminal code, and to increase the punishment of crimes related to corruption, but this is a misleading approach. Without establishing a proper anti-corruption legal environment, the criminal justice approach can't be successful, and in some cases can appear as a witch-hunt against political counterparts. Only a broader, holistic approach is useful for combating corruption.

Broader approach of legal instruments

Transparency International (TI)¹ offers such an approach. In TI's definition, corruption is known as "the abuse of entrusted power for unmerited private gain". It means such conduct on the side of public sector representatives (politicians, government officials or any persons related to them) by which they - in an unlawful and illegal way - gain a profit, abusing the powers entrusted to them. Within the same concept, a different approach defines corruption as an offer, a promise, or a provision of any sort of unmerited advantage in exchange for a certain reward. Such reward does not necessarily have to be in monetary form (bribing); it may take a form of providing insider information, clientelism, nepotism, neglect of duty in property management, conflict of interest, machinations in public procurement, or fraud.²

Within TI's broad activity, here – without going into the details - we should mention three program which offers useful approach for building proper anti-corruption legal instruments: the Global Corruption Report (GCR), the Corruption Perception Index (CPI), and the National Integrity System (NIS).

Global Corruption Report (GCR)

The Global Corruption Report (GCR) presents an in-depth assessment of the state of corruption around the world. It brings together contributions from experts and activists to explore corruption issues in a specific sector, to present a review of corruption trends and issues in a series of country reviews and to showcase the latest research findings with

¹ More information available: <http://www.transparency.org/>, <http://www.transparency.hu/>

² <http://transparency.hu/en/corruption>

regard to corruption and anti-corruption reform.³ The most recent Global Corruption Report was published in 2009 and focuses on corruption in the private sector.

Transparency International's Global Corruption Report 2009: Corruption and the Private Sector (GCR) features more than 75 experts examining the scale, scope and devastating consequences of corporate corruption. This is complemented by 45 in-depth country reports along with the best practices and practical recommendations. The Report shows how corrupt practices constitute a destructive force that undermine fair competition, stifle economic growth and ultimately undercut a business's own existence. In the last two years alone, companies have had to pay billions in fines due to corrupt practices. The cost extends to low staff morale and a loss of trust among customers as well as prospective business partners.⁴

The previous reports dealt with the water sector in 2008. According to the Report, corruption in the water sector is a root cause and catalyst for the global water crisis that threatens billions of lives and exacerbates environmental degradation.⁵ The 2007 Report dealt with Corruption in Judicial System.⁶

Corruption Perception Index (CPI)

The Transparency International Corruption Perceptions Index is the best-known program of TI. It ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index, a poll of polls (or "survey of the surveys"), drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions. The CPI reflects views from around the world, including those of experts who are living in the countries evaluated.⁷

The composite index scores on a scale from 0 (perceived to be highly corrupt) to 10 (perceived to have low levels of corruption) using 13 different sources.⁸

According to the global survey in 2010, Hungary, with its 4.7 score, ranks #50. With this result we finished below the regional average. Among the neighboring countries it is also Hungary which showed the highest downturn: 0.4 point to last years CPI. It is the indicators of the business sector that have fallen most significantly in Hungary's case. The market is impatient and demands effective governmental response as soon as possible, since overall anti-corruption measures are essential in overcoming the economic crisis and in increasing the competitiveness of the country.⁹

Corruption Perception Index (2010):

- **Scores: 4,7 (2009: 5,1)**

³ http://transparency.hu/en/corruption_index

⁴ <http://transparency.hu/en/gcr2009>

⁵ http://www.transparency.org/news_room/latest_news/press_releases/2008/2008_06_25_gcr2008_en

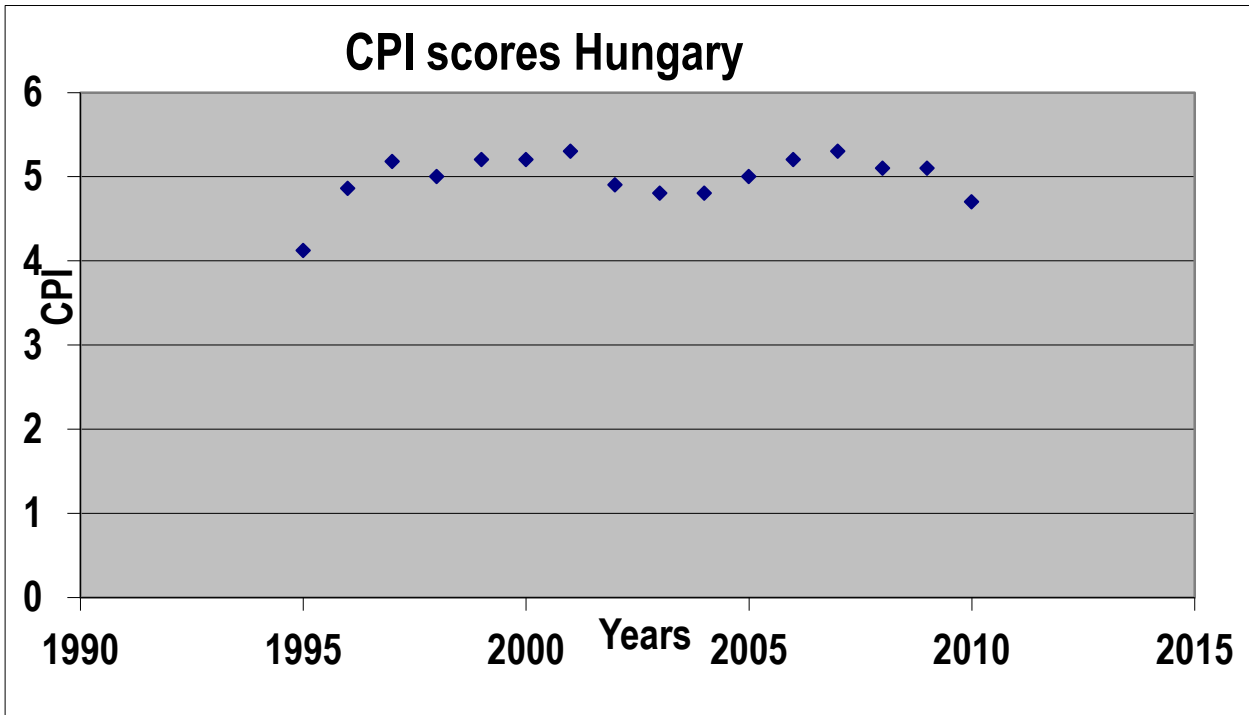
⁶ http://www.transparency.org/publications/gcr/gcr_2007

⁷ http://transparency.hu/en/corruption_index

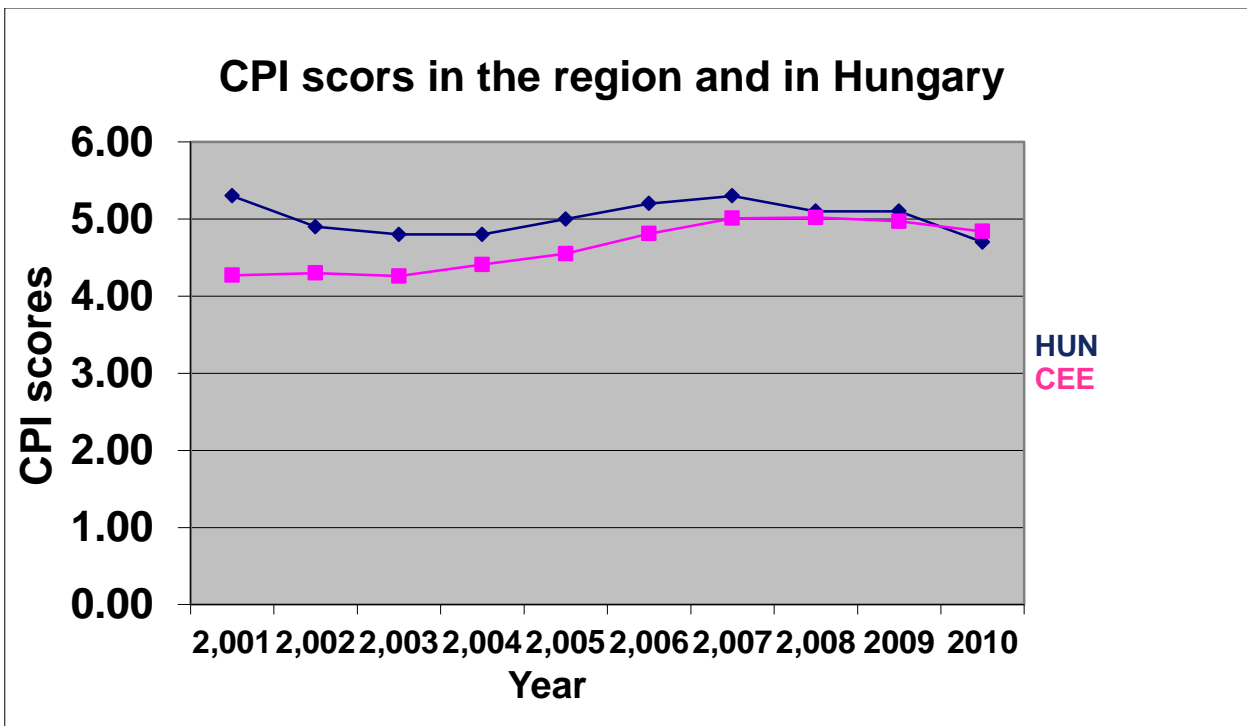
⁸ <http://transparency.hu/en/cpi2010/en>

⁹ <http://transparency.hu/en/cpi2010/en>

- Rank: 50. (2009: 46.)



Regional comparison:



National Integrity System (NIS)

The concept of the NIS has been developed and promoted by Transparency International (TI) as part of TI's holistic approach to combating corruption.¹⁰ While there is no blueprint for an effective system to prevent corruption, there is a growing international consensus as to the salient features of anti-corruption systems that work best.

The NIS consists of the *key institutions, laws and practices* that contribute to integrity, transparency and accountability in a society. When it functions properly, the NIS combats corruption as part of the larger struggle against abuse of power, malfeasance, and misappropriation

The main 'pillars' of the NIS are considered to be the in following: Legislature, Executive, Judiciary, Public Sector, Law Enforcement Agencies, Electoral Management Body, Ombudsman, Supreme Audit Institution, Anti-corruption Agencies, Political Parties, Media, Civil Society, Business.

Uniquely, a NIS study assesses not only relevant legislation and formal institutions in relation to each of the 'pillars', but also how laws are implemented and institutions function *in practice*. As such, it provides a comprehensive and yet detailed analysis of both the extent and causes of corruption in a given national context, and the adequacy and effectiveness of national anti-corruption efforts. NIS country studies do not investigate or expose specific cases of corruption not yet in the public domain, and therefore they subscribe to TI's policy of 'not naming names'. But by diagnosing the strengths and weaknesses of a particular integrity system, a NIS study provides *essential information for anti-corruption advocacy and reform efforts*.

The NIS is based on a holistic approach to preventing corruption, since it looks at the entire range of relevant institutions and also focuses on the relationships among them. Thus, the NIS presupposes that a lack of integrity in a single institution would lead to serious flaws in the entire integrity system. As a consequence, the NIS assessment does not seek to offer an in-depth evaluation of each pillar, but rather puts an emphasis on covering all relevant pillars and at assessing their inter-linkages.

TI believes that such a holistic "system analysis" is necessary to be able to appropriately diagnose corruption risks and develop effective strategies to counter those risks. This analysis is embedded in a consultative approach, involving the key anti-corruption agents in government, civil society, the business community and other relevant sectors with a view to building momentum, political will and civic pressure for relevant reform initiatives.¹¹

¹⁰ Further details of the NIS can be found in The TI Source Book 1997 and 2000 and the partly completed TI Anti-Corruption Handbook, both available at www.transparency.org/nis.

¹¹ <http://transparency.hu/en/nis>

According to the first part of the National Integrity System Country Study, which was published in 2007¹² the most sensitive issues uncovered in the study are as follows.

- Funding of political parties is the most important issue. Based on campaign cost analyses, a large proportion of financial resources political parties use, seem to originate from off-the-books contributions. Campaign and party finance regulations are not appropriate and monitoring and auditing of campaign finance leave considerable scope for abuse.
- The State Audit Office is one of the most important anti-corruption institutions, but it does not always use its full authority and because of limited organizational and human resources, audits are not sufficiently frequent or broad. Moreover, the recommendations of the SAO are not always acted upon.
- The performance of law enforcement agencies as pillars of the NIS is weakened by what appears to be a high level of internal corruption (in the case of the police and the Customs and Finance Guard) and the lack of professionals specialized in the investigation of corruption-related crimes.
- The system and regulation of public procurement is highly and perhaps overly complicated, and it leaves room for manipulation. A simpler system that is better enforced and monitored would improve the situation.
- Not all data of public interest is made public. The Government Control Office plays a crucial role in anti-corruption measures, but its reports are not publicly accessible.
- In the case of local governments, the areas of highest risk for corruption are public contracting and utilization of community assets, basically due to fiscal pressure.
- From regime change until the present day corruption has been tackled on an ad hoc basis and at the administrative level, avoiding politically sensitive issues indicating the absence and the weakness on behalf of the political class to seriously engage with the issue.¹³

According to the second part of the National Integrity System Country Study, which was published in 2008¹⁴ the most sensitive issues within the business sector:

- Sanctions on business crimes and corruption offences are sufficiently strict but law enforcement is however gravely deficient.
- Regulations on the broader environment of business operations such as tax and lobby laws and the public procurement and party acts do not provide for reliable, easily predictable, transparent and unbiased business procedures.
- Several government initiatives have shown improvements, however the state in its regulatory and economic role has not been able to establish an adequate business climate which would enhance performance and competition.
- Excessive administrative requirements and bureaucratic regulation make business management more difficult and arbitrary simplification in administration bears corruption risks.

¹² <http://www.transparency.hu/files/p/en/489/5603216722.pdf>

¹³ <http://www.transparency.hu/files/p/en/489/8231893980.pdf>

¹⁴ <http://www.transparency.hu/files/p/en/490/2625261448.pdf>

- The administrative and tax burden on companies is high compared to other European countries. The contribution of the black economy is high, partially due to the fact that consistent law enforcement and sanctions show serious defects.
- Causes of corruption are the deficiencies in legislation and in the implementation of regulations, the scarcity of economic possibilities and also cultural traditions. Hungarian business culture does not focus on fair competition and the public is unaware of the long-term profit making and risk reducing effect of ethical business behavior. The public judgment on companies caught in abuse practices is not really negative.
- According to businesspeople active in Hungary, it is impossible or almost impossible to advance business in Hungary without corruption. For businesspeople, business corruption is a larger problem in transactions between the public and the private sectors than within the business sector.
- The small size of the economy and a flooded market leads to a lack of competition in Hungary. A large part of the private sector survives on state and local government orders and subsidies.
- The expenditure of political parties and the revenues of the political elite are not transparent and so we cannot therefore refute the assumption that the business sector assists in the financing of politics partly through corruption mechanisms.
- Corruption is widespread in Hungary. Its different forms can be detected independently of political groups or economic sectors. According to most of our interviewees, corruption has increased in Hungary over the past five to ten years. Both types of corruption – mutual favors with no money involved and classical money transfer based ones exist. Concerning the latter, transactions with many participants organized in a chain are spreading, warning us that corruption is becoming institutionalized – as a trend.
- Corruption free company management in Hungary results in a competitive disadvantage that – together with the present unfavorable economic developments – pressures many businesspeople to help counter corruption and promote the establishment of transparent business affairs, not only within business but also between the private and public sectors.¹⁵

Legal instruments in the criminal law

Regarding the criminalization of corruption, the Hungarian Criminal Code¹⁶ is, to a large extent, in conformity with the requirements of the Criminal Law Convention on Corruption (GRECO).¹⁷ In the XVth Chapter of the Criminal Code, which regulates the Crimes against the integrity of State Administration, the Administration of Justice and Public Life, the law punishes the passive and active *bribery of domestic public officials*¹⁸.

According to the Code, “*domestic public officials*” are: “a) Members of the Parliament; b) the President of the Republic; c) the Prime Minister; d) members of the Government, state secretaries and deputy state secretaries; e) constitutional judges, judges, prosecutors; f)

¹⁵ <http://www.transparency.hu/files/p/en/490/2625261448.pdf>

¹⁶ Act No. IV 1978.Criminal Code (hereafter CC)

¹⁷ <http://www.transparency.hu/files/p/en/529/7688879603.pdf>

¹⁸ Section 250-255 CC

ombudsman; g) members of local government bodies; h) notaries and assistant notaries; i) independent court bailiffs and assistant court bailiffs; j) persons serving at the constitutional court, the courts, prosecutors offices, administrative agencies, local government administrative bodies, the State Audit Office, the Office of the President of the Republic, the Office of Parliament, whose activity forms part of the proper functioning of the organisation; k) probation officers working for the national parole board under an employment relationship in the judicial system, l) persons exercising public or administrative powers in a body entrusted by law with public or administrative tasks.¹⁹

Active and passive *bribery of foreign public officials* are separate criminal offences under sections 258B and 258D CC. 3. "Foreign public official" shall mean: a) a person empowered with legislative, judicial, public administration or law enforcement duties in a foreign state; b) a person serving in an international organization created under international convention, whose activity forms part of the proper functioning of the organization; c) a person elected to serve in the general assembly or body of an international organization created under international convention; d) a member of an international court that is empowered with jurisdiction over the territory or over the citizens of the Republic of Hungary, and any person serving in such international court, whose activity forms part of the proper functioning of the court."²⁰

Passive and active *bribery in the private sector* are criminal offences under sections 251, 252 (passive), 254 (active) and 258/C (foreign active bribery) of the Criminal Code.

Passive and active *trading in influence* (action taken by the "influence peddler") is a separate criminal offence under Hungarian law as covered by section 256 CC (domestic public official) and 258/E CC (foreign public officials).

The criminal sanctions for passive bribery in the public sector range from 1 to 5 years of imprisonment and may go up to a maximum of 10 years in certain circumstances. Passive bribery in the private sector is punishable by 3 years of imprisonment, but the sanctions may go up to 10 years in particularly grave cases. Active bribery in the public sector may lead to 3 years of imprisonment and active bribery in the private sector 3 years of imprisonment, unless there are aggravated circumstances (for instance where the perpetrator induces the bribee to breach his duty) in which case these penalties may be much more severe. Furthermore, the range of sanctions appears to be in line with other comparable crimes such as embezzlement (section 317 CC) and fraud (section 318 CC).

In the last decade, the legislator amended the regulations several times, usually by implementing more severe punishments for different forms of bribery, but in some cases implementing new regulations for preventing corruption. In 2001, the Act CXXI.amended the Criminal Code by constructing a new crime: *failure to report bribery*. In Section 255/B the Criminal Code says. that "(1) Any public official who has learned from credible sources of an act of bribery (Sections 250-255 of the Criminal Code) yet undetected, and he fails to report it to the authorities at the earliest possible time is guilty of misdemeanor and may be punished by imprisonment not to exceed two years, work in community service or a fine."

¹⁹ Section 137 point 1) CC

²⁰ Section 137 point 3) CC

The regulation is in effect since the 1st of April, 2001, but since that time there is no public record of anybody that has committed this crime.

The legislator had hopes of increasing efficiency with yet another amendment in the Section 255/A of the Criminal Code which says that: "The perpetrator of a criminal act defined in Subsections (1) and (2) of Section 250, subsection (1) of Section 251, Subsection (1) of Section 252, and Subsection (2) of Section 255 shall be exonerated from punishment if he confesses the act to the authorities first hand, surrenders the obtained unlawful financial advantage in any form to the authorities, and reveals the circumstances of the criminal act. (2) The perpetrator of a criminal act defined in Section 253, Section 254, and Subsection (1) of Section 255 shall be exonerated from punishment if he confesses the act to the authorities first hand and reveals the circumstances of the criminal act." In this case the new regulation tried to strengthen the already existing plea bargaining regulation of the Criminal Procedural Code which gives the right for the prosecutor to guarantee immunity for the perpetrator of a crime if he or she cooperates with the authorities by providing valuable information. Unfortunately, until now there is no evidence available which might prove the efficiency of these regulations.

As was mentioned earlier, according the second part of the National Integrity System Country Study, which was published in 2008²¹ sanctions on business crimes and corruption offences are sufficiently strict but law enforcement is, however, gravely deficient. An earlier study about the implemented sanctions between 2006 and 2008²² demonstrated this fact. According to statistical data from cases in 2006, courts imposed fines in 50 bribery cases out of 354 (14 %), in 2007, 49 fines out of 241 cases (20 %), in 2008, 41 fines out of 271 cases (20 %). This means, that in every fifth case the perpetrator of bribery got a fine, despite the fact that the intention of the legislator was the use of imprisonment.

There is a temptation to say that the courts are too lenient in corruption cases. But the facts don't prove this. A survey conducted by Judge Ágnes Gimesi in the Metropolitan Court of Budapest²³ between January 2005 and April 2009, in 86 cases 74 people were convicted for active bribery, 4 got imprisonment, 66 suspended imprisonments, 1 was fined, and there were 4 reprehensions. In the same cases 54 persons were convicted for passive bribery: 1 got imprisonment, 49 suspended imprisonments, 3 were fined.

The results of this Court show the same phenomenon seen from the national court-statistics; that the courts seemed to be too lenient. But if we take another look at the individual cases we can reach another conclusion. Among the 86 bribery cases there were 75 cases when somebody gave or offered an undue advantage in the form of money. In 41 cases (55 %) the given or offered money was less than 20.000 HUF (75 EUR), in 24 cases (32 %) it was between 20.000 and 100.000 HUF (75-377 EUR), in 6 cases (8 %) was between 100.000

²¹ <http://www.transparency.hu/files/p/en/490/2625261448.pdf>

²² *Függetlenség és elszámoltathatóság az igazságszolgáltatásban*. Transparency International Magyarország 2007 május 24. <http://transparency.hu/drupal/files/active/0/Hack%20Péter.doc>

²³ The results of the survey were published in the Krimnalexpo 2009 conference in Budapest on the 5th of May 2009.

and 1 million HUF (377 – 3773 EUR), and just in 4 cases (5 %) over 1 million HUF (3773 EUR).²⁴

From these surveys we can draw the conclusion that despite the lawmaker's intention in the vast majority of the cases the law enforcement agencies mainly are really only able to catch the small fishes. Further research programs are needed to find the exact reason of this phenomenon. (And we have to admit that in the last two years some "large" cases started have come before the courts, and just recently a former deputy mayor got 6 years imprisonment for corruption related crimes, and some former mayors, and council members are awaiting (or their trials, or sentences.)

Without hard empirical facts, we can conclude, that the reason is not in the Criminal Code, nor is it in the Criminal Procedural Code,²⁵ or the Police Act²⁶,. Sections 200 to 206/A of the Criminal Procedural Code, and Section 69 of the Police Act provides regulations for all secret operations that require judicial warrants. These measures (including searching private premises, wire tapping, controlling mail and email, etc.) may be applied in connection with a variety of serious offences, including crimes punishable by up to three years imprisonment, which includes the majority of corruption related cases.

As András László Pap explained in his article, "a judicial or a prosecutorial warrant must often be obtained for secret information collection, though it depends on the nature of the operation. In cases of emergency or pressing need, the police may use unauthorized interim measures. In connection with any criminal offence that ~~(can be punished with)~~ is punishable by more than two years imprisonment, upon obtaining a warrant signed by a prosecutor, the police can have access to tax, telecommunications, bank and health care data."²⁷

The latest amendment of the Criminal Procedural Code even broadens the possibility to include the results of secret operations by permitting the use of evidence gathered by these methods outside of the scope of the judicial warrants.²⁸

Conclusions

If we summarize our findings in the field of Hungarian criminal law, and criminal procedural law, we can conclude that Hungary has proper legal instruments for combating corruption. The largest challenge for the legislation is to find a workable solution for the structural problems of the law enforcement agencies. Until now there were more than ten different organizations which were responsible for fighting against corruption. Recently the Parliament closed up the Tax Agency and the Custom Agency, and decided to establish a special anti-corruption unit within the Chief Prosecutors Office.

²⁴ We have to add, that in all the last 4 cases the undue advantage was just offered and not given money.

²⁵ Act XIX 1998

²⁶ Act XXXIV. 1994.

²⁷ András László Pap: Ethnic Discrimination and the War Against Terrorism – the Case of Hungary. Fundamentum. Human Rights Quarterly Special English Edition p. 40 <http://157.181.181.13/dokuk/05-eng-02.pdf>

²⁸ Section 206 (4) (5), and Section 206/A (3) (4)

A year ago on the 6th of May 2010, TI Hungary published its Recommendations for anti-corruption methods.²⁹ The statement declares: “Without reducing the risks of corruption, Hungary’s economic and competitive indicators will not improve. The restraint of corruption cannot be executed without structural reforms, changing the current management of some institutions and the top level’s exemplary devotedness. In the case that the two governing parties, Fidesz (Young Democrats’ Association) and KDNP (Christian Democratic People’ Party), dispose of the necessary parliamentary majority to execute the structural reforms; every chance is given to provide effective measures against corruption.”

One of the key areas which are mentioned in the Recommendations: “Enhancing the capacity of law enforcement organs. The investigation and exemplary sanctions of large corruption scandals are still missing. The investigation of corruption cases can be improved by strengthening the units of police and prosecution investigating corruption cases, and ensuring their influence-free operation.”

“The observance and making of the policies that are observed is what is lacking most in Hungary. Every year only 350 bribery cases ~~a year~~ are concluded by a legally binding judgment, but the majority of these bribery cases are of little or no consequence. –The investigation and exemplary sanctions of large corruption scandals are still missing due to the lack of capacity of appropriate law enforcement organs and the political influence of investigative branches. The investigation of corruption cases can be improved by enhancing the units of police and prosecution investigating corruption cases, and ensuring their influence-free operation.”

It can be seen that some steps have already been made in the right direction; now we must wait for the results.

²⁹ http://transparency.hu/en/news_events?nid=517